TABLE

OF THE CASES REPORTED.

Agricultural Bank, T	ucker	97.		-	446	Bank of Louisiana v. Delery - 648	
Aillet v. Henry -	-				145	v. Wilcox - 344	
Akin v. Drummond					92		
Alexander, Parker v.					188		
Allen, Beall v.	-	-			932	Bank v 659	
, Nimmo v.	-		-		451		
Alley, Cane v.				-		Barrett, Bach v. 955	7 N
Alling v. Bach -	-				746		-
Allison, Miller v.	_	_			308	v. Zacharie - 655	
Amis v. Merchants I	A TANKS M		Co	-		Barrow, Louisiana State Bank v 405	
	Buran	ico i	00.	,	357		,
Amonett, Pierse v.	-		-				
v. Fisk	-	*		-	203	ing Co. v 326	
Anderson, Bookout v.			•				-
, Ledoux v.		~ **		-	558	The second secon	
Andrus, Miller v.	-		•			Bass, Planters Bank v 430	
Angelloz v. Rivollet,				-	652		
Anselm v. Brashear			•		403		
Armor v. Downes	-		-	-	242		1
Armstrong, New Or				-		Beall v. Allen 932	3
rollton Railr	ond Co	D. V.	-		829		1
Arsene v. Pigneguy		-		-	621	Peu v. Furst 46, 53	1
Atchison, Bryan v.			-		462	Beazley, Millaudon v 916	5
, Chambliss	v.			-	488	Behrnes v. Coxe, - 472	2
v. Parks	-				306		
Aubic v. Gil -		-			342		
Auguste v. Trudeau	-		-			v. McFarland - 399	
Avery v. Lauve	-			-	1016		-
Avery v. Laure					2020	Bellomé, Plique v 293	
Dakin Malan a					357		-
Babin, Nolan v	-		•		346		
v. Nolan	•	-		-			_
Bach, Alling v	-		-		746		_
- v. Barrett		-		•	955		
- v. Police Jury	-		-		163		
-v. Slidell	-	-		-	626		
Bacon v. Smith	-		-		441		
Bailey, Dick v.	-			-	974	Benton, Copley v 590	
Baker, Cutters v.			-		572	v. Roberts 243	-
v. Bank of L	ouisia	na		-	371		-
Ballard v. Wall					404		
Balph v. Hoggatt	-	-		-	162	Béraud, Lataste v 768	3
Bank of Alabama v. I	ivings	ston			915	Bergeron, Rivette v 75%	3
Charleston v.				-	999	Berry v. Slocomb, - 993	3
Louisiana, B	aker e		90 .		371		2
				-	453)
, I	look a		-		324	The state of the s	
T. D.			2		157	Biossatt, Cumming v 794	_

								1
Died a McCalon		_			3511	Carruth Elian r	100	275
Bird v. McCalop		_		-		Carsor, Dwight v		459
Birdsall v. Bemiss	-		•				_	393
Blancq, Olivier v.	66			-		Carson, Sanders v		567
Bloodworth v. Jacobs	4		-			Cassily, Clements v.		
Bloomfield v. Jones	-	-		-	936	Cavelier e. Mess	-	584
Boatner, Devall v.	-				271	Chaler, Barrett v.		874
Bogan, State v.						Chambers, Perot F	-	800 .
Bookout v. Anderson		_						870
			•				_	488
Booth v. McFarland		-		-	398	Chambliss v. Atchison		722
Bonin v. Bérard	-					Champonier v. Weshington	. 9	
- v. Durand			1	-		, 2d case	, 1	1013
Bosley, Lemée v.			-/			Chaney, White r	-	277
Bosworth v. Beiller,			- 1	-	293	Charity Hespital c. Stickney -		550
			_			Chew, Succession of -	-	730
Bowden, Hill v.	-					- v. Police Jury		796
Bowles v. Wilcoxen,				-				606
Boyce, Hughes v.	-					Chigé v. Landreaux,	•	
Vance v.		-		-		Chirago Roe		492
v. Escoffie			-		872	Citizene Bank, Hepburn v	-]	1007
Boyd v. Brown				-	218	Little v		976
Bradford, Union Ban	ale at				416	City Dank v. Hauston -		114
						Clark v. Prestou		580
Brandegee, Conrey	U.	•		•				987
Brander v. Cobb	44		-	8	396	Clarke v. Suloy		
Brashear, Anselm v.		-		-	403	- n Scott		907
, Hall v.					392	Clay v. Figure	-	997
- v. Dwight				-	403	Clements r. Cardy		567
- v. Hudson			-		450	Clinton and Port Hudson Railroad	Co.,	
Bray v. Bynum	4			-	879	Meeker v	-	971
		4	_		835	Cobb, Brander v		396
Brewer, Union Bank	10		-					363
Bridge v, Oakey		-		-	968	Hynes v		
Briggs v. Phillips	•		-		303	Cochran v. Dewees		960
Brigham v. Taylor		-		-	906	Cole v. Lucas	-	946
Brinegar v. Griffin					154	Colt v. O'Callaghan		189
Briscoe, State v.	-	-		-	383	, 2d case	-	984
Succession o	£ .		_		268	Collingsworth v. Covington -		406
-			_			Commercial Bank v. Buckner		
Bronsema v. Rind	•				959		-	1023
Broughton v. King			-		569	v. King		457
Broussard v. Broussa	ard				769		846,	861
Brown, Boyd v					218	Conner, Gridley v		87
, Hobgood v.					323	Conrey v. Brandegee -		132
- v. Bemiss			_		365	- v. Elbert		18
v. Brown				_	834	Consolidated Association, Little v.		1012
. Diown				-				
- v. Hughes	-				623	v. Little		731
v. Lambeth v. Police Ju		-		-	822	Cook v. Bank of Louisiana -	-	324
v. Police Ju	ry -		-		366	Coons, Whiting v		961
Bry, New Orleans C	anal and	B	anki	ng		Cooper, Ledoux v		586
Company a					303	v. Polk		158
Bryan v. Atchison					462			329
Buckner, Commerci					1023	Frelleen a	-	911 2
Bullard, Dunbar v.	in Pall	L Uo		-		Frellsen v.		
	•		-		810	v. Denton · ·	-	590
Fluker v.					338	- v. Fretwell		310
Burckhalter, Graham	n v				415		-	487
Bynum, Bray v.					879	v. Sanford		335
, Elam v.			-		881	Course v. Forshey		402
Byrne v. Riddell		-		_	11	Covingtou, Collingsworth v		406
adjust of action of	-	-		-	11			
Callamore 1 m						, Morris v.	*	259
Calderwood, Trent			-		942	v. Gustine		303
Calloway, McDonos	gh v.			-	518	Craig, Douglass v	-	919
Camblat v. Tupery			-		11			150
Cammack v. Griffin		_		_	175		-	905
Campbell, Union B	-	_		-		0 0 5 -		826
	ana V.		-		759	0 0 1		
Cane v. Alley	-	-		-	918	43 11. D 1	-	597
Carlile, Taylor v.	-				579			727
Carmichael, Prewit	tv.				943			546
Carr, Morrill v					807			769
1					501			

	TABL	E O	F	THE	CASES REPORTED.		XI
Creditors, Lee v.		-		- 599			239
2d c	case	-		994			806
, Robert v.		9	4	- 535	Dupeire, Jartroux v		606
Crowley v. Copley Cumming v. Biossatt		-		329	Duplantier v. Newcomb -		279
Cumming v. Biossatt	t .	-		794	Duplessis, Louisiana State Bank	v.	651
Currie, Lacour v. Curry, Roebuck v.		-		790	Sophie v	-	724
Curry, Roebuck v.	•	-	4	- 998	Dupuy r. Bemiss		509
Curtis, Dwight v.	*	40		752	r. Hunt		562
, Osburn v.		-		- 764	Durand, Bonin r		776
- v. Woodman				309	Dwight, Brashear r		403
Cutters v. Baker				572	v. Carson		459
					- t. Curus -		752_
Daigre v. Daigre Dale, Davis v.	**	-		333	v. Smith		759
Dale, Davis v.				205			
David v. Ferrand				596	1		202
Davis v. Dale				205	Edwards C. Fairar	-	307
- v. Hood -	-	-		453	Ekill to Dynam		881
- v. Larguier			-	326		•	275
Dawson, Dowell v.				495	Elbert, Conrey v.		18
Day, Succession of				895	Editoria Jones Va	-	1009
Deconet, Labenelle		-		545	Ellis, McAee v.		163
Decoux v. Bank of L				157			251
Dees v. Tildon -		-		412	Erwin, Union Bank v		657
De Goer v. Kellar				496	- v. Lowry -	-	314
Duke v. Routh -	-			385	Non-Onland		872
Delamarre, Lacour v			-	_140	. New Orleans Canal and F	sank	
- , Mourain				142	ing Co. v.		830
Delery, Bank of Lou	isiana r.		648	649	Eugenie v. 1 icvai	-	
De Lizardi New Or	leans Di	raini	nor		Tarana Campionent (.		474
Company v. Dennistoun v. Mallard	TOURIS D	CARLAIN	8	991			
Dennistoun r. Mallare	1 .	_	, -	1.4	Fant, State v		837
r. Nutt			_	483	Fant, State v.		307
Denton v. Wilcox			_	60	v. New Orleans Gas Light	and	1
Depas v. Riez			_	30	Banking Co.		873
Derbes, Bienvenu r.	_		-	771	r. Rowley		475
Derbigny, McDonogh		•		956	v. Stacy		210
Destréhan, Stachlin v			-	1019	Farrell v. You		903
De St. Romes, Rober	t	-		135			geodition and district
			•	271	Fenner, Friend r.		789
Dewees, Cochran v.		-			Fenner, Friend v . Ferguson, Jackson v .		723
Dick v. Bailey -			•	960	Fernandez, Molinari r	-	553
Dickerman v. Reagan			-	974	13 1 75 13		596_
Dickerson, Smith v.				440	T3 13 T3 31	-	334
T) 1 T)		*		401	First Municipality, Jure v		321
Dimond v. Petit			-	537			527
Dinond v. Petit Dinn, Palmer v. Doat v. Maltby		•		536	v. Hall		549
Doat v. Maltby			-	583	v. Han		
Dodd, Youngblood v.	•	-		187			538 997
Douglass v. Craig			-	919	Fisher, Clay v v. Fisher		997
Dowell v. Dawson	•	•		495	- v. Gordy	-	774
Downes, Armor v.			•	242		•	
- v. Scott		w .		399	Fisk, Amonett r	-	263
Drew v. Robertson .				592	, New Orleans v		78
Driggs v. Morgan				151	v. Fisk		71
Drummond, Akin v.			-	92	Fletcher, McKiernan r.		438
Dubord, State v.				732	Fleury v. Murphy		59
Duclaud v. Rousseau				168	Florance r. Richardson -		663
Ducloslange, Succession	on of		-	98	v. Yorke	-	995
Duke v, Routh .			-	385	Flower, Robin v		721
Dunbar, McMasters v.				577	Flukor r. Bullard	-	338
- v. Bullard .				810	Folke, State r		744
v. Creditors				727	Fonbene, Green r	-	957
Duncan, Second Muni	cinality :	r.	-	182	Fontenot, Neda r		782
Dungan, Pellerin r.	- Junity			383	r. Husband -		780
Danlap r. Hundly .			-	212	v. Soileau		774
f bennend	-		-	MIN	4		

											-
Ford, Morancy v				•	299	Harper v. Lee	-				382
Forgay, Larthet v.	-		-		524	v. Stanbrough		-		-	377
v. Lambeth		-			589	Harris, State v.	-		-		516
Forshey, Course v.				Annual Trans	402	- v. Patten -		-		-	217
Foster, Gibson v , -		•		-		Harrison, Townsend v.					174
Franklin, McIlvaine v.	-		•			Harvey v. Kendall -				-	748
Freeman v. Savage -		-		-		Hawkins, Bemiss v.	-		•		500
v. Stacy	•		-	900		Haydel v. Bateman				-	755
Frellsen v. Copley -		-			911	Headen v. Oubre			-		142
French v. Now Orlean	s and	Car	rrol	lton	00	Hebert, Lejeune v.		•		•	145
Railroad Co.	-		•		80	Police Jury v.	D .:	Land	c.	44	149
Fretwell, Copley v		-		-		Heirne, Pontchartrain	Kai	iroaa	Co.	v_{\bullet}	129
Friedlander v. Myers	•		-			Hellwig v. West Henderson v. Wilcox	-		•		502
Friend v. Fenner -		-		•				•		-	241
Frosh, Munroe v.	-			AC		, White v.	-		•		220
Furst, Beaulieu v		-		41)				-		•	145
Fuselier v. Spalding	•		-		110	Henry, Aillet v.	-		_	_	593
						Hepburn v. Citizens B	lonk		_	-	1007
Gaines v. Merchants I	Bank	-		-	479	v. Ratliff	CLL IN		_	_	331
Galbraith v. Snyder			-		492	Herbert v. Benson	-	-			770
Gardère v. Garvey -		-		-	136	Hickman a Stafford	_	_	-	_	792
Gardiner, Oakey v.	-			1	1005	Hicky King a	-	-		-	367
, Toledano r.		-			779	-, Nugent v	_		-		368
Garvey, Gardere v.	-		-		136	Hill, New Orleans G	na	Light	t an	d	000
Gasquet v. Robins -		-			407	Banking Co.		7.6			402
Gerard v. New Orlean	.8		-		897	- r. Bowden	-		-		452
Gibson, Murray v		-		-	311	- v. Vaught -		-	_		970
r. Foster	-			400	503	Hoban v. Thompson	-		-		538
v. Selby		-		•	628	Hobdy v. Jones -				-	944
Gil, Aubic v.	-		*		342	Hohmood e Brown			-		323
Gilbert, State v.		-		-	244	Hoffmeyer v. White					597
v. Meriam	•		•		360	Hoggatt, Ralph v.					462
v. Neal	•	-			904	Holmes, Goodloe v.					400
Girod, Succession of	-		-		595	Hood, Davis v.					453
v. Creditors		-		-	546	- v. Stewart -		-		-	219
Glover, Succession of	-		-		400	Hopkins v. Johnson					842
Goodloe v. Holmes .	•	-		-	400	Wan Wickle					143
Gordy, Fisher v.	•				762	Hotchkiss, Taylor v.	-		-		917
Goza, Ledoux v . Newman v .		-		640	395	Houston, City Bank v.					114
Graham v. Burckhalte			-	042,	646 415	Huddleston, Weather		v.	-		845
Grant, Perkins v.) L	-		-		Hudson, Brashear v.		-			450
Grayson v. Mayo			-		328 927	Hueston v. Jones	-		-		937
Green v. Fonbene		-	_	-	957	Hughes, Brown v		-			623
Gridley v. Conner		_	-			- v. Boyce					803
Griffin, Brinegar v.		•		-	87 154	Huie, Police Jury v.		-		-	887
Cammack v.		-	_	•	175	Humble, Stroud v.	-		-		930
Groves v. Steel	. •	_		_	480					-	562
Guice, Union Bank v	_	_	_	_	249	Hundly Dunlan	-				212
, v. Lawrence		_	_		226	Hunter, Jones v.					254
Guilbeau v. Creditors		-		-	769	Wiley v.	-				806
Guillemin, Succession		_	-		634	Huchand Fontanet					780
Gustine, Covington v		_	_	-	303	Hrda a Rannott	-				799
Castino, Corington t			-		000	Hynes, Craighead v.					150
						v. Cobb	-		-		363
Hagan, Bank of Cha	rlesto	n v.			999	Hynson v. Meuillon					798
Hagedorn v. St. Lou	s Per	peti	ual	In-							
surance Cor					1005	Ingram a Manua					270
Hall v. Brashear			~		392	I I II PI AIII V. IVI OOLG			-		870 839
v. First Munici	pality	_		-	549	v. Iticharuson		-		•	387
Hamilton, Johnson v					206	-1-18hDCHR V. I CCUL		•	•		292
Hampson v. Reynau					996			•		•	202
Haralson, Louisiana		Ba	nk :	v.	456						
Harkins, Succession				-	923				w		723

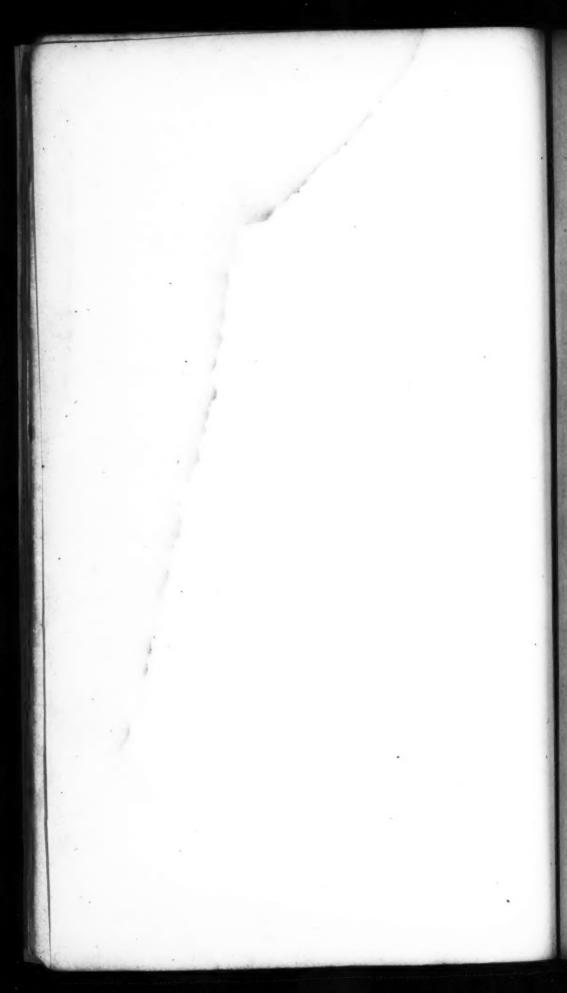
TABLE OF TH	IE CA	SES REPORTED.	xın.
Jacobs, Bloodworth v.		Lee v. Creditors, 2d case -	- 994
, Nicholson v		v. Sewall	940
	964	Lejeune v. Hebert	- 145
Jatroux v. Dupeire	608	Lémée v. Bosley Levinson, Tulane v Lewis v. Splane	802
Jarvis, McNamara v.	591	Levinson, Tulane v.	- 787
Jewell v. Porche	148	Lewis v. Splane	754
Johnson, Hopkins v.	842	Lindeman v. Theobalds	- 912
- v. Hamilton		Little v. Citizens Bank - w. Consolidated Association	976
31 1		v. Consolidated Association 2d case	- 731 1012
			- 620
Jones, Bloomfield v	036	Livingston, Bank of Alabama v.	902
Crawford v.	876	- v. White	- 915
** * * *		Loucks v. Union Bank	617
Hueston v.		Louisiana State Bank v. Barrow	- 405
, Sandridge v	933	Poulsiana State Dank v. Darrow	651
, Union Bank v.	345	v. Duplessis - v . Haralson -	- 456
v. Elliott	1009	Louisville, Riley v	965
v. Hunter	254	Lowry, Erwin v	- 314
	802	Lucas, Cole v.	
Jure v. First Municipality	321	Lucas, Cole v. Luckett, Turner v.	- 885
oute of I not Manierpanis		Lynch r. Crain	905
Kearney, White v	639	Lynch v. Crain	- 843
Kellar, De Goer v.	496		
Kelly, Succession of	574		
Kemp, Romley v	360	Macarty, Succession of	979
v. Rowley	316	v. New Orleans Theatre Co	The state of the s
Kemp, Webb v.	337	Magee v. Robins	411
Kemp, Webb v.	370	Malard, Dennistoun v	- 14
Kendall, Harvey v	748	Maltby, Doat v.	583
, Sturges v	565	Marcenaro v. Bertoli -	- 980
Kenner v. Peck	938	Marsh, Johnson v.	772
Kenton, Morris n.	722	Marshall v. McCrea	- 353
Kerr v. Wells	832	Marshall v. McCrea	79
King, Broughton v	569	Martin, State v. Maskell, Murphy v. Mason v. Oglesby	- 667
Commercial Bank v.	457	Mason a Oglosby	763 - 793
, Union Bank v	920	Matter of the Merchants Bank -	68
	367	Mayo, Grayson v	- 927
Kirkland, Woods v	337	McAlnin et Laure	1015
Kitchen, Lynch v Knowland, Spencer v	843	McAlpin v. Lauve McCalop, Bird v.	0.53
Knowland, Spencer v	222	v. Newcomb	332
		McCrea, Marshall et	- 79
Labenelle v. Deconet -	545	McCullough v. Minor	466
Labourdette v. First Municipality	527	McDonogh v. Calloway -	- 518
Lacour v. Delamarre - 5:	140	- v. Derbigny	956
- v. Carrie	790	McElrath v. Dupuy -	- 520_
Lambeth, Brown v.	822		399
—, Forgay v.	589	Booth et	- 398
Lanata v. Planas	544	McGill, Sexton v	190
Landreaux, Chigé v	606	McIlvain v. Franklin -	- 622
Larguier, Davis v	326	McIntosh v. Smith	756
Larthet v. Forgay	524	McKee, Bank of Tennessee v.	- 461
Lataste v. Béraud	768	v. Ellis	163
Lauve, Avery v	1016	McKelvey, New Orleans and Car	r-
	1015		359
Lawrence, Guice v	226	McKiernan v. Fletcher -	- 438
- v. Second Municipality	- 651	McLeod, O'Reilly v	138
Le Blanc v. Nolan	222	2d case -	- 146
Ledbetter v. Ledbetter -	215		577
Ledoux v. Anderson -	5 58	McNamara v. Jarvis	- 591
- v. Cooper	- 586		567
- v. Goza	395		- 795
Lee, Harper v		Mechanics and Traders Bank	
— v. Creditors	599	Rowley	- 372

Medley v. Voris	140		
Meeker v. Clinton and Port Hudson		v. Barrow	326
Railroad Co	971		303
Menard v. Winthrop	333		830
Merchants Bank, Gaines v	479	New Orleans Draining Company v.	001
Matter of	68	De Lizardi	281
v. Bank of United	050	New Orleans Gas Light Banking Co., Farrar v	089
States	659	v. Hill -	873
Merchants Insurance Co., Amis v.	594 160	v. Webb	526
Meriam, Gilbert v Meuillon, Hynson v	798	New Orleans, Girard v	897
Mexican Gulf Railway Co., Taylor v.	654	New Orleans Theatre Co., Macarty v.	46
Michel, Roubieu v.	808		78
Millaudon v. Beazley	916	Niblett, Scott v	270
Miller v. Allison	308	Nicholson v. Jacobs	666
- v. Andrus	767	Nicolas, Succession of	97
Miller, New Orleans and Carrollton	-	2d case -	98
Railroad Co. v.	824	Nimmo v. Allen	451
Minden Seminary, Prothro v	934	Noblet, Succession of -	281
Minor, McCullough v	466	Nolan, Babin v	346
Mitcheltree, Splane v -	265	, LeBlanc v	357
Molinari v. Fernandez	553 485	Nora, Succession of	223 229
Monget v. Pate - Monguit, Offut v.	785	Nugent, Spears v	11
Montegut, Succession of	630	- v. Hicky	368
Montgomery, Succession of -	469	Nutt, Dennistoun v	483
v. Myers	276		
Moody, Copley v	487	Oakey, Bridge v	968
Moore, Ingram v	870		1005
	1017	O'Brien, Berteau v	162
Morancy, Beard v	347	v. Police Jury	355
v. Ford	299	O'Callaghan, Colt v	189
Morgan, Driggs v	151	2d case	984
, Union Bank v	418	Offut v. Monquit	785
Morrill v. Carr Morris v. Covington	807		793
Morris v. Covingion	259	Oliver v. Simmes Olivier v. Blancq	882
v. Kenton v. Terrenoire	458		517 138
Moss, Cavelier v	584	2d case	146
v. Smoker	989	Orleans Cotton Press Co., Shepherd v.	
Mourain v. Delamarre	142	Osburn v. Curtis	764
Muir v. Henry	593	v. Planters Bank	494
Mulford v. Wimbish	443	Oubre, Headen v	142
	962	Overton v. Ricord	805
Murphy, Bell v	765		
, Fleury	59	Packwood, Succession of -	96
Maskell	654	Thompson v	624
	703	Pahnvitz v. Fassman	625
	990	Palmer v. Dinn	536
			188
,		Parks, Atchison v.	1017 309
Neal, Gilbert v	904	Pate, Monget v.	485
37 1 73	Sept.	Patton, Harris v.	217
Newcomb, Duplantier v		Patton, New Orleans and Carrollton	
McCalop v	332	Railroad Co. v	350
Newman v. Goza - 642,	646	-2d case -	352
New Orleans and Carrollton Rail-		3d case	352
road Co., French v.		Pease, First Municipality v	538
2 27 1		Peck, Kenner v.	938
		Pecot, Isabella v.	387
	824	Pellerin v. Dungan Perkins, Prendergast v	383 383
		v. Grant	328
		Perot v. Chambers	800
	414	vi washenna nam	

Perret v. Sauvinet -				-	559	Robin v. Flower -		-			721
Peterson, State v.	-		-		920				-	846,	861
Petit, Dimond v		-		-		Robins, Gasquet v		•		-	407
DIME D	-					Magee v.			-		411_
v. Murphy -						Roe, Chinn v					492
Pierce v. Pierce	_		-		329				-		998
Pierse v. Amonett -	-		-		357					-	225
		_		-	621		_				808
Pigneguy, Arsene v.	•		-				-		-	_	766
Planas, Lanata v		-		-		Rougeau, Soileau v.		-		-	168
Planters Bank, Osburn	v_{\bullet}				494				-		385
v. Bass		-			430			-		-	
Plauché, Succession of					575		-				475
Plique v. Bellomé -				-	293	, Kemp v		-		-	316
Poirrier v. White			-		934		nd T	rade	ers		020
Police Jury, Bach v.		-		-	163			-		-	372
, Brown v.			-		366	, Reynolds v.	-				890
Chew v. O'Brien v.		-			796	v. Kemp					360
O'Brien v.	-		-		355	v. Rowley			-		208
Slattery v. v. Hébert		-			444	Rundell, Taylor v					367
- u. Hébert	_				149		-				266_
v. Huie -		_		-	887					-	961
PTO 1	-				272						604
Polk, Cooper v.	-		-	-	158	, State t.					
Pontchartrain Railroad	C-	. 1	Tain	-		Salar Clarks					987
		v. I	Tell	пе	129			-		-	
Porche, Jewell v.					148				-		393
Potts, Robb v.		•		-	552			-		-	933
Prados, Segura v.					751						335
Prendergast v. Perkins		-		*	384					-	196
			-		264				-		427
Preston, Clark v		-		-	580	Sauvinet, Perret v				-	559
Préval, Eugénie v.	*		-		180	Savage, Freeman v.	-				269
Prevost v. White				-	936	Scott, Clarke v					907
Prewitt v. Carmichael			-		943	—, Downs v.	-				399
Prothro v. Minden Ser	nina	rv		-	939						270
Pumphrey, Richardson	v.		-		448		-				266
Purnell, Ferriday v				-	334						651
,							unca				182
Rankin v. Bell -					486					_	139
Ratliff, Hepburn v.		-		-				_			751
			-		331	CO II COII	•		-		628
Read v. Ware		•		-	498					-	141
Reagan, Dickerman v.			-			Semple v. Barron			-		940
Reed v. Ritchey .		-		~	796			-		-	
	•		-		824		-		-		190
Reyburn, Benoist v.		-			137	Shaw, Weld v.	_	-	,	-	559
Reynaud, Hampson v.			-			Shepherd v. Orleans C	cotton	Pr	088	Co.	100
Reynolds v. Rowley					890	- v. Young	-		-		238
Richards v. Presler			-		264					-	277
Richardson, Florance	7.	-		-	663	Shropshire v. Russell	-		-		961
, Ingram v.			-		839	Simmes, Oliver v		-		-	882
, Ingram v.	ev	-		-	448	Sims, Dunlap v.					239
Ricord, Overton v.	-		-		805	, Ells v		-		*	251
Riddell, Byrne v		-		-	11	Slattery v. Police Jury	7				444
Riez, Depas v	_				30	CHILL IN TO I		-		-	626
Rightor, Slidell v	-			_	143	v. Rightor	-				143
Riley v. Louisville		-		_	965						993
Rind, Bronsema v			-			Smith, Bacon v.					441
Ritchey, Reed v.		-		-	959	Dwight v.	-	_			759
Rivette P.	-		-		796			_			756
Rivellet Appeller		-		*	752	, McIntosh v.	*				828
Rivollet, Angelloz v.	-		-		653	Vascocu v.		-			401
Robb v. Potts				-	552	v. Dickerson	*				447
Robert v. Creditors	-		-		535	v. Smith		-			
v. De St. Romes	8	-		-	135	Smoker, Moss v.	*		-		989
Roberts, Benton v.					243	Snyder, Galbrath v.		-			492
2d case				-	749	Soileau, Fontenot v.	-		-		774
Robertson, Drew v.	-		~		592	- r. Rougeau		-		-	766

Sophie v. Duplessis					724	Van Horn v.	587
Sowles, Crear v					597		579
Spalding, Fuselier v.					773	- v. Hotchkiss	917_
Spears v. Nugent -				-	11		654
Spencer v. Knowland	-		-		222	- v. Rundell	367
Splane, Lewis v				-	754	v. Stone	910
- v. Mitcheltree	-			10	265		870
Stachlin v. Destréhan					1019	- v. Williams	868
Stacy, Farrar v.					210	Terrenoire, Morris v	450
, Freeman v				-	615	Thayer v. Tudor	1018
Stafford, Hickman v.	-				792	Theobalds, Lindeman v	912
, Succession of		_			886	Third Municipality v. Ursuline Nuns	611
Stanbrough, Harper v.			-		377	Thomas v. Marsh	353
v. Barnes				-	376	v. McNeil	795
v. Barnes					474	Thompson, Hoban v	538
State v. Bogan -				-	838	- v. Packwood -	624
- v. Briscoe	-		-		383	Tilden, Dees v	412
- v. Dubord .				-	732	Toledano v. Gardiner	779
- v. Fant -	_	_	_		837	Toler v. Swayze	880
- v. Folke -				-	744	Townsend v. Harrison -	174
- v. Gilbert -		•	_	_	244	Trent v. Calderwood	942
- v. Harris -	-		-		516	Trépagnier, Saulet v	427
- v. Martin -		•	_		667	Trudeau, Auguste v	623
v. Peterson -	-		•		921		446
- v. Russell		•		-	604	Tucker v. Agricultural Bank - Tudor, Thayer v	1010
	-		-				
Steel, Groves v.		-		-	480	Tulane v. Levinson	787
Stewart, Hood v.	-		•		219	Tupery, Camblat v	11
Stickney v. Charity Ho			-	-	55 0	Turner, Jacobs v.	964
St. Louis Perpetual In	gura	nce	C	0.,		v. Luckett	885
Hagedorn v.			•		1005	Tutorship of Bates	941
Stone, Taylor v		-		-	910		
v. Rose -	-		•		225	Union Bank, Loucks v	617
Stroud v. Humble -		•			930	v. Bradford .	416
Sturges v. Kendall			-		565	v. Brewer	835
Succession of Briscoe				-	268	v. Campbell -	759
Chew	-		•		730	v Erwin	657
Day - Duclosla		-		-	895	v. Guice	249
——— Duclosla	nge				98	v. Jones	345
Girod	-	-		-	595		928
Glover					4	- Morgan	418
- Guillemi	n			-	634	v. Webb	585
Harking					923	Urquhart v. Sargent	196
Kelly		-		-	574	Ursuline Nuns, Third Municipality v.	
			-		979	Cibando Italis, Imia Manicipanty Co	011
McNeil	-			_	567	Vance v. Boyce	827
- Montégn	t		_		630	— v. Depass	16
Montgon	DATE		_		469	Williams v.	908
Montgon Nicolas	-			-	97		587
21100105	d cas		-	_	98	Van Horn v. Taylor	
Noblet	. 003	-0	_	•	281	Van Wickle, Hopkins v	143
Nora -		_	_	_	229	Vascocu v. Smith	828
Packwoo	h	_	_	-		Vaught, Hite v	971
Plauché	ru.	_	-		96	Viola, Sue v	986
Segond		-		*	575	Vitrac v. Rey	824
Stafford	-		-		139	Voris, Medley v	140
- Stanord Wadswor	utl-	•			886		
			-		966	Wadsworth, Succession of -	966
White		•		-	236	Wall, Ballard v	404
Sue v. Viola White	-		-		964	Ware, Read v	498
		•		-	986	Washington, Champomier v	722
Sullivan, Ivor v.	-		-	*	292	2d case	1013
v. Williams		•		-	876	Weathersby, Bates v	484_
Swayze, Toler v.			-		880	- v. Huddleston	845
m						Webb, New Orleans Gas Light and	
Taylor, Brigham v.				-	906	Banking Co. v -	526
——, Police Jury v.	•		-		272	v. Kemp	337

TABLE	OI		CHI	E CA	SES REPORTED.				3	cvii.	
Webb v. Kemp, 2d case			6	370	Wilcoxen, Bowles v.				1.	760	
- v. Union Bank				585	Wiley v. Hunter -		-			806	-
Weld v. Shaw					Williams, Sullivan v.					876	
Wells, Kerr v	-		-	832	, Tear v					868	
West, Hellwig v.				1	r. Dunn					806	
Whipple, Succession of	-			236	- v. Vance -					908	
White, Hoffmeyer v		-		597	Wimbish, Mulford v.	-				443	_
, Livingston v.			-		Winthrop, Menard v.				-	333	
Poirrier v.				934	Womack v. Womack			-		339	
	-			936	Wood v. Henderson -				-	220	
- Succession of -				964	Woodman, Curtis v.					309	
- v. Chanev -	-				Woods v. Kirkland -		-			337	
- v. Henderson -				241						Name	1
- v. Kearny -			-	639	35 E					002	
Whiting v. Coons -		-		961	Yoe, Farrell v.		-		-	903	
Whitton v. Jones -			-	802	Yorke, Florance v.					995	
Wilcox, Bank of Louisiana	v.				Young, Shepherd v		-		-	238	
—, Denton v			-	60	Youngblood v. Dodd	•		•		187	
, Henderson v				502							a
——, Littlejohn v.	*		•		Zacharie, Barrett v.				•	655	-/



CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

A

NEW ORLEANS,

FROM THE

1st JANUARY to 30th JUNE, 1847.

PRESENT:

Hon. GEORGE EUSTIS, Chief Justice:

Hon. PIERRE ADOLPHE ROST,

Hon. GEORGE ROGERS KING, Associ

Hon. THOMAS SLIDELL,

Associate Justices.

HELLWIG v. WEST and Wife.

The incapacity of married women to contract is not universal and absolute. The limitations imposed on their capacity to contract, for the maintenance of the marital power or for their protection against its abuse, must be construed strictly. In all cases to which they do not extend, the capacity of women is not affected by marriage.

The plea of want of authorization will not avail a married woman, where its effect would be to enable her to commit a fraud. For the same reason, in all obligations arising framquasi-contracts, offences and quasi-offences, the wife is bound without authorization.

A PPEAL from the District Court of the First District, Buchanan, J. Durant, for the plaintiff. C. Janin, for the appellant. On the first hearing of this case, the following opinion of the court was pronounced by

Rost, J. The plaintiff, a skilful and diligent gardener, was employed in that capacity by Mr. West, with the assent and approval of his wife, at the rate of \$25 per month, and took charge of a garden attached to the suburban residence of his employer. West was at the time engaged in business in New Orleans, and his wife had the exclusive management of the place, and of all persons employed on it. She furnished the supplies, received the profits, which amounted to five or six dollars per day, and represented herself to the persons she hired as the absolute mistress of the plantation. After the plaintiff had been working nearly two years West failed, and the plaintiff brought suit against the assignee of the creditors and Mrs. West, for the balance due him, with privilege on their moveable effects, under art. 3158 of the Civil

WEST.

Code. The court of the first instance gave judgment against them in solido, with the privilege claimed, and Mrs. West has appealed.

The defence set up takes it for granted that the inexpacity of married women to bind themselves without authorization, is universal and absolute. We conceive the law to be otherwise. Women are not rendered incapable on account of their sex. The capacity of single women to contract is the same as that of men. When they marry the laws, which limit their capacity in certain cases, have for their object the maintenance of the marital power on the one hand, and the protection of women against the abuse of that power on the other. These limitations must be construed strictly, and, in all cases to which they do not extend, the capacity of women is not affected by marriage.

There are entire classes of obligations in which the plea of want of authorization cannot avail married women, because it would enable them to commit fraud. Ulpian, commenting upon the Senatusconsultum Velleianum, in which most of the laws establishing the disabilities of married women originate, says: "Decipientibus mulieribus senatusconsultum auxilio non est. Infirmitas feminarum non calliditas, auxilium meruit." V. 2, § 3. Ulp. lib. 29. (§ 31, tit. 1, lib. 16. Paris edition.)

In all obligations arising from quasi-contracts, offences and quasi-offences, the wife is bound, on that ground, without authorization.

"Ajontons ici que la femme est obligée sans autorisation par son délit ou son quasi-délit, et qu'elle l'est également si elle a géré sans mandat les affaires d'un tiers. En effet, les tiers ne peuvent être victimes, soit du délit ou du quasi-délit, soit des mauvais résultats de l'administration dont la femme s'est emparé spontanément. Enfin, la femme pourrait être obligée par la gestion d'affaires d'un tiers." Proudhon, Etat des Personnes, p. 463, et notes.

These authorities appear to us to cover the present case. The plaintiff was a gardener, and attended besides to the general administration of the place, for the exclusive benefit of the appellant, as he was informed. She represented herself as the owner of the plantation, administered it in her own name and right in presence of her husband, and received the fruits it produced. Under these acts and representations, the plaintiff was not bound to inquire into her title. He had good reason to believe that he was working on paraphernal property, which the appellant had capacity to administer, without the assistance of her husband, under art. 2361 of the Code.

Her title to the property is not shown; but, if it was not paraphernal, the plaintiff was deceived. So far as relates to the rights of third persons, the appellant was, in that case, administering the property of another, and, by the fact of that administration, there was formed between her and the plaintiff, a quisi-contract, which is binding upon her without authorization.

It is a principle of high authority, that the laborer is worthy of his hire; and the laws which award it to him in cases like the present, are a just limitation of those intended for the protection of the rights of married women.

For the reasons assigned, the judgment of the District Court is affirmed, with costs in both courts.

HELLWIG W. WRST.

SAME CASE-ON A RE-HEARING.

A wife cannot be made responsible for wages due to a laborer for work done for the community, in the absence of proof of any fraud or misrepresentations on her part, calculated to mislead the plaintiff, by inducing him to believe that the property was paraphernal.

A promise by a wife to pay a laborer who had been employed to work on community property, is not obligatory. Whether separated in property or not, a wife cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage. C. C. 2412.

I SLIDELL, J. After a careful consideration of this case, we have come to the conclusion, that the judgment heretofore pronounced was erroneous. West and his wife, were in community when the contract with the plaintiff was made, and the land which the plaintiff was employed to cultivate was community

MHE judgment of the court, on the re-hearing, was pronounced by

property. Under these circumstances, to impose a liability upon Mrs. West, it was necessary for the plaintiff to establish that she had committed a fraud upon him, by falsely representing to him, or inducing him to believe, that the property was her paraphernal property, and by herself employing him accordingly.

The position in which Mrs. West placed herself towards the gardener who succeeded the plaintiff, gave a very strong coloring to the plaintiffs' pretensions; but its effect is greatly diminished by considering the separation of property and the bankruptcy of West, which had intervened. Fraud should be clearly established. There is here no direct proof of fraud, nor of any representations made by the wife to the plaintiff, either at the date of his employment or during its continuance, which were calculated to mislead the plaintiff. The inferences drawn from her subsequent acts and dealings with others, upon which the plaintiff's case rested, appear to us, after our renewed examination, to be insufficient to sustain the suit. Moreover, on recurring with more care to the petition, we find it militates against the inference of fraudulent representation, which was attempted by the plaintiff to be drawn from the wife's subsequent conduct. The plaintiff there alleges that he was employed by West and wife as a gardener, upon the place belonging to them. No suggestion of fraud is there made, no indebtedness in solido is alleged, nor is judgment prayed in solido.

The contract having been a community contract, the property on which the plaintiff labored community property, and the debt a community debt, the subsequent declaration of the wife to a third person, after the discharge of the plaintiff, that he should lose nothing and that she would pay him, was unavailing. If this could be considered as a promise to the plaintiff, still it is not proved to have been authorized by the husband, and is moreover destitute of legal effect, under article 2412 of our Code, which declares that the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage.

As to a subsequent acquisition of the land by Mrs. West, which is conjectural, and rests upon inference from her declarations made in conversation with a third person some months after the plaintiff's discharge, the terms and manner

HELLWIS,

of such acquisition, if made, whether by judicial sale in bankruptcy or how otherwise, and whether with or without a divestiture of plaintiff's privilege, do not appear. It is evident no such acquisition was made before the plaintiff's employment ceased.

The case of the plaintiff, a laboring man who had served faithfully and skillfully, is one of great hardship; but however much it ought to commend itself to the conscience of the appellant, we are bound by the less liberal rules of law to reject his claim, as now presented. We do not wish, however, to be considered as withdrawing the opinion expressed at the former hearing, that where a married woman commits a fraud, she is liable, even out of her separate estate. This reversal is based upon a change in our opinion as to questions of fact.

It is therefore decreed that, the judgment appealed from be reversed; and it is further decreed, that there be judgment, as in case of non-suit, in favor of the said Adelaide Duplessis, wife of John K. West, with costs in both courts.

Succession of GLOVER.

The Probate Courts, under the late judicial system, were authorized, on an opposition to an account presented by an executor, to condemn him to pay to the succession, out of his own property, the amount of any debt due to the estate, which he had failed to collect through culpable negligence, (C. P. 993, 997, 1053, 1057); he being chargeable with all sums due to the succession which he has failed to collect, unless he show a sufficient excuse for his failure. Such a proceeding is not to be confounded with an action against an administrator on his bond, or for a tort, when the claim against him is a personal one.

Where an executor obtains a judgment against a debtor of his testator with a stay of execution, due diligence on his part requires that the judgment should be recorded immediately, and that an execution should be issued as soon as the delay has expired. It is for him to

show any reason which might render such steps unnecessary.

Any creditor may oppose the homologation of an account presented by an executor, and may, without making the other creditors parties to the proceeding, obtain a judgment condemning him to pay, for the benefit of the succession, the amount of a debt due to it, which the executor fails to show that he has used due diligence to collect.

A PPEAL from the Court of Probates of New Orleans, Bermudez, J. The executor of Rebecca Glover appealed from a judgment condemning him to amend an account filed by him, so as to credit the succession with \$1168 10, the amount of a debt, on the ground that he had not shown due diligence to collect it. The judgment was rendered on an opposition to an account filed at the instance of the opposing creditor, Dudley.

E. Randolph, for the opponent. The exception taken in this case to the form of proceedings confounds claims for damages founded on torts, with claims for indemnity founded on matters of administration. The rule in the first class of cases is given in 3 La. 464, Young v. Chaney. The question there, was damages for injury to real estate. These, from their nature, are unliquidated demands, and the court say, "the act complained of would amount to a quasi-offence, and to say the least of it, a question might be raised as to the competency of a Court of Probates to decide on such a claim." The reason of this rule is to be found in considerations touching the trial by jury. Morgan v. Lard, 14 La. 286. "The jury are the peculiar judges of the quantum of damages." "The assessment of damages is the peculiar province of a jury."

Barney v. De Russey, 1 Rob. 75. C. P. 313. The two following cases were judgments by default, in which the court had assessed damages without the intervention of a jury: In actions of tort in which, from the nature of the demand, damages are to be assessed, a jury must be summoned to find the same." Olivier v. Canon, 11 La. 474. "A jury only can assess damages." Liles v. New Orleans Canal and Banking Company, 6 Rob. 273. Construed by these authorities, the interpretation of the rule in 3 La. seems to be, that that a Court of Probates ought not to have a jurisdiction which is the peculiar province of a jury, and that it cannot exercise a jurisdiction which, in every case

of a judgment by default, would require it to perform an impossibility.

This case is different. The opponent's claim is based upon a mere matter of maladministration. In matters of this sort, curators are responsible in the Court of Probates. C. C. 1140. C. P. 924, no. 9, 997. These articles declare that curators are responsible for their maladministration: that they are to render their accounts to the Courts of Probate; that these courts alone have the power of compelling them to render accounts, and to pay over what they owe. To suppose, under these circumstances, that the Court of Probates could not give judgment against a curator personally, would involve the absurdity of supposing a tribunal possessing exclusive jurisdiction over the facts, without the power to decree

what consequences flow from these facts.

Nor do any of the reasons given for the rule in 3 La. apply here. There can be no doubtful question of facts to be solved by a jury, for the curator is bound to furnish all the proofs and to make all the facts clear in his accounts; and there can be no unliquidated damages to assess, as the amount of the debt lost by his negligence, furnishes the exact measure of his liability. See Lafon's Heirs v. His Executor, 3 Mart. N. S. p.718, 719. Longbottom v. Babcock, 9 La. 49. In these two cases, the executors were held liable, on oppositions to their accounts, for debts which they had failed to collect; the one for gross negligence, and the other for want of proof of due diligence. See also, *Hodge's Heirs* v. *Dunford*, 1 Mart. N. S. p. 126. *McMicken* v. *Millaudon*, 2 La. 184. Watts v. *McMicken*, 2 La. 183. These cases were from courts of ordinary jurisdiction, and it was held that a single act of an administrator cannot be selected as the foundation of a suit; that the action ought to be to compel him to render an account of every thing he has done in that character, that is, that the Court of Probates had jurisdiction and that an opposition was the proper form of proceeding.

The cases of Ingraham's Heirs v. Stokes, 10 La. 26, and Parmelee v. Brushear,

11 La. 332, sustain the jurisdiction of the District Courts in suits brought upon bonds of curators, &c., when the penalty of the bond is the gist of the action, and, by implication, refer it to the Probate Court when the gist is an account. In the case of *Flint* v. Wells, 4 La. 332, the jurisdiction of the District Court was negatived, when a suit on a curator's bond claimed an account, and not the penalty. The act of March 16, 1842, ch. 120, § 6, gives, in terms, exclusive jurisdiction to the Probate Court in all suits upon bonds of curators, &c., in relation to sureties. It must be construed to embrace principal, of course, Conclusive upon the point of jurisdiction, it says nothing about the mode of proceeding; but the case of Wilson v. Murrell, 6 Rob. 69, in construing the clause of this act which requires that the necessary steps shall be taken against the principal before recourse upon the surety, expressly designates the mode by account and opposition under arts. 1055, 1056, 1057 of the Code of Practice. In Boudousquie's Succession, 9 Rob. 407, the issues made involved the question of an administrator's liability for negligence in collecting a debt; the prayer of the plaintiff in opposition, however, was for a different kind of relief; and the court ordered that the case be remanded to the Court of Probates to enquire whether the administrator ought not to be charged, with a certain sum of money, "in consequence of failure of recovery and loss to the estate, resulting from the administrator's negligence in pursuing legal means to secure payment." Code de Procédure, arts. 533, 1002, 995. 2 Toullier, p. 407-9.

On the question of jurisdiction, the court is referred to Prieur et al. v. Their Creditors, 2 Rob. 541. Dupin's Pothier, v. 8, p. 79. Story's Agency, § 183. 11 Mart. 192. 6 Ibid. N. S. 195. 8. Ibid. N. S. 328. 7 Ibid. N. S. 38. 18 English Common Law Reports 348. 20 Ibid., 183. Story's Agency, § 217, 218.

8 Mass. Rep. 57. 7 Dupin's Pothier, 161.
M. M. Robinson, for the appellant.—I. Courts of Probate are without jurisdiction of any action or proceeding to render an administrator personally responsible, for laches, or mal-administration. They are courts of limited jurisdiction.

SUCCESSION GLOVER.

SUCCESSION OF GLOVER,

They have no powers but such as have been expressly given. No article of either Code—no statute has ever given them jurisdiction in such a case. Art. 997 of the Code of Practice declares, that "the judges of the Courts of Probate, who have appointed or confirmed testamentary executors, and other persons administering successions, alone have the power of compelling them to account and pay over what they may be found to owe"—in the french text "ont seuls le droit de les contraindre a rendre compte de leur administration et à en payer le reliquat." The Probate Court has exclusive power to compel an administrator to account; it has authority to force him to pay into court any money, or to give up any property, of the succession, in his possession—but when there is no longer any money or other property of the succession in kind, the Probate Court ceases to have jurisdiction. Any thing due to the succession by the executor personally, becomes a debt to the succession—and payment must be sought from him, as from any other individual, by an action before the ordinary tribunals. In the case of Baillio v. Wilson, 5 Mart. N. S. 217, the question of the jurisdiction of the Probate Court in such a case, was expressly raised and decided. Porter, J. says: "The first questions to be examined arise out of the pleas to the jurisdiction of the court, and we think the defence well offered to that part of the petition, which alleges the personal responsibility of the defendant by reason of her mal-administration. Such an action should be commenced in the District Court."

In the case of Bouquette v. Donnet, 2 La. 133, the question of the jurisdictiction of the Probate Court of an action against an executor personally, for an illegal act in his administration was raised and argued. The court say: "It appears to us, this is a demand against the executor, in his personal capacity, for property sold by him contrary to law. In other words for a tort or wrong done by him." "We think the Probate Court had no jurisdiction of the case."

In Ingram v. Stokes, 10 La., 28, which was an action against a curator of absent heirs on his bond, brought before a District Court, the jurisdiction of the

court was excepted to, but sustained.

In the case of Hemken v. Ludewig, 12 Rob. 188, the question was again expressly raised, whether a Probate Court could take jurisdiction of an attempt to render a curatrix liable personally, for the debts of the succession. Simon, J., in delivering the opinion of the court, says: "It is well settled that Courts of Probate have no jurisdiction of a claim against an administrator personally, for mal-administration."

The power of the Probate Court is limited to the property of the deceased—it has a sort of jurisdiction in rem. When the property itself has ceased to exist, and the succession has only a claim against an individual—whether the claim results from an ordinary contract, or from the mal-administration of an executor, payment can only be enforced before the ordinary tribunals.

It is evident that Probate Courts have not been invested with jurisdiction in actions against executors, &c., for mal-administration, because the remedy being in damages, the defendant is entitled to a trial by jury. The reason does not apply when the the object is to enforce the delivery of property or

money, of the succession, in his hands.

Not a case is to be found in the whole series of Reports in this State, in which the court has sustained the jurisdiction of a Probate Court in such a case, where the point has been raised. An examination of the numerous cases cited by the counsel of the appellee will satisfy the court of this. In the cases of Longbotton v. Babcock, 9 La. 49—Lafon's Heirs v. His Executors, 3 Mart. N. S. 718—Collins v. Andrews, 6 lb. N. S. 195—and Succession of Boudousquie, 9 Rob., 405, no exception was taken to the jurisdiction of the Probate Court, nor was the question of jurisdiction raised. The controversies turned on other matters.

The case of Hodge's Heirs v. Durnford, 1 Mart. N. S. 126, was an action before a District Court, and the question of jurisdiction was not raised. That of Flint v. Wells, 4 La. 537, merely decides that a District Court is without jurisdiction of an action to compel an administrator to account. In the case of Prieur et al. v. Their Creditors, 2 Rob. 541, the question related to the administration of a syndic of the creditors of an insolvent. The case had nothing to do with a a succession. The case of Wilson v. Murrell, 6 Rob. 65, was an action against the surety of a curatrix under the express provision of the act of 1842, and decides nothing as to the question of jurisdiction. The case of McMicken v.

Millaudon, 2 La. 184, is the only case in which there was any plea to the jurisdiction of the court, and that case was evidently determined on the ground, that the Probate Court alone had authority to compel an executor to account—which is not denied. The decision was delivered by Judge Porter, but a week or two before his decision in the case of Boquette v. Bonnet, reported in the same volume, p. 193, and must be taken in connection with the latter, in which it is expressly decided that a Probate Court has no jurisdiction of an action

against an executor personally, for mal-administration.

If an executor can be condemned, on a mere rule in the Probate Court, to pay a large sum to the succession de bonis propries on the ground of neglect or maladministration, there must be some law authorizing the proceeding. An examination of the articles of the Code of Practice, (see arts. 993, 997, 1056, 1057,) will show that the Code never contemplated giving the Probate Courts authority to proceed against an executor personally, but where he retained in kind property or money of the succession. Art. 993 says: "It shall be the duty of the curator to account before the judge of probates, and pay over, &c.. a due proportion of the sums which be may have in his hands; and on his failure to reader his account, &c., or to make payment, &c., execution may issue against his property." Art. 997 gives authority to probate judges "to compel executors, &c., to account and pay over what they be found to ove—(in the french text, le reliquat,) that is to say, any balance of property or money in their hands belonging to the succession. Art. 1057 authorizes an execution against the property of an executor, "when he fails to prove that he has no junds in his hands belonging to the succession;" and this proof the preceding article (1056) declares may be made by "filing in court, a brief statement of his condition as executor, &c., with regard to the succession."

The provisions of sects. 3, 4, 5, of the act of 13th March, 1837, (B. & C's. Dig., 498--9) seem to have suggested the summary proceedings resorted to in the lower court; but it will be seen that they do not extend to a case like this. The accounts of the executor show that the money received was disbursed according to the judgment of the court homologating the tableau, and as fast as received. Besides, there is no evidence that there was any bank in the parish of Orleans allowing interest on deposits. The third and fourth sections of the act of 1837, prescribe a penalty for not depositing money in bank, or withdrawing it-they relate to no other matter. The rule in this case was taken to effect a different object, nor is it pretended that the executor had any funds to deposit.

Admitting the jurisdiction of a Probate Court to condemn an executor de bonis propriis, for laches or mal-administration, where the question of liability arises incidentally, it does not follow that it would have the same power where

such a judgment was sought as the principal end of the proceeding.

The case of the Succession of Johnston, 1 Ann. Rep. 75, does not touch the

questions presented by this case.

II. All the creditors appearing on the homologated tableau of distribution should have been made parties to the proceeding against the executor, otherwise the judgment on the question of lackes, if given in favor of the executor, would not be final, while it would be, if against him. If a contrary rule were admitted, there might be as many judgments as creditors. See McMicken's case, 2 La., 184.

III. There was no laches. The omission to take out execution is not conclusive evidence of negligence. It may be-as was the fact in this case, that

there was no property to be seized.

IV. The omission to record a judgment is not alone evidence of such neglect as will subject an executor to the payment of the whole debt. Such a precaution can only be required where there is reason to believe it might be productive of some good. To render an executor liable for such an omission, it ought to be proved that some injury resulted from it. There was no pretence ought to be proved that some injury resulted from it. There was no pretence of any thing of the sort in this case, which is a mere attempt to render an executor personally liable for a technical neglect, in a case in which, in fact, the utmost diligence has been used.

V. Though the omission to take out execution be regarded as evidence of laches, what law condemns the executor to the payment of the whole debt as a penalty for his neglect? To entitle any party to damages for the malfeasance

or misfeasance of another, he must show an injury to himself.

The judgment of the court was pronounced by

SUCCESSION GLOVER.

BUCCESSION OF GLOVER. King, J. On a rule taken by T.B. Dudley, as judgment creditor of Glover's succession, the executor of the deceased was ordered by the Probate Court to file a final account of his administration, and to state particularly all the steps taken for the collection of certain bills, which figured on the inventory and which were past due.

In obedience to this order, the executor filed an account, showing the application of the funds which had been received up to that date. It was accompanied by a statement that a judgment had been obtained against James Dunlap, the acceptor of the bills, a part of which had been collected; that an execution had been issued for the residue of the judgment, in virtue of which property had been seized, but had not been sold at the date of the last information from the sheriff, in whose hands it was. Dudley opposed the account on the ground that it was incomplete, inasmuch as the steps taken by the executor to coerce payment of the judgment were not stated, and diligence in the collection was not shown. He charged the executor with negligence in the pursuit of the debt, in giving unreasonable and unwarrantable delays, whereby the claim had probably been lost; and concluded with a prayer, that the executor be condemned to pay the amount of the opponent's claim, out of his individual effects.

The judge considered that the executor had been guilty of culpable negligence, and ordered him to amend the account, by placing to the credit of the succession the uncollected residue of the judgment against *Dunlap*, and to distribute it among the creditors, as directed in a provisional tableau proviously approved. From this judgment the executor has appealed.

The appellant contends that this is an action to render an executor personally responsible for lackes or mal-administration, of which the Probate Court has no jurisdiction; that all the creditors on the homologated tableau should have been made parties to the proceeding against the executor; and finally, that he has been guilty of no lackes.

The Probate Court, as it lately existed, had the exclusive power to compel executors and other administrators to account and pay over what they might be found to owe; and, on their failure to account, or to make payment of the sum found due upon a rendition of accounts, executions issued from that court against the property of the administratos. C. P. 997, 993, 1053, 1057.

The appellant treats the proceeding of the opposing creditor, as an action to render him personally liable for damages for his mal-administration, and contends that courts of ordinary jurisdiction can alone entertain the action. The proceeding, however, is not to be confounded with an action against an administrator on his bond, or for a tort, when the claim against him would be personal. If such were its character, the position assumed by the appellant would be correct. 10 La. Rep. 28, 12 La. Rep. 332. It is strictly an opposition to an account presented by an executor, in which the latter is required to charge himself with the whole of the effects which have come into his hands.

An administrator to whom funds or other effects of a succession are entrusted, cannot alter his relation to the estate he administers, when called on to account, and claim to stand as an ordinary debtor, for sums which he has either failed to collect, or which have been lost by his negligence. He will still be regarded as the depositary of all the effects and funds figuring on the inventory, for which he must render an account to the court by which he was appointed.

SUCCESSION OF GLOVER.

The right of the creditors to resist the homologation of a tableau until the entire effects of the succession have been accounted for, and of the Probate Court to charge the administrator with all sums which he has failed to collect, unless he show a sufficient excuse for his failure, has been repeatedly recognized. This jurisdiction of the Probate Court, we consider to be well settled.

In the case of Watts v. McMicken, the action was instituted in the District Court, to render the defendant liable for mal-administration, in causing an execution to issue improvidently, in consequence of which a loss was sustained. The question of jurisdiction was expressly raised, and it was determined that the District Court was without jurisdiction of the demand. In that case the court say that, "the proper time to get redress will be when he, the curator, presents his account. Particular acts of the representatives of estates, cannot be singled out by individual creditors, and be made the basis of a suit. There can be only one to render an account, and when that is presented, all the acts of the curator, whether of non-feasance or of mal-feasance, by which the creditors are injured, can be opposed to him. This doctrine has been long established in this court." 2 La. 184. 1 Mart. N. S. 126.

In the case of Flint v. Wells, where the suit was to recover from an administrator the value of property lost by his negligence, and to compel him to account, the question of jurisdiction was again expressly made, and it was held that the Probate Court could alone entertain the action. 4 La. 537.

In numerous cases originating in the Probate Court, both before and since the decision of those already cited, this jurisdiction of that court has been tacitly recognized, without the point being expressly raised; and administrators have been charged, in their accounts, with sums lost in consequence of their negligence. 3 Mart. N. S. 718, 719. 9 La. 49. 10 La. 28/ 9 Rob. 407.

As regards the question of diligence, it appears from the evidence that the effects of the succession of the deceased consisted, with an unimportant exception, of several bills of exchange; upon these a judgment was obtained against James Dunlap, the acceptor, and a stay of execution granted for about six months. This judgment was not recorded for many months after its rendition. At the expiration of the delay granted, no execution was taken out, nor did one issue until steps were taken by a creditor of the succession to render the executor liable for laches, about fourteen months after the judgment was obtained.

It was the duty of the executor, in the exercise of the diligence which a prudent administrator would use in his own affairs, to have caused the judgment to be recorded immediately upon its rendition, and to have issued an execution upon the expiration of the delay accorded to the debtor. If the known insolvency of the debtor, or other reasons existed which rendered these steps unnecessary, it was incumbent on the executor to show affirmatively the circumstances of excuse, and that the creditors had suffered no injury in consequence of his neglect. 11 Mart. 193. 6. Mart. N. S. 195. 9 Robinson, 407. 12 Robinson, 220.

The only excuse offered is, the belief of the executor that the debt could only be collected by indulgence. No sufficient grounds for this belief are shown. It has not been made to appear that the debtor's property was so covered by previous incumbrances as to render the registry of the judgment useless, nor that, at the expiration of the delay, he was not possessed of property out of which the judgment could have been made, in whole or in part. We are of opinion that the executor has failed to show the exercise of due diligence in securing and collecting the judgment.

GLOVER.

It is arged that all the creditors appearing on the homologated tableau, should have been made parties to the proceeding against the executor. This, in our opinion, was not necessary. Any one creditor who is dissatisfied with an account rendered by an administrator, may oppose its homologation. His rights are not to be controlled or concluded by other creditors, who may be unwilling to unite in the proceeding, and hold the executor to a more strict accountability.

Judgment affirmed.

CAMBLAT v. TUPERY.

A partner has no remedy against his co-partner for money paid or advanced on account of the partnership, or for profits made during its continuance, until a final settlement of the partnership.

In an action by a partner against another for the settlement of the partnership, it is the duty of the plaintiff to furnish the evidence necessary to enable the court to settle the partnership and determine the rights of the partners. Where such evidence is not furnished, the action will be dismissed.

A PPEAL from the Parish Court of New Orleans, Maurian, J.

St. Paul and Buisson, for the plaintiff. Biron and Schmidt, for the appellant.

The judgment of the court was pronounced by

King, J. The plaintiff alleges that he was for some time the partner of Tupery, the defendant, and claims a settlement of the partnership, and a judgment for a sum of money which he avers to be due for capital advanced, profits made, commissions, travelling expenses, &c. The defendant denied the partnership, and claimed a large sum in reconvention. Subsequently he filed a peremptory exception to the form of the action, alleging that the plaintiff claimed a specific sum, and not a settlement of the partnership. This exception was overruled. The matters in controversy between the parties were submitted to arbitrators, who, after a laborious investigation, made a report which was not homologated, in consequence of having been filed after the expiration of the delay prescribed for that purpose. The arbitrators, however, were sworn as witnesses on the trial of the cause, and stated that their report, which was used by them while testifying as a memorandum, was the result of their examination of the books and vouchers, and of the admissions of the parties during the progress of their investigation. They determined a balance to be due to the plaintiff, for which a judgment was rendered in the court below, and the defendant has appealed. He contends: 1st. that the court erred in overruling his exception to the form of the action; and 2nd. that the judgment is based on the opinion of the arbitrators, and is unsupported by the evidence.

I. We think that the judge did not err in overraling the plaintiff's exception. The averments and prayer of the petition sufficiently indicate that, the object of the suit was to enforce a settlement of the partnership concerns, and the payment of such sum as might be found due upon a final adjustment.

II. The only evidence in the cause which throws any light whatever on the confused and unintelligible books and accounts of the parties, is that of the two accountants who acted as arbitrators, and this is unsatisfactory. These witnesses state that their report, which is the foundation of the judgment of the lower court, does not embrace a settlement and liquidation of the affairs of the partnership. They conceived that their authority did not extend to such an

examination. They state that the profits and loss were not ascertained; that, in the settlement of a partnership account, it is usual and necessary to establish the profits and losses; that, in making up their report, the whole amount of sales, paid or unpaid, was taken into consideration; and that no allowance was made for bad debts. They cannot say what amount is due to the partnership.

It is well settled, that one partner has no remedy against another for moneys paid, or advanced, or contributed on account of the partnership, or for profits made during its continuance, until a final settlement takes place, when he may recover the balance which may appear to be due to him. 11 Mart. 435. 8 Mart. N. S. 280. Story on Partnership, ss. 221, 348, and notes.

No final settlement of the partnership affairs has taken place in the present instance, and the evidence is not before us in a form that enables us to make the liquidation, and determine which is the debtor or creditor partner. Information indispensable to that end is wanting, which the plaintiff should have furnished. It was his duty to make his demand clear.

We think that the judgment of the lower court is erroneous; and for the reasons assigned it is ordered that it be voided and reversed. It is further ordered that the plaintiff's demand be dismissed, and that he pay the costs of both courts.

BYRNE v. RIDDELL et al.

Where the record does not contain all the evidence on which the case was tried, and there is no statement of facts, bill of exceptions, nor assignment of error filed within the time prescribed by art. 897 of the Code of Practice, the appeal must be dismissed.

A PPEAL from the Parish Court of New Orleans, Maurian, J.

Redmond and Collens, for the plaintiff. Bartlett, for the appellant, Banks.

The judgment of the court was pronounced by

SLIDELL, J. The judgment from which this appeal was taken was a confirmation of a judgment by default. The record presents no bill of exceptions, there is no statement of facts, and the assignment of errors was filed six months after the record was brought up. The motion to dismiss must prevail.* Code of Practice, art. 897. 1 Robinson, 196.

Appeal dismissed.

SPEARS et al. v. NUGENT.

Where a party requires his adversary to answer interrogatories of to produce a book in open court, the day on which the interrogatories are to be answered, or the book produced, must be fixed by the judge, and notified to the party. C. P. 951. Fixing the day of trial as that on which the answers are to be given or the book produced, is not a sufficient designation of the day, unless ascertained with certainty in the order notified to the party-Nor is the usual weekly notice posted in the court-room, of the days for which the cases are fixed, sufficient. Per Curiam: Whenever an act is to be done by a party personally, which cannot be done by his counsel, he is entitled to a special notice of the order, and of the particular day on which he is required to comply with it, before he can be deemed to be in default.

CAMBLAT

TOPERY.

^{*} The final judgment in this case confirmed one previously taken by default, but it was rendered on the verdict of a jury. The record did not contain the evidence laid before the jury.

SPEARS NUGERT. PPEAL from the Commercial Court of New Orleans, Walls, J.

T. J. Lacy and Hunton, for the plaintiffs. The interrogatories annexed to the The defendant was supplemental petition, were properly taken pro confessis. required to answer them in open court, on the day of trial. The Code of Practice, art. 463, provides that cases shall be fixed for trial on the docket of the court, and for all purposes connected with the trial the parties are bound to take notice of the day so fixed. The order was made by virtue of the Code of Practice, art. 351. The party refusing to answer, the interrogatories were properly taken for conference. properly taken for confessed. Code of Practice, art. 349. It is true, the record does not show when the case was fixed for trial, nor does any record in this court show when the causes may have been fixed. The presumption is that it was properly done, until the contrary is shown.

The neglect and refusal of the defendant to bring into court, in obedience to its orders, the ledger of Turpin, Watt & Co., which order was based upon the affidavit of the agent of the plaintiff, authorized the court to consider the fact

sworn to as confessed.

The fact sworn to was, that the ledger of the firm of Turpin, Watt & Co. would show the indebtedness of defendant. 'The Code of Practice, art. 140, provides, that the facts stated in such an affidavit as was made in this case, shall be considered as confessed, unless satisfactory evidence be shown of the impossibility of producing the documents. Article 143 of the Code of Practice provides that, where a party has been ordered to produce books or papers, he must deliver them previous to, or on the day of the trial, to the clerk of the court. See also Code of Practice, art. 473.

Grymes, for the appellant. 1. The judgment was rendered without sufficient evidence. The only evidence upon which it rests is the order taking the interrogatories of the plaintiff for confessed, and the order taking the facts set forth in the affidavit of the plaintiff's attorney for confessed. The day fixed by the court for the answering the interrogatories in open court, was the day of the trial of the cause. The Code of Practice requires the judge to fix a day on which the interrogatories shall be answered. Code of Practice, art. 351. The order was made at the instance and on the prayer of the plaintiffs. The day of trial is a day uncertain, and when the plaintiff took upon himself to ask of the court to fix a day uncertain, depending upon many contingencies, he took upon himself the responsibility of citing or notifying the defendant of the happening of the contingency, which would render his personal attendance necessary, in compliance with the order of the court. The record shows no notice to the defendant that the cause was to be tried on the 10th February, 1845. The taking the interrogatories for confessed was by surprise, and is no

evidence to support the judgment. 10 Ln. 417.

II. The neglect on the part of the defendant to produce the ledger of Turpin, Watts & Co., was wrongfully taken by the court as a confession of what the plaintiff proposed to prove by the book:

1st. Because the defendant had no notice of the day of trial.

2d. Because the Code of Practice, art. 140, requires that the party should declare, in writing and under oath, what are the facts he intends to establish, and that the facts stated and sworn to, shall be taken as confessed, only on the refusal of the party to answer.

The judgment of the court was pronounced by

King, J. The plaintiffs instituted this action to recover a sum of money with interest, alleged to be due on open account, by Richard Nugent, the defendant, as a member of the commercial firm of Turpin, Watt & Co., at the time that the debt accrued. To this petition were annexed interrogatories addressed to the defendant, whose answers were not such as to establish the demand.

On motion of the plaintiffs' counsel the defendant was ordered to produce the ledger of Turpin, Watt & Co. on the trial of the cause, on the 11th of December, 1845. The application was supported by an affidavit of the agent of the plaintiffs, of his belief that the ledger called for would show the sum claimed to be due by the defendant. On the 11th of December, the trial was not gone into, and the plaintiffs obtained a second order requiring the book to

be produced on the trial of the cause. On the same day they filed a supplemental petition, propounding further interrogatories to the defendant, which they proposed should be answered in open court on the trial, and an order to that effect was granted. The defendant was notified of both of these orders. No certain day, however, was fixed for a compliance with either of them, and the only notice which it is pretended he recoived of the day of trial, was that effected by posting up in the court-room a list of the causes assigned for each day. The record does not inform us whether, at any subsequent time, the cause was set down for trial. We find, however, that, on the 10th of February following, an order was entered by the court, that the second set of interroga-

sum claimed, from which the defendant has appealed.

The plaintiffs contend that the court must be presumed to have done its duty, and set the cause down for trial, of which parties are required to take notice at their peril, and that this was a sufficient notification of the day on which the interrogatories were to be answered and the ledger produced.

tories propounded to the defendant should be taken as confessed, and that the facts stated in the affidavit for the production of the ledger should be taken as true, the defendant having failed to answer or produce the book. The court thereupon proceeded to render a final judgment in favor of the plaintiffs for the

When a party requires the answers of his adversary to interrogatories to be given in open court, "a day must be appointed to that effect by the judge," by which is understood a day fixed and determined, and of that day the party interrogated must be notified. C. P. 351. 10 La. 417. Fixing the day of trial as that on which answers are to be rendered, is not a sufficient designation of the day, unless it be ascertained with certainty to the order notified to the party. Assuming that the cause was set down for trial, the only notice given of the day assigned was, by posting up in the court room the cases fixed for the week. This is a sufficient notice to counsel to be in readiness for trial, and to that end to make all the preparation that depends upon them. But where an act is to be done by a party personally, which cannot be done by his counsel, he is entitled to a special notice of the order, and of the particular day on which he is required to comply with it, before he can be deemed to be in default for negligence. If the rule were otherwise, litigants would be perpetually exposed to surprise.

The production of the ledger was also an act to be performed by the defendant personally, and a special notification to him of the day fixed for the trial was necessary, before he could be considered to have refused to comply with the order of the court.

The facts of this case present a striking illustration of the injustice which would frequently result from the enforcement of the rule contended for by the plaintiffs. The defendant was asked whether he did not believe that he owed the plaintiffs the sum claimed, and was called on to produce a partnership book, in order to show the indebtedness. His failures to comply with the orders of court at a time of which he only received constructive notice, and of which he was probably ignorant, was taken as a confession of the debt, and a judgment rendered against him on this evidence, when, at the time, his answers to the first set of interrogatories were spread upon the record, in which he had previously informed the plaintiffs that, while he was a member of the house of Turpin, Watt & Co., the business of the firm was conducted in the State of Mississippi, and that he resided in this city, that he knew nothing of the business of the

SPEARS O. NUGENT.

SPEARS NUGERT. house, except what he had derived from his partners, and that he was not in possession of the books of the firm. Thus facts have been taken as confessed, almost directly opposed to those which the defendant had previously stated un-

We think that the judge erred in ordering the interrogatories to be taken as confessed, and in considering the facts stated in the affidavit for the production of the ledger to be true.

It is therefore ordered that, the judgment of the Commercial Court be reversed, and that the cause be remanded for further proceedings, the appellees paying the costs of this appeal.

DENNISTOUN et al. v. MALARD et al.

The privilege of the lessor is superior to that of the vendor, where the property sold has been delivered to the purchaser. Nor can the rights of the former be affected by a sale made by the lessee to one of his creditors, and a fraudulent removal of the property, by an agent of the purchaser, from the premises leased, for the purpose of placing it beyond the landlord's reach. C. C. 1965, 1972, 1977, 3185, 3230.

PPEAL from the Commercial Court of New Orleans, Watts, J.

1. H. H. Strawbridge, for plaintiffs and intervenors. 1st. It was a giving in payment, not a sale, and there was no real delivery. C. C. 2628, 2626.

2d. It was made when the seller, or rather the transferror, was insolvent.

C. C, 1965, 1972.

3d. Such transfers, within a year preceeding insolvency, are presumptive of fraud in both vendor and vendee, who must prove their good faith. Acts of 1840, p. 133, ss. 14, 19. Hodge v. Morgan, 2 Mart. N. S. 61.

4th. Malard's continuing in possessson was proof presumptive of fraud. C. C. 1915, 2456. 5 Toul., no. 41. Pierce v. Curtis, 6 Mart. 418. Thibodeaux v.

Thompson, 17 La. 359.

The vendor's privilege yields to the lessor's, All the goods had been unpacked, and were not claimed within eight days thereafter. Civil Code, arts. 3196 3197, 3230.

Durel for appellant. By art. 1977 of the Civil Code, "If the parties with whom the debtor contracted, be in fraud as well as the debtor, he shall not, in the annulling the contract, be entitled to restitution of the price or consideration he may have paid, except so much as he shall prove shall have inured to the benefit of the creditors by adding to the amount of property applicable to the payment of their debts; but if the only consideration be a sum due from such debtor to the party with whom he contracted, then the only restitution to be made is the placing the parties in the situation in which they were before the contract complained of was made.

By art. 1978, it is declared: "But if such fraud consisted merely in the endeavor to obtain a preference over other creditors, for the securing or payment of a just debt, under circumstances in which, by law, the endeavor to obtain such preference is declared to be a constructive fraud, in such case the party shall only lose the advantage endeavored to be secured by such contract, and shall be re-imbursed what he may have given or paid, without interest, and shall restore

all advantages he has received from the transaction."

It is under these articles the plaintiff proceeds. If Hunt & Co. are, in the language of art. 1978, "only to lose the advantage endeavored to be secured by the contract" of sale; and if, in the language of art. 1977, "the only restitution to be made, is placing the parties in the situation in which they were before the contract complained of was made," then Hunt & Co. stand, as creditors of Malard, with the vendor's privilege upon all his goods, and upon all goods transferred by the act of sale of the 14th January. excepting a small quantity, which, being unsaleable, were sent to auction, and brought \$124 14.

Plaintiffs' privileges as lessors upon the goods was lost by them, as they did not, in accordance with art. 2679 of the Civile Code, seize the objects subject to it, before they were taken from the store, nor within fifteen days thereafter.

DESSISTOUN E. MALARD.

it, before they were taken from the store, nor within fifteen days thereafter.

The judgment of the court below was based upon art. 1972 of the Civil Code. By that art. it is declared that, "The judgment in this action, if maintained shall be that the contract be avoided as to its effect upon the complaining creditors, and that all the property in money, taken from the original debtor's estate by virtue thereof, or the value of such property to the amount of the debt, be applied to the payment of the plaintiffs" In this case, the effects of the sale were not injurious to the complaining creditors, for Hunt & Co. obtained thereby only the advantage which the vendor's privilege gave them, and would still give them, though the sale be anulled. That article must, moreover, be construed in connection with arts. 1973, 1974, 1976, 1977, and 1978. Art. 1973 says, "No contract shall be avoided by this action but such as are made in fraud of creditors, and such as, if carried into execution, would have the effect of defrauding them. If Hunt & Co. have the vendor's privilege upon the goods, and no other creditor has a superior or equal privilege, by carrying the contract into execution, Hunt & Co. gained no more than their privilege gave them, and its execution could defraud no one.

As to Brewster, it would seem impossible to sustain the judgment of the court below, if the articles 1973, 1974, 1976, 1977, and 1978, are regarded as at all applicable to the facts of the suit.

Greiner, on the same side.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs leased to Malard a shop in the city, and while he was in possession, on the 14th day of January, 1843, being in insolvent circumstances, he executed to John Hunt & Co., who were his creditors, and represented by an agent at New Orleans, a notarial bill of sale of all his stock in trade, then on the leased premises. The items forming the consideration of the sale were all antecedent debts. Malard, however, remained in possession of the store for several weeks. The understanding between him and Hunt & Co. seems to have been, that he should continue the business and account to Hunt & Co. for the proceeds of the sales, after applying small sums first for his family expenses and his small debts. Malard's sign was continued on the outside of the shop; but a sign was put up inside representing Malard as the agent of Hunt & Co. Subsequently, and about the middle of February, Malard ceased to act in the store, some dissatisfaction arising between him and Hunt & Co. who put there an agent appointed by themselves, Malard's sign still remaining and his clerks continuing to act there. A few days before the institution of this suit, between sunrise and breakfast time, Hunt & Co. carried off all the stock of goods; and then the plaintiffs, who had never had any notice of the transfer to Hunt & Co., though Hunt & Co. appear to have known that the rent was unpaid, obtained a sequestration; but the shop was found empty, and the goods could not be traced. Soon after, upon discovering the notarial sale, the plaintiffs, by a supplemental petition, made Hunt & Co. parties, charging the invalidity of the assignment as a fraudulent preference, and also charging a fraudulent combination between Malard and Hunt & Co. to deprive them of the landlord's lien. Brewster, another creditor for a small amount for goods sold, intervened, and joined with the plaintiffs in their suit to set aside the assignment. The court gave judgment in favor of the plaintiffs and intervenor; and the defendants, Hunt & Co., have appealed.

We entirely agree with the judge of the court below in the conclusions to which he came, both that the assignment was a fraudulent preference by an insolvent debtor, and that there was besides a breach of good faith towards the

DENHISTOUN E. MALARD.

landlord, and a violation of his rights in the removal of the goods. We consider the court below as justified in the opinion, that the agent of Hunt & Co. was aware that the lessors had not been paid, and that the object of the removal was to defeat their lien. It is said that the lien was gone, because it was not exercised within the fifteen days by a levy on the property, and that the alleged lien of Hunt & Co., as vendors of the goods, must be preserved to them, even if the assignment be set aside. It is not proved that this alleged lien of the vendor existed on the whole of the goods, nor indeed, as the case is presented, would we be able to say whether it existed at all; for Hunt & Co. being a New York house, there is strong reason to infer that the sale to Malard was made there. But, however this may be, it is clear that the landlord's lien is superior to that of the vendor's, who has made a delivery; and it cannot be contended that Hunt & Co. could place themselves in a better position, by fraudulently removing the goods beyond the landlord's reach and frustrating his search. To recognize such a doctrine would be to say, that a party could, by his own wrong, place a fair creditor in duriori casu. Three or four days after the removal, the sheriff was started in pursuit of the goods, and his return is as follows, to the writ by which he was commanded to seize them: "Rec'd, 2nd March, 1843. Nothing could be found; all the within mentioned property having been removed to parts unknown either to plaintiffs or sheriff."

That Hunt & Co. did not themselves do the acts complained of, is no defence. What was done, was done by their agent, in the management of their business and the prosecution of their interests, and they are equally responsible for its legal consequences. They do not repudiate the assignment, but claim under it, and hold on to the abstracted property.

It is contended that the amount of the goods was not equal to the amount of the judgments rendered. The evidence on this point is conflicting, but we are not able to say that there was manifest error in the finding of the court below. The judge of the Commercial Court, who heard the witnesses, thought the value was large enough to cover the complaining creditors; and the conduct of the defendants in secreting the property, and thus preventing a more accurate estimate of its value by impartial witnesses, gives a bad grace to their application in the appellate court for a reduction. See Civil Code, arts. 1965, 1972, 1977, 3185, 3230.

Judgment affirmed.

VANCE et al. v. DEPASS.

Where no enquiry was made of the maker of the note, nor of his syndic when he had failed, nor of a person of the same straume with the endorser, but the initial letter of whose first name was differently printed in the city directory, sufficient diligence will not be considered to have been used, to ascertain the residence of an endorser living in the city where the note was payable, to excuse want of notice of protest.

Where the endorser of a note, who had been discharged by want of notice of protest, on being applied to for payment stated, "that he had been very unfortunate in endorsing the note, that he could not pay it, that the estate of the maker owed him money, and that he had no means of paying it but from that source," it will not be considered as a promise to pay the note. Per Curiam: Where there has been laches on the part of a holder of the note, by which the endorser has been discharged, a promise to pay, to be obligatory, must be deliberately made, in clear and explicit language, and amount to an admission of the rights of the holder, or of a duty and willingness to pay.

VANCE

DEPASS

PPEAL from the City Court of New Orleans, Collens, J.

A Budd and Redmond, for the appellants. There was due diligence, and the endorser was properly notified, under sec. 3 of act of 13 March, 1827. B. & C's. Dig. p. 43. Jones v. Mansker, 15 La. 51. Union Bank v. Grimshaw, 15 La. 321. The evidence shows that the defendant promised to pay the note, after the protest.

Pilié and Le Gardeur, for the defendant. There was not sufficient diligence used to discover the residence of the endorser. Canonge v. Louisiana State Bank, 7 Mart. N. S. 585. Chitty on Bills, 213. There was no sufficient promise to pay after discharge, it not having been shown that the defendant knew of his discharge at the time of the pretended promise. 12 La. 465.

The judgment of the court was pronounced by

SLIDELL, J. The defendant is the endorser of a promissory note, and received no notice of protest. The principal enquiry is, whether there was such an exercise of due diligence as excused the want of notice.

It appears beyond dispute that Depass lived in New Orleans at the date of the institution of this suit, which was brought only eight days after protest, and that he also lived in New Orleans before the note was protested; and though his actual residence in New Orleans at the date of the protest is not positively shown, yet the inference flows very conclusively from all the circumstances in proof that he had such residence. Depass was a stevedore, and was generally to be seen on the wharves or levée. The notary says he met him in New Orleans the next day after the protest, but said nothing to him; and four days afterwards the plaintiffs' agent went to him to ask payment, and found him. On the day of protest the notary went to the house which Depass formerly occupied, but found it occupied by another person, who could not inform him whither Depass had removed. He states also that he enquired of a great many persons in the neighborhood, and spent an hour in attempting to obtain information, and also looked for him on the levée, but unsuccessfully. He then gave the notice to the plaintiffs, and deposited a duplicate, addressed to Depass at New Orleans, in the post office at New Orleans.

We do not think there was such diligence as the law requires to excuse notice. No enquiry was made of the drawer of the note, nor of his syndic, nor of another person of the same sirname, whose name was in the directory.* See Story on Bills, § 316 and notes. Chitty on Bills, 488. And the opinion of Lord Ellenborough, in *Beveridge* v. *Burgis*, 3 Campbell, 262.

But it is contended that there was a subsequent promise by Depass to pay this note. We do not consider the promise as satisfactorily proved. A witness says, that he demanded payment of Depass, who stated that he had been very unfortunate in endorsing this note, that he could not pay it, that the estate of Pigneguy (the maker) was owing him money, and that he had no other means of paying than from the estate of Pigneguy. Witness advised Depass to go and see the plaintiffs' attorney, but he said it was useless—he had nothing further to say. This conversation took place four or five days after the protest. It establishes no promise to pay, for where there has been lackes on the part of the holder discharging the endorser, the promise, to be obligatory, must be deliberately made, in clear and explicit language, and amount to an admission of the rights of the holder, or of a duty and willingness to pay. See Story on Notes, § 363.

^{*}The endorser's name was Isaac Departs. The directory contained the name of "S. Departs."

CONREY V. ELBERT.

CONREY v. ELBERT.

Where an agent residing in this State, purchases a bill endorsed on blank, for a non-resident, principal, which is afterwards protested for non-payment, and no discharge has been given by the principal to the agent from any responsibility growing out of the transaction, the latter may consider himself as a creditor of the party from whom he purchased the bill. The provision of the ninth sect. of the state of 28 March, 1840, that no citizen of another State shall be hereafter arrested at the suit of a non-resident creditor, except where the debtor has absconded from his residence, does not apply to the arrest of a debtor made by the purchaser of a bill, under such circumstances. Per Curiam: He has such an interest in the bill as will entitle him to exercise all the rights of a bond fide litigant creditor.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. This was an action on a bill of exchange, for \$4,500, drawn by John C. Harrison, to the order of the defendant, by whom it was endorsed, on Pearce & Elbert, of Philadelphia, who accepted, but failed to pay, the bill at maturity. The petition, in addition to the usual allegations requisite to charge the endorser of a bill of exchange, alleges, that the bill sued on was drawn against one hundred hogsheads of sugar, shipped by the drawer to the drawees, who sold the same, and converted the proceeds, which were more than sufficient to pay the bill, to their own use. Plaintiff further avers, that the defendant is a member of the aforesaid firm of Pearce & Elbert, and that he had, by falsely representing his firm as rich, obtained credit; and concludes, by praying that the defendant, in case of non-payment, be dealt with as a fraudulent debtor, and required to give bail.

The defendant was arrested on the following affidavit, made by the plaintiff:

"Peter Coursey, Jr. declares on oath, that William T. Elbert is justly indebted to him in the full sum of \$4,500; that said Elbert is on the eve of leaving the State permanently, without leaving in it sufficient property to pay and satisfy his said demand; and that he does not take this oath in order to vex the said Elbert, but solely for the purpose of securing his demand."

The defendant having been released on giving bond, took a rule on the plaintiff to show cause why the arrest should not be set aside: 1st. Because the plaintiff is not the true and bond fide holder and owner of the claim on which this suit was instituted, but that said claim belongs in fact to the Bank of Charleston, the plaintiff being an agent for the collection of the same. 2d. Because the affidavit is insufficient and incorrect.

The plaintiff having been ordered to answer certain interrogatories in open court, on the trial of the rule, objected to the right of the plaintiff so to interrogate him, which objection being over-ruled, and a bill of exceptions taken to the opinion of the court, he stated under oath: "That he sent the bill, or draft, on which this suit is brought, to the Bank of Philadelphia, for collection; that he has ordered it back, and expects to receive it here in the course of a week. He purchased the draft on the 3d of March, 1846, for the account of the Bank of Charleston, of which he is the agent; that it was purchased with funds furnished him by the Bank of Charleston; and the said funds were under no individual control. After purchasing the draft he remitted it to the Bank of Charleston on the 4th of March, 1846, with these remarks in the letter which accompanied it: 'The bill on Pearce & Elbert is on a shipment of sugar, invoice

ELBERT.

86000, made under the supervision of Mr. Elbert, who endorses the bill.' He CONEXY did not write any letter to any other person, advising of the said purchase; that he keeps no account in his own name in the Bank of Philadelphia; that funds are placed there by the Bank of Charleston, against which he checks as agent of said Bank; does not know to what account the draft was placed by the Bank of Philadelphia; on deponent's own books it was debited to the Bank of Charleston, but he does not consider the transaction closed until the bill is paid. The bill originated with the deponent, and of course he feels an interest in the termination." mechanistics in a comm

C. Moise, clerk of Conrey, testifies that, "the note sued on was bought on the 3d of last March; it was purchased by plaintiff as agent of the Bank of Charleston, for account of said bank, and with their funds; after the purchase the draft was remitted to the Bank of Charleston, through which source they make all remittances. This suit was instituted under direction of the Bank of Charleston, as per letter on file. That plaintiff did not endorse the draft when he remitted it to the Bank of Charleston." Witness could not say whether there was any understanding between the Bank of Charleston and plaintiff, that drafts taken by him, which might be afterwards protested, should be charged to him individually.

The "letter on file,' addressed to P. Conrey, Jr. New Orleans," reads thus: "Bank of Charleston, S. C., May 20, 1846. With this you will receive from Mr. Moise, under protest, Pearce & Elbert's acceptance of J. C. Harrison's draft for \$4,500.

You will lose no time in seeing the parties at your end, and obtain payment or security with the least delay and in the bost manner possible.

Commending the above to your usual prompt attention, we are, yours,

H. W. TREVOR, Cashier."

The rule having been made absolute, and the arrest set aside, the plaintiff appealed.

Schmidt, for the appellant. The plaintiff's bill of exceptions embodies the principal legal points on which he relies to reverse the decision of the inferior court, which is manifestly erroneous, for the following reasons:

1st. Because the facts, which defendant sought to establish, if they were available at all, could only be inquired into on the trial of the cause, and not in this

summary manner.

Article 218, of the Code of Practice, permits the defendant te disprove, in a summary manner, the facts stated by plaintiff to obtain the arrest. This law, enacted for the protection of the personal liberty of the citizen, could never have intended that the defendant, merely because he had been compelled to furnish bail, should have the right to try his cause on the merits upon a rule to set aside the arrest, which would be the necessary result, should this tribunal sanction the doctrine of the inferior court.

sanction the doctrine of the inferior court.

Reason alone, independent of precedent, compels us to reject such a conclusion; but if authority be wanting, it will be found in the case of Welman, Curator, &c. v. Connolly, 2 Martin's Rep. p. 245. It is true that, that decision was made in 1812, and is therefore not a construction of art. 218 of the Code of Practice. This, however, is no objection, since the law to which it applies was not only in pari materia, but substantially, if not verbatim, similar, and the reasoning of the court certainly applies equally to the law now in force.

2d. Because the law of Louisiana does not permit the defendant to interrogate plaintiff on facts and articles on a rule like this.

An appeal to the conscience of his adversary, is one of the means recognised by our laws for the protection of the rights of a suitor; but as this privilege, like every other, is susceptible of abuse, the law has thought proper to circum-

like every other, is susceptible of abuse, the law has thought proper to circumscribe its use. We accordingly find that art. 347, C. P., requires that such interrogatories, if the answers be required by plaintiff, must be annexed to his

CONREY ELBERT. petition, and, if by defendant, to his answer. Interrogatories on facts and articles are intended to answer the same purpose as a bill of discovery in an equity court; that is, to enable the party, by probing the conscience af his opponent, to obtain a discovery of facts material to the prosecution or defence of a suit. Story's Equity Jurisp., No. 1483. Ib. Eq. Plead. No. 311.

The analogy of these two remedies seems to hold in other respects, since, is both in the property of the second of the second

in both, it appears to be requisite that a suit should be pending, to which the remedy is auxiliary. Story's Eq. Jur. § 1483.

In this case, there was no issue, the defendant having as yet failed to answer. In mere interlocutory proceedings, which do not in the least affect the merits of the controversy, a piaintiff will not be permitted to have recourse to interrogatories. The case of Swift v. Tyson, 16 Peters. 2, shows the mode and manner in which a bill of discovery is made auxiliary to a defence on a bill of exchange; but neither in that suit, nor in any other which has come under our notice, have we found any thing which warrants the proceedings of the defendant in the present suit. It would be almost as reasonable to admit a bill of discovery in aid of a demurrer, or a plea in abatement at common law, as to allow of interrogatories on facts and articles to set aside an order of bail.

3d. Because the defendant has no interest and no right to inquire into the ownership of the note, unless the same is prejudicial to any defence he may

have against the real owner.

The defendant, the payee of the bill sued on, endorsed the same in blank; but such endorsement makes the bill payable to bearer, and gives even an agent the right of suing on it, in his own name. Story on Bills of Exch. § 207. The same principle was recognised by this court, in the case of Boswell v. Zender, 13 La. 366; and in Lapice v. Clifton, 17 La. 152.

But, if mistaken in every one of the positions hitherto advanced, the judgment

of the inferior court is still erroneous.

4th. Because the record furnishes no evidence inconsistent with the affidavit

of plaintiff.

If we admit that plaintiff was the agent of the Bank of Charleston—that this draft was bought with the funds of that institution-that it had been forwarded to Philadelphia for collection, for account of the bank, what could such admissions avail the defendant? The Bank of Charleston, as owner, surely had the right to transfer it to the plaintiff, nay, to give it to him gratuitously if it thought proper, since such power is the accompaniment of ownership. By what right, then, does the defendant constitute himself the guardian of the bank, and undertake to institute an inquiry into the private relations between the Bank of Charleston and the plaintiff? All that the defendant has a right to exact, and this is a right which never has and never will be denied him, is, that the transfer should not be permitted to operate prejudicially to any defence which he would be authorized to set up against the bill of exchange, had the

present action been brought in the name of that corporation.

H. H. Strawbridge, for the defendant. 1st. The oath of the plaintiff, Conrey, that, "Elbert is justly indebted to him," is contradicted by his own books, letters, clerks, and by his own evidence. The facts alleged to obtain the arrest being also disproved in open court, the defendant was, in accordance with

art. 218 of the Code of Practice, properly discharged from custody.

2. The Bank of Charleston is proved to be the true holder and owner of the bill on which suit was brought, and the writ of arrest issued. Now, as the law of 28th March, 1840, § 9, provides "that no citizen of another State shall hereafter be arrested in this State at the suit of a non-resident creditor," an arrest by the bank itself would have been illegal, and the arrest by its agent Conrey, under cover of an action brought in his own name on a debt due to his principal, but which he swears to be due to himself personally, is an evasion of the laws. "Nemo potest facere per alium quod per se non potest." Nemo potest plus juris ad alium transferre quam ipse habit. Coke Lit. 309.

The jungment of the court was pronounced by

Eustis, C. J. This suit is brought on a protested bill of exchange for \$4,500, drawn by John C. Harrison, to the order of the defendant, on the house of Pearce & Elbert, of Philadelphia. It was endorsed in blank by the defendant, and purchased of him by the plaintiff in New Orleans, as agent for the Bank of Charleston. It was protested for non-payment, and the plaintiff

CONREY ELBERT.

caused the defendant to be arrested in this suit, which the plaintiff instituted in his own name, and he made the affidavit required by the statute that the debt was due to him.

An application was successfully made in the court below to set aside the writ of arrest, on the ground that the plaintiff was not the true owner of the bill, but that it belonged to the Bank of Charleston, and that the plaintiff was the mere agent of the bank for its collection. From this decision the plaintiff has appealed.

The inhibition of the act of 1840, under which the writ of arrest was set aside by the district judge, is in these words: "That no citizen of another State shall be hereafter arrested in this State at the suit of a non-resident creditor, except in cases where it shall be made to appear that the debtor has absconded from his residence." Act of 1840, to abolish imprisonment for debt, s. 9.

This suit is not brought by a non-resident creditor, and it is not denied by the counsel for the defendant that the plaintiff can stand in judgment in this suit, nor that the endorsement of the defendant gives the right to an agent to maintain an action on the bill in his own name.

The affidavit made by the plaintiff is positive and unqualified, and we do not consider this as a case in which the intendment of the statute is sought to be evaded, nor that the disclosures made by the plaintiff weaken the effect of his affidavit. True it is that the bill was brought by the plaintiff as agent for the Bank of Charleston, and that the bank has directed its collection; but the plaintiff swears that he does not consider the transaction as closed. The relations between the plaintiff and dependant, defendant on the sale of the bill, may or not create a responsibility, from which no discharge has been given by the bank to the plaintiff; and, in this state of things, in re agenda, he is at liberty to consider himself as a creditor of the party from whom he purchased the bill, under representations of the appropiation of a shipment of sugar to its payment, by the house of the defendant, which were not carried into effect. He certainly has such an interest in the bill as will entitle him to exercise the full rights of a boná fide litigant creditor, and the case does not come within the exception provided in the 9th section of the act before cited.

The judgment of the District Court is therefore reversed, and the rule taken by the defendant to obtain the setting aside of the writ of arrest and the discharge of the defendant discharged, with costs in both courts.*

^{*}H. H. Strawbridge, for a re-hearing. The question at issue is not what remote interest Conrey might have, in case the Bank of Charleston should attempt to make him terest Conrey might have, in case the Bank of Charleston should attempt to make him personally liable, but whether Conrey in person was really Elbert's creditor. The right of arrest belongs only to the creditor himself. "The arrest is one of the means which the law gives the creditor to secure the person of his debtor." C. P. 210. An agent may, indeed, arrest the debtor of his principal; but an agent cannot swear that the debt due to his principal is due to himself in person.

But, say the court, the relations between the plaintiff and defendant, dependent upon the sale of a bill, may or not create a responsibility, from which no discharge has been given by the bank to the plaintiff, and in this state of things he is at liberty to consider himself as a creditor of the party; he has such an interest in the bill as will entitle him to exercise the full rights of a bonâ fide litigant creditor.

The mere possibility of an agent becoming liable to his principal, cannot entitle him to exercise the full rights of an actual creditor, and assume a power greater than the principal himself ever possessed.

pal himself ever possessed.

The chance of A's becoming, at some future period, the bona fide creditor of B, cannot authorize the arrest of the latter.

CONREY ELBERT. Could the plaintiff obtain judgment for the \$4,500, on a petition setting forth that "he may or not become liable to the bank for that amount," and that, therefore, Elbert is really indebted to him?

From the earliest decisions of our tribunals it has been held that, a mere contingent terest does not suffice either to sustain an action or to authorize an affidavit. The very first article of the Code of Practice defines an action to be "the right given to every person to claim judicially what is due or belongs to him." "An action can be brought only by one having a real and actual interest, which he pursues; but as soon as that interest arises, he may bring his action." C. P. art. 15.

In Whetten v. Townsend, 1 Mart. 188, it was decided that, an affidavit for arrest,

made before the debt was payable, was bad, and the arrest was dismissed.

In the Plantere' Bank v. Lanusse, 1 Mart. 691 and 695, it was settled that, an endorser who had not paid his endorsee, cannot be permitted to vote at a meeting of the creditors of the insolvent drawer, and swear that he is a creditor. His own liability may be well settled, but his becoming a creditor of the drawer depends on a future event, viz.,

his payment of the obligation.

In cases of attachment, generally speaking, it is requisite, as in cases of arrest, that the debt claimed should be actually due. Yet in *Taylor* v. *Drane* 13 La. 62, it was held that "an endorser cannot sue the maker of a note not yet due, on the ground that he endorsed as surety, and that the latter is about to remove with his property, permanently, from the State, before the note becomes due. It is not a proper case for attachment, as the plaintiff does not show an existing debt due to him by the defendant, nor an absolute liability incurred as surety."

"So, in partnerships, an attachment or action cannot be sustained by one partner against another, before a liquidation of the accounts between them, because the plaintiff cannot swear positively to the amount of the debt due to him." Levy v. Levy et al., 11

La. 577.

I repeat it again, the question mooted is, who is the true owner of the bill—the real plaintiff in interest? Be it remembered, that the suit is on a bill of exchange; it is not such an action as Convey might have brought in his own right for any contingent or future damage. It is the property in the debt evidenced by the bill, which is in issue. Both cannot be creditors. There is no such thing known to our laws as two creditors of the same debt, unless in the case of creditors in solido, which in the present instance is not even pretended. Who then is the real creditor? Had the parties to the bill all failed, who must have been placed on their schedules as its owner? Who would have been entitled to vote for syndic in his own right? Who, in case of a dispute between Conrey and the bank, as to the real ownership, would, under the evidence adduced, be entitled in receive the dividends? Who, in case of a counter-claim, opposed by the defendant, could, under that evidence, plead the debt in compensation? Had a creditor of Conrey and a creditor of the bank attached or seized the debt, which, in the contest, would have been entitled to the proceeds?

The bare statement of these questions carries the answers on their face, and shows the property in this bill to belong to the bank alone.

If Conrey should be ultimately liable to the bank for neglect or mismanagement, it could only be when it had been established that the bank had lost the debt through his fault. Nor could Conrey, in his own right, be placed on the schedule, vote for syndic, receive a dividend, plead compensation, or even maintain an action in that right, until he had proved himself formally subrogated to the rights of the bank.

Subrogation could not take place by operation of law, for he is not a surety for the defendant nor with him, nor an endorser, nor a creditor on any other account. C. C. 2156,

2157.

The real owner of the debt set forth in the affidavit and petition is, beyond doubt or question, the Bank of Charleston, which is not a citizen of Louisiana, nor established or resident here, and not entitled, under the law of 1840, to arrest the defendant in its own

right and name.

The suit is, therefore, brought under cover of Conrey's name, and the defendant is thus

The suit is, therefore, brought under cover of Conrey's name, and the defendant is thus deprived of a defence which he could have set up against the bank itself. By various decisions of our courts, an agent is permitted to sue in his own name; none authorize him, however, to swear as the plaintiff has done. But, by the very decisions quoted by the plaintiff's attorney, in such cases the defendant may avail himself of any defence good against the real owner of the claim.

Benjamin and Micou, for a re-hearing. The question is, whether the arrest of the defendant was in contravention of the law of 1840? From the tenor of the opinion, we infer that the court would not sanction a clear evasion of the law, or, in other words, permit a party, who had no interest in the subject, to lend his name for an arrest, that without his aid could not be made. Let us consider whether such is not the case with the plaintiff

There is no proof of any interest in the plaintiff. His clerk knew of no guarantee or responsibility resting upon him in the transaction. He purchased the bill as the agent,

and with the funds, of the Bank of Charleston. He did not endorse it; he debited the bank with the amount advanced; and remitted it to the bank, as its property, to use as it pleased. Here ceased his connection with the bill. If it had been paid, he would never have heard of it again. If, after protest, more responsible parties than the defendant had been found in New York, or Philadelphia, some other agent would have been

employed to collect it.

employed to collect it.

A guarantee by an agent is not to be presumed. All the evidence in the case was drawn from the plaintiff and his clerk; and they do not speak of any such responsibility. The plaintiff says: "He does not consider the transaction closed until the bill is paid. The bill originated with deponent, and of course he feels an interest in the termination." His answer is carefully drawn. He had a full opportunity of stating his position in the most favorable light, and if he had any other interest than is here stated it would have been fully explained. The transaction may not have been closed, and yet the plaintiff's agency may have been at an end. He might well feel an interest in the bill, without being made richer or poorer by the result of the suit. The mere solicitude of a zealous agent for the interest of his principal, does not constitute such an interest in the subject agent for the interest of his principal, does not constitute such an interest in the subject as entitles the agent to use the thing as his own. The interest regarded by the law, is to be counted in dellars and cents, not tested by the sensitiveness of the feelings. The answer of the plaintiff is then conclusive that, he had no pecuniary interest, even for his commissions, and that no ultimate guarantee or responsibility rested upon him. We submit, therefore, respectfully that, the alternative of even a possible responsibility, growing out of the relations of the parties, referred to in the opinion, is not supported by the evidence. A responsibility which the plaintiff himself would not aver when interrogated, must be con-

responsibility which the plaintin himself would not aver when interrogated, must be considered as not existing. Considering the plaintiff as a mere agent, without pecuniary interest in the matter, he had no right to institute this suit in his own name.

An agent, with general powers, like the plaintiff, may certainly institute a suit. It is an act of administration, often necessary for the preservation of the credit, but he can only sue in the name of his principal. That such is the general rule will not be questioned. Let us examine the apparent exceptions. A factor who contracts in his own name, may sue in his own name upon the contract so made by him. But if the principal has dealt with the party as his debtor, and has taken steps in his own name to recover, the right of the factor to sue ceases. Paley on Agency, p. 282, and note, citing Sadler v. Leigh, 4 Camp. 195. An agent may sue on a policy of insurance, issued in his own name, because he is a party to the contract. Ibid, p. 283. The possession of a factor, gives him the right to bring an action of tresspass or trover, for injuries affecting his pos-

ion. Ibid, p. 284.

The point is discussed by Judge Story, in his Treatise on Agency, note to § 102. After stating that Chitty had laid down the rule rather too broadly, he intimates that the agent cannot sue in his own name, except when the law considers him a party to the contract.

The holder of a promissory note endorsed in blank may sue, because the law implies a promise to pay to the bearer. The legal title follows the possession. Where there are several endorsers, having distinct interests, it has been held that, one of them may sue for the benefit of all, with their consent, because they are all interested in recovering from

the maker. Chitty on Bills, p. 535, and cases cited.

All of these exceptions establish only the following principles: that an agent may sue in his own name, when he has the legal title, though in trust for another; when he has possession of the property in dispute; when he has a direct interest in the subject matter; and when he is a party to the contract. We know of no other exceptions, if these can be called exceptions, in all of which a legal title or interest rests in the plaintiff. In accordance with this view, is our own law. "An action can only be brought by one having a real and actual interest, which he pursues." Code of Practice, art. 15.

The plaintiff was not the holder of the note. He was not a party by endorsement. He was merely the general agent for the holder. He bought it, not for himself, but as agent of another. He was no party to the contract. He had no possession, with the right of protecting it. He had no real and actual interest, which we take to mean a pecuniary

interest. He had not received the note even on the trial of the rule.

A case very similar to this is found in the New York Reports. A cashier of a bank had given up a note belonging to the bank, on receiving a check for an equal amount. The check was dishonored, and the cashier brought suit on the note in his own name. It was held that, the note was not novated by the check, but that the cashier could not maintain the suit in his own name. The court say: "It is not as agent, but as holder or assignee, that the plaintiff must show his right. In point of fact, the note never was transferred or assigned to him. If he had the actual possession of it, the court would not entertain an enquiry into his right, unless there was proof that he had obtained possession nada fide: but the difficulty is, that the plaintiff has not the possession, nor a right to the malâ fide; but the difficulty is, that the plaintiff has not the possession, nor a right to the

note, by reason of any interest he has in it.

"The officer or agent cannot, without other authority than that arising out of his agency, prosecute on it, or for it, in his own name." Alcott v. Rathbone, 5 Wend. 494.

CORREY ELBERT. CONRET ELBERT.

So a party to a bill who has assigned it for value to a third person, cannot sue on the bill, although his responsibility as endorser remains. Escheric v. Black, 3 Howard. Blanchard v. Grousset, 1 Ann. R. 96.

Blanchord v. Grousset, 1 Ann. R. 96.

Hence, even an eventual guarantee by the plaintiff, if one were proved, would not entitle him to sue in his own name.

But let us for a moment concede that suit can properly be maintained in the name of the plaintiff. The question remains whether, by changing the name of the plaintiff of record, the condition of the defendant can be made worse. All the cases, whether on notes or otherwise, concur on this point. If the suit is permitted, in the name of an agent, but really for the benefit of a third person, the plaintiff is regarded as a nominal party; the party in interest is considered the true plaintiff. The permission of the law that such suits shall be brought, is given as a matter of convenience and in aid of commerce; but this permission is not allowed to destroy any right of the defendant. All defences that could be urged against the true plaintiff, can be made against the nominal party. McNair v. Thompson, 5 Mart. 561.

"No consequence results from it affecting the rights of the defendant, for he can offer every defence to the suit of the agent, he could present against the action of the principal. The agent can only be considered as the nominal plaintiff." Laceste v. De Armes, 2 La. 265.

But are not the rights of the plaintiff increased by the characteristics.

The agent can only be considered as the necessary plaintiff." Laceste v. De Armes, 2 La. 265.

But are not the rights of the plaintiff increased by the change made in this case? Is not the defendant placed in durier's case? If the Bank of Charleston had sued, confessedly the defendant could not have been arrested. But P. Conrey, Jr. brings the suit, and the defendant is imprisoned for three months.

There is no conceivable reason why this plaintiff should bring this suit, except to arrest the defendant. Our courts are open to the complaints of the Bank of Charleston; and, if the arrest had not been desired, the suit would have been brought in its name. The nominal party then exercises a right or privilege, which does not belong to the real party. The bank is permitted to do by its agent, more than it could do by itself.

True, the arrest is a remedy—a means of enforcing payment; but where the law prohibits an act to a particular person, can that person do the act prohibited, by the interposition of another? This would be a mere evasion. Ner do we understand the rule to be confined to pleadings and proofs on the merits. If there are collateral advantages or disadvantages, the court must look to the bottom of the transaction, and decide these, a well as the merits, according to the character or position of the actual parties. The nominal party must be set uside; and if a right is claimed, or defence urged, the enquiry must be, can this right be exercised by the real party—will the defence avail against him. If it can, the same rule will apply to the nominal party.

Rights and remedies are so blended, that it is often difficult to distinguish them. Hence the most intelligible and safest rule is, to say that the defendant shall not be injured by a change of plaintiff. In this case he clearly sustains a serious injury in his personal restraint.

The counsel for the plaintiff admits that the defendant may plead against Course every defence that he could urge against the bank. "All that the defendant has a right to exact," says he, "and this is a right which never has, and never will be denied him, is that the transfer should not be permitted to operate projudicially to any defence, which he would be authorised to set up against the bill, had the action been brought in the name

of the corporation.

But if the suit had been so brought, the defendant could have set aside the arrest. He would have preserved his liberty, which was lost in the change of the name of the plaintiff, although the suit accrues only to the benefit of the bank. Is not this one of his defences, and has he not lost it by the change?

Rehearing refused.

BLOODWORTH v. JACOBS et al.

ways may to the street which their district

The debtor has the right to make the imputation of any payment made by him. If he do not exercise this right, the creditor may do so. If neither make any imputation, the law makes it for them; and, in all cases, the imputation takes place in one of these modes, at the time of the payment. Where the imputation is made by the creditor, the debtor is always pretected against surprise as well as fraud.

When a debtur has accepted a receipt in which a payment is imputed to a particular debt, it

it is irrevocable, unless in cases of surprise or fraudon the part of the creditor. C. C. 2161. By the term payment is meant not only the delivery of a sum of money, but the performance of an obligation. It is an act requiring the exercise of the will-of consent.

JACOBS.

Where a factor receives the proceeds of a crop to be held at the disposition of the owner, the BLOODWORTH amount cannot be considered as an ordinary debt, upon which compensation necessarily operates. It is an irregular deposit, identical with a loan for use; and no compensation takes place as to a demand for the restitution of a deposit or loan for use. C. C. 2207 2927.

Though the distinction formerly existing between a perfect and imperfect deposit is abrogated by article 2934 of the Civil Code, which recognises as the only real deposit a thing received to be preserved in kind, without the power of using it, and to be restored identically, yet parties are at liberty by their contracts, or course of dealing, to create irregular deposits, which, between themselves, are inviolate, and prevent the effects, which the law, in the absence of any such agreement or course of dealing, would have upon their respective

The contract implied between principal and factor, in the ordinary transaction of business, partakes, in some respects, of the nature of the contracts both of loan and irregular deposit. Their accounts-current are necessarily provisional until settled, and, even after settlement, may be rectified by either party on account of errors or omissions, subject to which every settlement is held to be made.

rights.

Where a factor sends all account to his principal, at the usual time, in which certain imputations are made by the former, and the principal approves the account, or receives and acquiesces in it, and there is no fraud or surprize complained of by him, the imputation of payment must be considered as having been made by the authority of the principal, the ratification of the acts of the factor being tantamount to an original imputation by the principal; and such imputations cannot be subsequently changed by the debter, nor by third persons.

Every ratification by the principal of the act of an agent, relates back to the time of doing the act, or making the contract, which is ratified; and this principle] applies as well to acts of imputation of payment, as to other acts.

The product, or substitute of a thing follows the nature of the thing itself, so long as it can be ascertain to be such. So the property of a principal, entrusted to a factor for a special purpose, is considered still to belong to the principal, notwithstanding any change of form it may have undergone, so long as it can be identified.

PPEAL from the Parish Court of New Orleans, Maurian, J. A H. H. Strawbridge, Elmore, W. W. King, and H. A. Bullard, for the plaintiff. Benjamin, Micou, and Grymes, for the appellants.

The judgment of the court was pronounced by EUSTIS, C. J. The plaintiff is the holder of a promissary note for the sum of \$11,666, drawn by William Hunter, in favor of Charles A. Bullard, secured by mortgage on a certain plantation and slaves, which were purchased at a sheriff's sale by one of the defendants, Chartes A. Jacobs, for the sum of \$60,982, for which the purchaser only paid to the sheriff the sum of \$4,000 07, assuming to pay the mortgages on the property for the balance of the purchase money.

The petition charges that Jacobs refuses to pay the amount of this note, under the pretence that there are certain pre-existing mortgages on the property which will absorb the unpaid part of the price, and which have a priority over that of the plaintiff; but the petition charges that these mortgages do not in fact exist upon the property sold, but have been extinguished altogether or in part, so that there will remain in the hands of Jacobs a sufficient portion of the unpaid purchase money to satisfy the plaintiff's debt and interest. The prayer of the petition is for judgment against Jacobs, and that the holders of the outstanding mortgages, which are set up as taking the precedence of the plaintiff's, "be decreed to show how much, if any, of said mortgages exists in their favor respectively," and for general relief, &c.

The defendants, cited as holders of the mortgages, Lambeth and Thompson, and also Jacobs, filed separate answers, in which they plead the general issue,

Biconwonen and on this the parties went to trial. There was judgment against Jacobs for Jacobs.

the plaintiff's debt and interest, and the defendants have appealed.

The case depends on the validity of certain transactions between the defendants and the debtor, Hunter, which the plaintiff alleges have been to his detriment, by the misapplication of certain funds of the debtor, from time to time, by Lambeth & Thompson in the extinguishment of certain debts of their own, instead of applying them to the payment of the mortgage notes, which were on the property purchased by Jacobs, and which the plaintiff, a subsequent mortgage creditor, had an interest in having reduced.

The rules concerning the imputation of payments were laid down with such admirable clearness and precision in the Roman law, that they have undergone very little change since, and the learned counsel who argued this case concur in their exposition of them.

The debtor has first the right to make the imputation; if he does not exercise this right, it then appertains to the creditor; if neither make the imputation, the law makes it for them; and in all cases the imputation takes place in one of these modes at the time payment is made, it being understood that where the imputation is made by the creditor, the debtor is always protected against surprize as well against fraud.

After the debtor shall have accepted a receipt in which the imputation is made by the creditor to any particular debt, it becomes irrevocable, unless there has been surprise or fraud on the part of the creditor.

But there is a preliminary enquiry to be made in order to determine this case, and that is, as to the meaning of the word payment, concerning which our Code removes every doubt. Payment is a mode of extinguishing obligations. It is not only the delivery of a sum of money, but the performance of an obligation. It is an act calling for the exercise of the will—of consent, without which it has not the characteristics of that mode of extinguishing obligations.

It by no means follows because a banker has the money of his customer, that he can apply it in payment, or that a factor, selling the crop of the planter, has necessarily that control over the proceeds. The disposition of the fund in both cases, depends upon the agreement, or course of dealing, between the parties. On the breach of the agreement, or the interruption of their relation, what may be the operation of compensation as to their mutual debts, it is not now necessary to determine. Pothier, Contrat de Nantissement, no. 47. Our enquiry is as to the law applicable to the state of facts which this case presents, and whether the defendants were bound to apply the funds of Hunter otherwise than they did apply them. If a factor receive a fund for a particular object under instructions from his principal, no law and no principle of morals will permit him to apply it to any other; and how any different appropriation of it can be required from him by a third person, it is difficult to apprehend. Grave est fidem fallere. Take a very common case. The current expenses of a plantation must be paid—a man's family must be supported; and if the factor agree to pay bills, or furnish money for these purposes to a planter, out of the proceeds of a crop consigned to him, can he, after procuring the consignment, apply the proceeds to the extinguishment of a previous debt, and set at nought the very condition on which the crop was consigned to him. We have not considered the

In the case of Walker v. Birch, 6 Term. Rep., 258, in which the assignees of a factor claimed to retain a quuntity of cotton under the lien for a general

balance, in order to indemnify them for certain bills of the principal on which BLOODWORTH the bankrupt was liable, Lord Kenyon said, after stating that there was no doubt in general as to the existence of the lien, but that the question arose as to its application to the present case: "It is a maxim as old as our law, conventio vincit legem. The parties may if they choose introduce into their contract an article to prevent the application of a general rule of law. In order to determine the present case, it is not necessary to consider how the case would have been, if there had been no express stipulation between the parties, for the whole resolves itself into this, that the goods were deposited for a par-

An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him. Opinion of Lord Ellenborough in Taylor v. Plummer, 3 Maule and Selwyn, 574. See The Farmers' and Merchants' Bank of Memphis v. Franklin & Henderson, 1 Au. Rep. 393.

ticular purpose."

Bankers have a lien on bills deposited with them for general account, but if the securities are deposited as a pledge for a specific sum, the banker has no lien on them beyond that sum, though the customer be previously indebted to him in a larger amount. 2d Kent. Com., 5th ed., 584. Story on Agency, ss. 362, 373, 378. 15 Mass. 389. Where the parties have contracted for a particular time and mode of payment, a factor has no right to set up any claim of lien inconsistent with the terms of the contract. Chasev. Westmere, 5 Maule and Selwyn, 180.

It is obvious, in the instance we have given, of a factor receiving the proceeds of a crop to be held at the disposition of its owner for the whole or for a part, that he has no right to make any other disposition of it in the mean time. The amount is at the credit, and subject to the order of the owner. A sum of money thus placed cannot be considered as an ordinary debt, upon which compensation necessarily operates. It is an irregular deposit, which is identical with a loan for use. Massé, Dictionnaire de Droit Commercial, Verbis, Crédit Ouvert, § 2, and Compte-Courant. 2 Pardessus, Droit Commercial, ss. 491, 514. Civil Code, 2900.

By our Code no compensation takes place as to a demand for the restitution of a deposit or a loan for use. Arts. 2207, 2927. And the distinction which exists between a perfect and imperfect deposit, purports to be abrogated by article 2934, which recognizes only as a real deposit the case of the delivery of a thing to be preserved in kind and to be returned identically. But we consider parties at liberty by their contracts, or course of dealing, to create irregular deposits, which, between themselves, are to be inviolate, and prevent the effect which the law, in the absence of any such agreements or course of dealing, would have upon their respective rights.

The existence of accounts to which, under the name of accounts-current, the law has given a certain effect, between the factor and his principal, necessarily pre-supposes two species of contracts-of loan and of irregular deposit, or rather, the contract implied between them in the ordinary transaction of business partakes in some respects of both. These accounts are necessarily provisional until settled, and, even after settlement, may be rectified by either party on account of errors or omissions, subject to which every settlement is held to be made. 2 Pardessus, Droit Commercial, § 475.

By article 2161 of the Code, which we have before noticed, when the debtor has accepted a receipt by which the creditor has made an imputation of money he has received to one debt, the debtor cannot change the imputation,

BLOODWORTH unless in case of frand or surprize. When, therefore, at the usual time for rendering his accounts, the factor sends his account to his principal, in which certain imputations of payment are made by him, and the latter approves the account, accepts the receipt, in the language of the Code, and there be no fraud or surprise of which he can complain, the payments are to be considered as having been made by the authority of the debtor.

The ratification of the acts of his agent, are considered tantamount to an original imputation of payment by himself; and it is a principle of law well settled, that every ratification relates back to the time of the doing of the act, or making of the contract, which is ratified. Ratificationes negotiorum gestorum ad illa tempora reduci oportet in quibus contracta sunt. Law 25, in fin. Cod. de Donat. inter viv. et ux. 5, 16.

Ainsi de même que la ratification des actes faits en notre nom, mais sans notre ordre, la confirmation des actes auxquels nous avons concouru, a, par sa nature même, un effet retro-actif relativement à la personne qui confirme ou ratifie.

Ce n'est point à son égard un contrat nouveau, c'est l'ancien qui conserve ou reprend sa force, et qui produit son effet du jour de sa date, et non pas seulement du jour de la confirmation. 8 Toullier, § 514. Story on Agency, § 239.

Having thus stated our views generally concerning the law applicable to the case, it is necessary to consider the issue between the parties. The plaintiff alleges that the apparent mortgages on the property purchased at sheriff's sale by Jacobs, do not in fact exist upon the property, but have been extinguished altogether or in part, so that there will remain in the hands of Jacobs a sufficient sum of money to pay him, the plaintiff. The general issue pleaded by the defendants imposes the burthen of the proof on the plaintiff.

There is no charge of fraud or collusion between the defendants and Hunter made in the petition, nor do the facts authorise any such charge. It seems to us that everything which has passed between these parties is in accordance with the system of defence which the case presents. Hunter was not made a party to the suit, and his interest, in having the mortgage notes paid out of the property on which they were secured, is obvious, inasmuch as he was personally bound for them. It is not pretended that he ever directed any payments to be made on the mortgage besides those which were made, or that he ever in any manner dissented from the imputation of payments made by Lambeth & Thompson.

The plaintiff has offered, in support of his allegations, of the partial extinguishment of the mortgage notes, the commercial books of Lambeth & Thompsan. The books of merchants are not evidence in their favor, but if used against them the whole must be taken together. Civil Code, art. 2244. The books show a certain course of dealing between the factors and their principal, which implies an agreement between them, and a change in the imputation of any of the payments, after it has been ratified and concluded by the debtor, would be to defeat that agreement. We are at a loss for a reason on which we can found any such right on the part of the plaintiff. Lambeth & Thompson, the creditors, had no such right; Hunter had not. It rested with him to pay the debt secured by mortgage, or not, as he thought proper, and he had the entire disposition of his funds in the hands of Lambeth & Thompson, and was at perfect liberty to direct their appropriaton as they have been applied.

It is proved that accounts were regularly rendered by Lambeth & Thompson Bloodword to Hunter, generally at the end of every business season; that he was in the city once or twice a year; and a witness, the book-keeper of Lambeth & Thompson, swears that he, the witness, was in the habit of showing Hunter his accounts on the books from time to time. Hunter never asked any explanation nor examined the accounts particularly; but of the rendition of the accounts and Hunter's acquiescence in them, there can be no reasonable doubt. Story on Agency, ss. 253, 254.

The counsel for the plaintiff have contended that, the general rule of ratification of the acts of an agent by the principal, does not apply to an imputation of payments; but we do not perceive any reason which would exempt an act of this kind from its operation, which we understand to be general in its relation to all acts to which the assent of the principal is necessary.

It is also urged that an agreement to make the imputations as they were made, or instructions to that effect, ought to have been shown affirmatively by the defendants. But the defence adopted by the defendants precludes the necessity of any such proof being made on their part; it rests upon an implied agreement, or a verbal agreement, to which there were no witnesses, which it is contended results from their books, which the plaintiff has made evidence, and the ratification of the doings of Lambeth & Thompson, the factors, by their principal, Hunter. Of the existence of any instructions or written agreement there is no evidence. It rested with the plaintiff to call for the correspondence with Hunter; but there was no obligation, under the issue and evidence, on the defendants to produce it without a call on behalf of the plaintiff.

The different sums of money which the plaintiff contends ought to have been imputed to the mortgage notes, the learned counsel consider as, on their reception, necessarily falling under the operation of the imputation of payments, by the effect of law, and of compensation, and particularly of the latter by reason of the debt for the sums received being an ordinary debt due by the factor to his principal. What might be the rule of compensation where money is received without any definite instructions or appropriation, or on the termination of the relations of principal and factor, it is not necessary to consider, under the conclusions that we have adopted as to the contract which the evidence in this case established between Hunter and Lambeth & Thompson, and under which the funds received ought to have been applied, and the application of which it is competent to neither party to disturb. The proceeds of the crops were an irregular deposit in the hands of the factors, destined not for payment nor compensation, but to be returned on the order of Hunter; and Lambeth & Thompson were not authorized to apply them otherwise, nor are we at liberty to give any other direction to the contracts of the parties than they themselves have established in executing them.

"The product or substitute of the original thing, still follows the nature of the the thing itself so long as it can be ascertained to be such;" and the property of a principal entrusted to his factor for a special purpose, is still taken to belong to the principal, notwithstanding any change of form it may have undergone, so long as it can be identified and distinguished from all other property. Russel on Factors and Brokers, 273.

Admitting that, so far as relates to creditors, *Hunter* would have no privilege on account of this irregular deposit, and also admitting that the amount of the deposit would be lawfully compensable against his debts, it by no means follows

63

Broodworth %.
Jacobs.

that, in reagenda, Lambeth & Thompson had any right to withhold it from the application which Hunter thought proper to make of it, provided they received the consignment under this condition. But where is the proof of any such agreement, it is asked? The proof results from the ratification of Hunter of the gestion of his factors, and of the imputation of payments made by them in their receipts furnished to him, as also from the books of Lambeth & Thompson, which contain the history of transactions as executed by both parties, or by one with the assent of the other, which furnishes the best guide as to the true intent of both.

Concerning the stock transaction, it must be born in mind that the mortgage originating with it was one of those to which precedence was given by the plaintiffover his mortgage, and which he has insisted to have been extinguished in whole or in part, and on the evidence we can find nothing in its origin which will authorize us to disturb it. The principles which we have laid down appear to us to cover fully this transaction, and that in relation to the Hills & Sinott mortgage.

Under the issue between the parties and the evidence before us, we do not feel ourselves authorized to compel the defendant Jacobs, to pay the plaintiff's debt to the detriment of the outstanding mortgages.

The judgment of the Parish Court is therefore reversed, and the plaintiff's petition dismissed with costs in both courts.

DEPAS v. RIEZ, Executrix.

Testamentary dispositions, made by a husband in favor of his wife, when he leaves a child at the time of his death, are governed by art. 1739 of the Civil Code. Art. 1480 does not apply to donations between married persons. Art. 1739 embraces testamentary dispositions, as well as donations inter vivos.

Definitions incorporated in a Code must be construed with reference to its positive enactments in pari materia, and have no meaning beyond them.

Art. 1745 of the Civil Code applies to testamentary dispositions.

The provision of art. 1745 of the Civil Code, which authorizes one who contracts a second or subsequent marriage, having a child by a former one, to give to the other spouse only the least child's portion, and that only as an usufruct, and which declares that the portion, of which the donee is to have the usufruct, shall in no case exceed the fifth part of the donor's estate, extends to all the property of which the donor may die possessed, whether brought by him into marriage or subsequently acquired.

The provision of art. 553 of the Civil Code, which authorizes one by whom an usufract has been established, to dispense, in favor of the usufractuary, with the securety required by that and the preceding article, must be construed with reference to art. 1485, which prohibits testators from disposing of the legitimate portion to the prejudice of their descendants. One who has the usufract of property forming part of the legitimate portion of the descendants of the person by whom the usufract was established, cannot be relieved from giving security.

Compensation is due to the community, for the value of useful improvements made during its existence, by the common labor or expense of the spouses, upon the separate property of either. But as such improvements benefit the community by increasing the vaelu and income of the property, which it enjoyed to the day of its dissolution, and are of advantage to the heirs of the owner only from that period, the compensation to which the community is entitled is the value of the improvements at the time of the dissolution, and not at the time when they were made; but whatever may be their value at that time, the recompense due to the community can never exceed their cost.

Any legal evidence is admissible to rebut the presumption that, a balance due on the price of

property purchased by the husband before marriage, but subsequently paid for by him, was

paid out of the funds of the community.

The community is entitled to the enjoyment of all the property and effects belonging to the hashand at the time of the marriage (C. C. 2371); and it owes no recompense to the succession of the latter, for any diminution in their value resulting from such enjoyment.

Property brought by the husband into marriage will belong to his succession, in the condition in which it was at the dissolution of the marriage; but it cannot claim credit for the value of the property at the date of the marriage.

The debts of the community must be paid out of its assets, and the surviving wife is entitled only to one-half of what will remain after their payment.

Where an executrix has paid debts due by the succession, though without authority, she will be entitled to credit for the amounts so paid.

An executrix who fails to deposit in bank the money of a succession, as required by sec. 3 of the stat. of 13 March, 1837, must be dismissed from office, on proof thereof, made in the manner prescribed by that section.

PPEAL from the Second District Court of New Orleans, Canon, J. Phinias Depas by his will bequeathed to the defendant, his widow, all that the law permitted him to dispose of in her favor, in full property, or usufruct, at her choice, dispensing her from furnishing security in case she decides to take the usufruct. He left one son by a former marriage. His will was ordered to be executed, on the petition of his widow, who qualified as executrix. An action of partition instituted by the plaintiff, the only son and heir of the testator, against the defendant, having been consolidated with an opposition made by the plaintiff to the account of her administration, there was a judgment below decreeing the defendant to be entitled to one-fifth only of the property in usufruct, and setting aside the account, and ordering her to file another. A rule taken on the executrix to show cause why she should not be dismissed from office, for having failed to deposit in bank the funds of the succession, in conformity to the stat. of 13 March, 1837, was, on the same day, made absolute, and a judgment rendered dismissing her from office. The defendant appealed from both of these judgments.

L. Castera, for the plaintiff. I. Le legs fait à Nanette Riez, est-il réductible?

qu'elle doit en être la quotité?
D'après Depas, elle a droit au cinquième en usufruit seulement, ainsì que l'a décidé le jugement; elle prétend, au contraire, avoir droit au deux tiers, tant du propre, que de la communauté, sans préjudice de l'autre moitié lui revenant dans ladite communauté. Cette prétention ne saurait être maintenue. Il suffit à cet égard de consulter les articles 1840, 1739 et 1745 du Code qui nous régit.

Le premier de ces articles dit: "Les donations soit entre-vifs, soit pour cause de mort, ne pourront excéder les deux tiers des biens du disposant, s'il laisse à son décès un enfant légitime ; la moitié, s'il laisse deux enfants ; le tiers,

s'il en laisse trois ou un plus grand nombre.

"Sous le nom d'enfants, sont compris les descendants, en quelque degré que ce soit, bien entendu qu'ils ne sont comptés que pour l'enfant qu'ils représentent."

L'article 1739 dispose ainsi: "L'époux peut, soit par contrat de mariage, soit pendant le mariage, pour le cas où il ne laisserait point d'enfants ni de descendants légitimes, donner à l'autre époux, en toute propriété, tout ce qu'il pourrait donner à un étranger.

"Et pour le cas où l'époux donateur laisse des enfants ou descendants légitimes, il peut donner à l'autre époux, ou un dixième en propriété, ou le cin-

quième de tous ses biens en usufruit seulement."

Enfin, d'après l'article 1745: "L'homme ou la femme qui contractera un second, ou un subséquent mariage, ayant des enfants d'un autre lit, ne pourra donner à son nouvel époux qu'une part d'enfant le moins prenant, et en usu-fruit seulement, sans que, dans aucun cas, la portion dont le donataire aura l'u-sufruit puisse excéder le cinquième des biens du donateur." DEPAS RIEZ.

DEPAR RIEZ.

La première réflexion qui se présente sur ces trois dispositions c'est, qu'elles n'établissent aucune distinction entre les dispositions soit entre-vifs, soit pour cause de mort. La loi française étant la même que la nôtre sur cette matière, qu'on me permette de citer, non pas la jurisprudence, qui est unanime sur ce point, mais l'opinion émise par un des commentateurs les plus distingués du Code Napoléon, sur ce point.

Duranton, vol. 8, page 303, no. 282, s'exprime ainsi: "La portion disponible, comme on vient de le dire, varie en raison du nombre et de la qualité des per-

sonnes à qui la réserve est due; nous l'envisagerons sous tous les rapports.

"La loi ne fait au surplus aucune distinction quant à la fixation de cette portion entre les dispositions entre-vifs, et les dispositions testamentaires (art. 913 du Code Napoléon, 1480 de notre Code); et c'est avec raison, car la réserve devait toujours être intacte." Code Civile de la Louis., arts. 1480, 1481,1486, 1488, toujours être intacte."

1489, 1491, 1492. Ce principe posé, il est facile d'établir que les trois articles cités peuvent facilement recevoir, chacun d'eux, leur application, et qu'il n'existe entre eux aucune espèce d'antinomie ou conflit. En effet, d'après l'art. 1480, si le défunt laisse à sen décès un enfant légitime, la quotité disponible est des deux tiers de ses biens : tel est, dans ce cas, le disponible ordinaire, le privilége du disposant. La loi, sans vouloir violer ce privilége, a voulu sagement empêcher certaines personnes, et notoirement le conjoint survivant, de recevoir cette quotité disponible. Specialia generalibus derogant, ff De regulis juris. Suivant l'article 1739, l'époux donateur ou testateur, s'il laisse des enfants, peut disposer d'un dixième; en toute propriété, ou d'un cinquième en usufruit, en faveur de l'autre époux : c'est là une quotité disponible, relative à l'époux survivant qui a des enfants de ce mariage. On voit donc qu'il n'existe aucun conflit entre ces deux articles; car dans le premier, le législateur trace une règle générale qui se trouve modifiée par les dispositions de l'article subséquent; cette démonstration va devenir complète par l'examen du dernier des trois articles. Selon l'art. 1745, l'époux qui aura des enfants d'un autre lit, ne pourra donner à son nouvel époux qu'une part d'enfant le moins prenant, et en usufruit seulement, sans que, dans aucun cas, la portion dont le donataire aura l'usufruit puisse exceder le cinquième des biens du donateur.

Qui ne voit que cette disposition, loin d'être en opposition avec l'art. 1480, ne se trouve en harmonie parfaite avec lui; en effet, le testateur peut disposer des deux tiers de ses biens en faveur d'un étranger dans le cas prévu par ce dernier article, et ce droit se trouve restreint par l'art. 1739, ainsi que par l'art. 1745, qui sont une exception établie par le législateur, en ce qui regarde le conjoint survivant, et pour ne pas permettre la spoliation des enfants d'un premier

mariage.

En résumé, il existe dans notre Code trois quotités disponibles, dans le cas où le donateur ou testateur laisse des enfants. La première est celle qu'on peut appeler quotité disponible ordinaire, prévue par l'art. 1480. La seconde, relative à l'époux donataire ou légataire, qui a des enfants de son mariage avec l'époux décédé, quotité prévue par l'article 1739, et qui constitue une réserve légale au profit des enfants du même lit. La troisième, relative à l'époux donataire ou légataire, dans le cas où l'époux donateur ou testateur a des enfants d'un précédent mariage, quotité prévue par l'art. 1745.

On voit donc maintenant qu'il n'y a aucune antinomie entre ces divers textes de la loi. N'est-il pas vrai en effet que l'époux donateur ou testateur peut toujours donner ou léguer même, quand il y a un enfant, les deux tiers de ses biens, pourvu que le légataire institué ou le donataire ne soit pas le conjoint survivant? Sans le moindre doute, il peut le faire, il en a le droit, seulement ce droit est modifié et restreint par les dispositions subséquentes. En résumé, il existe dans notre Code trois quotités disponibles, dans le cas

droit est modifié et restreint par les dispositions subséquentes

Ainsi, lorsqu'il y a des enfants d'un premier lit, comme dans le cas actuel, l'art. 1745 apporte une modification au droit genéral tracé par l'art. 1480, qui permet certaines dispositions en faveur de l'époux survivant. Lex autem pro-hibet quod facilius fieri putat. If De regulis juris.

Le législateur s'est montré si soucieux de fixer les droits des enfants d'un

premier mariage, que, dans l'art. 1746, il dit, que si l'époux qui passe à de secondes noces a des enfants de son précédent mariage, il ne peut rien donner

des biens qui lai ont été donnés ou légués par le prédécédé.

Depas croit avoir établi, par ce qui précède, que Nanette Riez ne saurait avoir droit aux deux tiers des biens du défunt, indépendamment de sa moitié, dans la communauté; il croit avoir établi qu'elle a droit au cinquième en usufruit seulement qui lui est attribué par le jugement. À l'appui de ces doctrines il invoque

les autorités suivantes :

Jurisprudence du C. N. vol. 2, pages 235 à 237. Toullier, vol. 5, nos. 869, 871 et 871 bis. Bousquet, Exposition du Code Civil, vol. 3, page 375. Duranton, vol. 9, sec. 787 à 799. Malleville, Analyse du Droit Civil, vol. 2, pages 470 à 472. Code Civil, art. 1736 à 1739. Arrêt de la Cour Suprême de notre Etat, dans la succession Albert Hoa.*

Le système de défense adopté par Nanette Riez sera sans doute le même ici que devant la Cour inférieure. Voici en quoi il consiste:

Le testateur et la légataire (Nanette Riez) avaient, le premier, la capacité de donner; la seconde, celle de recevoir. Art. 1456 du C. C. Les incapacités sont absolues ou relatives, art. 1457; Nanette Riez ne pouvait être atteinte que poids dans la cause. On ne doit jamais prendre un texte de loi isolément. L'art. 1480 se trouve bien dans le livre du Code Civil des Donations et Testaments, mais il est sous le chapitre 3, de la portion disponible et de la réduction en cas d'excès, tandis que les articles 1739 et 1745, sont placés sous le chapitre 9, intitulé, Des donations entre époux, soit par contrat de mariage, soit durant le mariage. Dès lors, ils ne peuvent pas former une exception à la regle générale tracée par l'art 1480. La donation faite par le testateur est une donation

faite pendant le mariage, et non une donation pour cause de mort.

Sur le premier point, nous admettons que le testateur, au moment du testament, comme à celui de l'ouverture de la succession, avait le droit de faire une institution au profit de Nanette Riez: que cette dernière avait le pouvoir de recevoir ou d'accepter le legs fait en sa faveur; avec cette restriction d'épouse de Phinias Depas, ayant des enfants du premier lit, la pertion qui pouvait lui être léguée, devait être réduite en conformité du droit restrictif, tracé par

l'art. 1745 du C. C.

Quant au second, que la loi française n'est pas la même que la notre, et que les commentateurs étrangers ne doivent exercer aucune influence dans la cause. La meilleure réponse à faire à cette doctrine, assez curieuse pour le dire en passant, c'est de mettre en regard les deux textes :

CODE NAPOLEON.

CODE CIVIL DE LA LOUISIANE.

De la portion des biens disponibles et

de la réduction. Art. 913.—Les libéralités, soit par acte entre vifs, soit par testament, ne pourront excéder la moitié des biens du disposant, s'il ne laisse à son décès qu'un enfant légitime ; le tiers, s'il laisse deux enfants; le quart, s'il en laisse trois on un plus grand nombre.

Art. 914.—Sont compris dans l'art. précédent sous le nom d'enfants, les descendants en quelque degré que ce soit; néanmoins ils ne sont comptés

que pour l'enfant qu'ils représentent dans la succession du disposant. Art. 1094.—L'époux pourra, soit par contrat de mariage, soit pendant le mariage pour le cas où il ne laisserait point d'enfants ni descendants, disposer en faveur de l'autre époux, en propriété,

De la portion disponible et de la réduction en cas d'excès.

Art. 1480.—Les donations, soit entre vifs, soit pour cause de mort, ne pourront excéder les deux tiers des biens du disposant, s'il laisse à son décès un enfant légitime; la moitié, s'il laisse deux enfants; le tiers, s'il en laisse trois ou un plus grand nombre.

Sons le nom d'enfants, sont compris les descendants en quelque degré que ce soit; bien entendu qu'ils ne sont comptés que pour l'enfant qu'ils repré-

sentent.

Art. 1739.—L'époux peut, soit par contrat de mariage, soit pendant le mariage pour le cas ou il ne lasserait point d'enfants, ni descendants légitimes, donner à l'autre époux, en toute proRIEZ.

^{*} Le Code Napoléon art. 920, déclare que de sembables donnations sont reductibles. Il emploit ces mots, dispositions soit entre-vifs soit à cause de mort. Rogron, sur ce même article dit, que par ces derniers mots on entend les donnations par testament. Loi 5 Code, tit. 9, de equandis nuptiis. Hac edictati. Pothier, traité du Contrat de mariage, vol. 5, partie 7, chap. 2 de l'édit des secondes noces, no 547.

DEPAS. HIER.

CODE WAPOLEON.

CODE DE LA LOUISIANE.

de tout ce dont il pourrait disposer en faveur d'un étranger, et, en outre, de l'usufruit de la totalité de la portion dont la loi prohibe la disposition au pré-judice des héritiers Et pour le cas où l'époux donateur laisserait des enfants ou descendants, il pourra donner à l'autre époux ou un quart en propriété et un autre quart en usufruit, ou la moitié de tous ses biens en usufruit

Art. 1098.—L'homme ou la femme qui, ayant des enfants d'un autre lit, contractera un second ou subséquent mariage, ne pourra donner à son nouvel époux qu'une part d'enfant légitime le moins prenant, et sans que, dans aucun cas, ces donations puissent excéder le quart des biens.

priété, tout ce qu'il pourrait donner à un étranger. Et pour le cas où l'époux donateur laisse des enfants ou descendants légitimes, il peut donner à l'autre époux, ou un dixième en propriété, ou le cinquième de tous ses biens en usufruit seulement.

Art. 1745.—L'homme ou la femme qui contractera un second ou subséquent mariage, ayant des enfants d'un autre lit, ne pourra donner à son nouvel époux qu'une part d'enfant le moins prenant, et en usufruit seulement, sans que, dans aucun cas, la portion dont le donataire aura l'usufruit puisse excèder le cinquième des biens du donateur.

On le voit donc par le rapprochement des articles qui précèdent dans les deux législations, les principes sont les mêmes; la seule différence, c'est que dans la loi française la portion dont peut disposer le testateur on le denateur est plus grande que chez nous.

Aussi est-ce la justification complète de ce motif donné par cette cour dans l'afffaire de la succession Hoa, que les seconds mariages étant chez nous assez fréquents, c'était à la justice et aux magistrats à accorder aux enfants la protection qui aété écrite dans la loi en leur faveur.

Il serait donc superflu de discuter plus longuement sur ce point. Quant au troisième, que l'arrêt prononcé dans la derniére affaire qu'on vient de citer, a été rendu ex parte, et que le juge qui a donné l'opinion de la cour

Je réponds: 10. Que la cause a été plaidée par écrit sur le mémoire de deux avocats, et qu'il ne s'en suit pas que lorsqu'un procès est plaidé *exparte*, justico ne soit pas rendue, car tout le monde sait, et le barreau surtout, que vos décisions ne sont jamais rendues que sur l'examen le plus approfondi et le plus consciencieux de la cause.

20. Quant à l'erreur dans laquelle l'honorable magistrat serait tombé, c'est une assertion gratuite, que non seulement rien ne justifie, mais encore que tout repousse, et l'arrèt lui-même, tant il est écrit avec soin, tant les doctrines qui y sont professées sont développées avec force et soutennes par les autorités les plus respectables.

Sur le quatrième, relatif à ce que les art. 1739 et 1745 ne forment pas une exceptiona l'art. 1480 : Il suffit d'observer qu'ils sont tous placés dans le même livre du Code, celui qui traite des donations et teslaments; ils sont tous compris dans la matière générale qu'embrasse ce livre : rien ne saurait donc empêcher que

les art. 1739 et 1745 ne fussent une modification à l'art. 1480.

Toutefois Nanette Riez paétend de ce que les art. 1739 et 1745 ne sont par placés dans le même chapitre que l'art. 1480, ils ne peuvent pas établir une modification ou une exception à ce dernier article; puis elle ajoute que cela doit être ainsi, parce que le législateur, après avoir parlé du disponsible général, per s'explique pas impédiatements de l'articles de l'ar ne s'explique pas immédiatement après sur le disponible relatif aux époux; dé lors il ne faut pas, dit elle, avoir aucun égard à l'article 1745. Elle comm une erreur que le besoin de sa cause peut seul justifier, en disant que l'article 1480 se trouve dans le chapitre du Code intitulé des Donations et Testaments, et que les articles 1739 et 1745 se trouvent dans le chapitre intitulé des Donations entre Epoux, soit par contrat de mariage, soit pendant le mariage. La vérité est que ces deux chapitres se trouvent, le premier sous la dénomination, De la portion disponible et de la réduction en cas d'excès; le second sous la dénomination, Des Donations entre époux, soit par Contrat de Mariage soit durant le Mariage. Tous les deux sont dans le même titre, intitulé, Des Donations et Testaments. Que si ces deux articles 1739 et 1745, ajoute-elle, se trouvaient dans le même chapitre que l'article 1480, alors elle ne prétendrait plus qu'ils ne fussent une exception au disponsible général tracé par l'art. 1480,

et qu'ils n'établissent un disponible relatif à l'égard des époux. Quoi donc de plus naturel de la part du législateur que de parler dans le même titre des Donations et Testaments, d'abord du disponible générale et de la légitime, et de réserver ensuite le disponible relatif aux époux pour le chapitre où il traite spécialement des donations entre époux, soit par contrat de mariage, soit pendant le mariage.

Nanette Riez dit qu'elle sera convaincue si on peut lui prouver que le legs ui lui n été fait n'est autre chose qu'une donation à cause de mort. La donation a été faite, dit-elle, pendant le mariage : ce n'est donc pas une donation causa mortis : ce serait donc, suivant elle, une donation entre-vifs. Qu'est-ce que la donation entre-vifs? Merlin, Rép. de Jurisp. Vo. Donation, sect. 1, § 1,

h définit ninsi :

"Une donation entre-vifs est la disposition de certaines choses dont le donatour se dessaisit, en faveur de celui auquel il donne. Cette donation se fait par un principe de libéralité, avec une intention absolue et déterminée de se dépouiller de la chose donnée sans pouvoir jamais revoquer cette libéralité." Code Civil,

arts. 1454 et 1455.

Nanette Riez serait elle d'avis, par hazard, que le testateur n'avait pas le droit de révoquer son testament jusqu'au moment de son décès? Nous ne lui faisons par l'injure d'une absurdité aussi capitale. Si donc le testateur pouvait révoquer son testament, il ne se dépouillait pas du legs qu'il lui faisait, ce legs était essentiellement révocable, et cette révocabilité, loin d'en faire une donation entre-vife, en faisait une donation causa mortis, puisqu'elle ne devait recevoir d'effet que par l'évènement de la mort du testateur, en un mot, à cause de sa mort.

Poursuivons: Dalloz, Jurisprudence du Royaume, vol. 5, Dispositions entre-

vifs et testamentaires, chap. 3, sect. 3, art. 2, p. 447, dit:

"La donation de ce dont la loi permet de disposer est une véritable donation à cause de mort; car ce n'est qu'au décès du donateur que l'on pourra connaître la consistance d'une pareille donation, qui varie suivant le nombre et la qualité des héritiers, suivant les acquisitions, les dettes qui existerent à cette époque."

Prenez le testament de Depas, et vous verrez qu'il se sert des mêmes expressions de Dalloz; car il déclare donner à Nanette Riez tout ce dont la los

lui permet de disposer. C'est donc une donation à cause de mort.

Ajoutez à cette autorité celle de Duranton, déjà citée, vol. 8, p. 303, no. 282, qui nous enseigne que la loi ne fait aucune distinction entre les dispositions entre-vifs et les dispositions testamentaires, quand il s'agit de la fixation de la portion disponible, la réserve devant toujours être intacte. Dalloz, Jurisprudence du Royaume, vol. 6, p. 271, et suivantes, rapporte un arrêt dans le même sens. Alauzun v. Alauzun. Le même auteur, même volume, pages 276 et 277, explique comment doit s'entendre la quotité disponible entre époux, ayant des enfants d'un précédent maringe, et consacre les principes avancés par Charles

II. Le testateur a-t-il pu dispenser Nanette Riez de fournir cautton?

Charles Depas soutient la négative, et demande sur ce point que le jugement de la cour inférieure soit réformé. Suivant lui, Nanette Riez doit être tenue de fournir caution pour le legs de son usufruit. En effet ce legs consiste en immeubles et en meubles. Ces derniers objets sont non seulement soumis à une détérioration journalière, mais encore une fois, en la possession de Nanette Riez, qui pourra l'empêcher d'en disposer, et sans cantionnement que devient le droit de propriété de Charles Depas sur ces mêmes objets? Il est vrai de dire que, d'après l'art. 551 de notre Code, l'usufruitier doit donner caution de jouir en bon père de famile ; mais il faut reconnaître en même temp que, d'après l'art. 552 du même Code, il peut être dispensé de fournir caution par le titre constitu-552 du memo Code, il pout etre dispense de fournir caution par le trre construtif de l'usufruit. On a prétendu que c'était le cas. On s'est mépris, ainsi
qu'on va le voir plus bas. Avant de le démontrer, qui'il soit permit de rappeller
que le Code Napoléon renferme les mêmes dispositions dans l'art 601.

Qu'on n'oublie pas qu'il s'agit ici de la quotité disponible et de la réserve
légale réclamée par un hérituer forcée.

Dispenser Nanette Riez de fournir caution, n'est-ce pas excéder la quotité
disposition de la quotité disponible et de la quotité disposition de la quotité de la quotité disposition de la quotité disposition de la qu

disponible, puisqu'elle pourra vendre et aliéner les meubles ou valeur mobilières soumises à son usufruit; et Charles Depas rester ainsi privé de sa propriété, sans recours et sans remède pour assurer son droit? N'est-ce pas, en outre, donner en jouissance à Nanctte Riez des objets que rien ne pourra lui faire restituer à la fin de son usufruit, si elle a jugé convenable d'en disposer avant DEPAS RIEZ.

DEPAS RIEE

qu'il prenne fin. Le cautionnement est le seul moyen de conserver le droit de l'heritier. N'est-ce pas d'un autre côté, toucher à la réserve légale qui doit être sacrée, qui ne peut en aucune manière être entamée ni altérée; ce qui arrive-

être sacrée, qui ne peut en aucune manière être entamée ni altérée; ce qui arriverait cependant, si l'époux donateur pouvait dispenser son conjoint de donner caution pour la part des biens qui lui est léguée en usufruit seulement, puisqu'alors cette nue-propriété conservée, par la loi aux enfants, deviendrait illusoire par l'insolvabilité de l'usufruitier.

Voici les autorités. Dallos, Jurisprudence du Royaume, au mots, Usufruit, Usage et Habitation, volume 12, page 805. no. 31, dit: "L'obligation de donner caution souffre exception dans plusieurs cas; ainsi, 10. l'acte constitutif de l'usufruit peut en dispenser, sauf toutefois l'application des règles concurrant la quotité disponible, car autrement l'insolvabilité de l'usufruiter pourrait blesser les droits de ceux au profit desquels la loi fait la réserve." Proudhon, tome 2, no. 824, et suivants. Duranton, tome 4, no. 611. Dalloz, Dictionnaire de Jurisprudence. Verbo Usufruit, page 622, art 6, 6 3, no. 484. Même auteur risprudence, Verbo Usufruit, page 622, art 6, § 3, no. 484. Même auteur, Recueil périodique, 2me partie, année 1826, page 131, Héritiers Michel v. Martin. Même auteur, même recueil, année 1833, 2me partie, page 188, Soto mayor, v. Guilles. Même auteur, même recueil, année 1837, même partie,

page 88, Coustard v. Ses Enfants.

III. Est-il ou n'est-il pas dú récompense par la communauté à Nanette Riez, soit pour les améliorations réclamées par elle et alléguées par le testateur dans son testament, soit pour le billet de \$1,100 souscrit par le défunt avant son mariage avec Nanette Riez, et payé environ neuf mois après ce mariage.

La communauté n'a droit à aucune récompense pour ce qui regarde les amé-

liorations.

L'art. 2377 du Code Civil dispose: "Lorsque l'héritage propre à l'un des époux a été augmenté ou amélioré pendant la durée du mariage, il sera dû récompense de la moitié de la valeur de ces augmentations ou améliorations à l'autre époux ou à ses héritiers, s'il est prouvé que ces augmentations ou améli-orations sont le fruit du travail, des dépenses ou de l'industrie commune; mais il ne sera pas dû de rocompense s'il est prouvé que l'augmentation n'est due qu'au cours ordinaire des choses, à l'accroissement de la valeur des propriétés et aux chances du commerce."

L'art. 1437 du Code Napoleon est ainsi conçu: "Toutes les fois qu'il est pris sur la communauté une somme, soit pour acquitter les dettes ou charges personnelles à l'un des époux, tel que le prix ou la partie du prix d'un immeuble à lui propre, ou le rachat de services fonciers, soit pour le recouvrement, la conservation ou l'amélioration de ses biens personnels, et généralement toutes les fois que l'un des deux époux a tiré un profit personnel des biens de la communauté, il en doit la récompanse."

Après la lecture de ces deux articles, on voit que s'ils diffèrent dans leurs expressions, leur intention, leur sens et leurs dispositions sont les mêmes, et de plus tous les deux nous enseignent que pour qu'il y ait lieu à récompense, il faut des améliorations qui profitent à l'un ou à l'autre des époux.

Appliquens-les maintenat à la cause: Le propre dont il s'agit a été acquis

par le défunt sept mille cent piastres. Acte du 8 août 1836. Il à été estimé à la dissolution de la communauté six mille piastres. L'inventaire fait à la requête de Nanette Riez, et homologué sur sa demande, établit ce fait.

D'aprés l'art. 1247 du Code Civil, "Tout partage en justice doit être précé-

dé d'un inventaire estimatif de tous les biens à partager, fait dans la forme pre-scrite pour les inventaires publics." Cette formalité a été remplie. Suivant l'art. 1248: "L'inventaire public qui aurait été fait entre les parties intéressées, à une époque qui ne serait pas antérieure de plus d'un an à la démande en partage, devra servir de base à ce partage, à moins que l'un des hé-ritiers ne demande une nouvelle estimation, et ne prouve que les biens compris dans cet inventaire n'ont pas été portés à leur juste valeur, ou à celle qu'ils ont acquise depuis la date de cet acte."

C'est le 10 février 1846 que Charles Depas a intenté la demande en partage, huit mois et quelque jours après l'inventaire. Nannette Riez n'a pas demandé de nouvelle inventaire, elle l'a fait homologuer. La propriété ayant été acquise par le défunt sept mille cent piastres, et n'ayant été estimée avec les améliorations que six mille piastres, il n'y a donc pas accroissement de valeur, mais bien

dimunition, par conséquent il n'y a pas lieu a récompense. Il y a d'ailleurs une autre raison pour qu'il n'en soit pas ainsi; non seulement

l'immeuble n'a pas été amélioré, mais les fruits que ce propre a produit durant l'existence de la communauté, ne lui ont-ils pas profité? cette même communauté n'en a-t-elle pas joui? elle les a absorbés, et elle à joui autant du propre que des améliorations. Les commentateurs sont d'accord sur ce point.

Pothier, Traité de la Communauté, vol. 4, chap. 1, art. 4, pages 202 et 203, no. 636, s'exprime ainsi sur cette question: "Au contraire, la récompense pour no. 636, s'exprime ainsi sur cette question: "Au contraire, la récompense pour impenses utiles n'est due qu'autant et jusqu'à due concurrence de ce que l'héritage propre de l'un des conjoints sur lequel elles ont été faites, se trouve en être plus précieux au temps de la dissolution de la communauté, suivant l'estimation qui doit en être faite par experts." Même auteur, Traité des Donations entre mari et femme, chap. 1, vol. 4, page 304, no. 57, dit: "Sur la demande en revendication, l'héritage doit être délaissé en l'état qu'il se trouve avec ce qui a été uni et qui en fait partie, à la charge néanmoins de rembourser au possesseur les impenses qu'il a faites à l'héritage jusqu'à concurrence de ce qu'il s'en trouve plus précieux." Enfin, le même commentateur, à l'introduction au titre dix de la Communauté, vol. 7, chap. 6, page 186, au no. 121, in fine, après avoir examiné les différentes dettes dont chacun des conjoints peut-être tenu envers la communauté, s'explique comme suit: "Cette reison ne milite tenu envers la communauté, s'explique comme suit: "Cette raison ne milite pas à l'égard des impenses utiles qu'il aurait pu se dispenser de faire : c'est pas à l'egard des impenses utiles qu'il aurait pu se dispenser de faire; c'est pourquoi la récompense pour ces impenses n'est dû que jusqu'à concurrence de ce que l'héritage sur lequel elle a été faite s'en trouve être plus precieux au temps du partage de la communauté." "Au reste, quelque précieux que soit devenu l'héritage, la récompense ne peut jamais être plus que ce qu'il en a coûté à la communauté, suivant le 3me principe du § 1."

A cette opinion dejà si recommandable, se joignent les suivantes : Toullier, vol. 12, page 504, après avoir parlé des différentes espèces d'impenses, ajoute :

"Il y en a donc de deux espèces, comme on le voit; les unes son dues lorsque l'un des conjoints a enrichi la communauté aux dépens de ses biens propres immeubles ou meubles; les autres, lorsqu'il s'est enrichi aux dépens de la commu-

nautè."

Nanette Riez oserait-elle soutenir que la propre de son mari s'est enrichi aux

dépens de la communauté?

On trouve dans le même auteur, vol 13, pages 228 à 241, nos. 166 à 167, le passage suivant: 20. "On conclut encore des distinctions ci-dessus, que les impassage suivant: 20. "On conclut encore des distinctions ci-dessus, que les impenses de la seconde espèce, ou améliorations seulement utiles, qu'on pourrait se passer de faire, mais qui augmentent le prix ou la valeur de l'héritage où elles sont faites, ne sont ni à la charge de la communauté seule, ni à la charge seule du conjoint propriétaire, et qu'elles ne sont dues par ce dernier que jusqua'à concurrence de ce que l'heritage se trouve avoir acquis de plus-value au temps de la dissolution de la communauté par suite des améliorations ou réparations qui y ont été faites pendant sa durée."

Poullier ajoute ensuite qu'un arrêt de la Cour Royale de Bordeaux, du 27 mai, 1827, rapporté par Boyer, tome 2, page 236, a confirmé cette doctrine.

Dalloz, Jurisprudence du Royaume, vol. 10, au mot Contrat de Mariage,

chap lor, sect. ler, art. 2, nos. 52 et 56, page 224, professe la même doctrine. "Les impenses utiles, dit-il, c'est-à-dire celles qu'on pouvait se dispenser de faire sans exposer l'héritage à périr ou se détériorer, mais qui augmentent le prix de l'héritage sur lequel elles sont faites, ne s'évaluent que jusqu'à concurrence de ce dont elles ont, à l'époque de la dissolution de la communanté, augmentent de la communanté de la communan menté la valeur de cet héritage; on ne pout plus dire ici que l'époux propriétaire ait été dans l'alternative d'employer à ces impenses les deniers de la communauté ou les siens propres, car elles n'étaient point indispensables; il aurait pu ne pas les saire. Il ne profite donc pas, comme dans le cas d'impenses né-cessaires de toute la somme sournie par la communauté, il n'en profite que jus-qu'à concurrence de l'augmentation de valeur que son héritage, à la dissolution de la communauté, se trouve avoir éprouvé à raison de ces impenses; ce n'est donc que du montant de cette plus-value qu'il est du récompense."

Paillet, annotateur du Code Napoléon, est de la même opinion sur l'article

La Cour Royale de Paris a, dans un arrêt rapporté au Journal du Palais, vol. 1814, 1815, page 275, Millet v. Millet, sanctionné les mêmes principes, en les étendant, il est vrai, jusqu'aux impenses de luxe, quand l'héritage sur lequel

elles ont été faites en a été enrichi ou amélioré.

Duranton, vol. 14, page 453 à 456, nos. 323 à 324 inclusivement, s'exprîme ainsi: "Au lieu que lorsque la dépense était simplement utile, comme lorsqu'il

DEPAR RIES

a été fuit une rigne d'une torre labourable de l'un des époux, ou qu'un bâtiment a été construit sur le terrain de l'un d'eux, l'époux propriétaire ne deit récompense à la communauté que de ce dont il se trouve réellement plus riche lorsqu'elle se dissout, par conséquent de la plus-value seulement que la dépense a procuré à son fonds; le surplus doit être considéré comme une dépense perdue, une fausse spéculation, qui reste par cela même à la charge de la communauté, encoré que ce soit sur le fonds du mari qu'elle ait été faite."

Cette opinion, qui semble avoir été écrite pour la cause actuelle, a été plusieurs fois corroborée par notre Caur Suprême, dans les affaires Babin y. Nolan.

sieurs fois corroborée par notre Cour Suprême, dans les affaires Babin v. Nolan, 4 Rob. 286. 6 Rob. 514. Waggaman v. Zacharie, 8 Rob. 181.

A cos opinions déjà si respectables, on peut ajouter Merlin, Vo. Améliorations, § 2, vol. 1, pago 364. Même auteur, Vo. Recompense, sect. 1, § 4,

page 242.

Or, en présence des divers textes de loi déjà rappelés, et de la jurisprudence or, en présence de concours comment en l'absence de ce concours et de l'unanimité des commentateurs, comment en l'absence de ce concours qu'il n'y a pas d'augmentation de valeur, qu'il n'y a pas d'améliorations, que le conjoint n'est pas devenu plus riche, peut-on accorder récompense même pour cinq cent plastres? La communauté n'a-t-elle pas d'ailleurs été récompensée cinq cent plastres. La communate à a-t-ene pas d'alleurs et recompensée déjà par les loyers qu'elle a perçus pendant dix ans, par le logement qu'ell a eu sur cette même propriété? Il y a mieux; d'après l'art. 1246, l'inventaire public qui aurait été fait entre les parties, à une époque qui ne serait pas anterieure de plus d'un an à la demande en partage, devra servir de base à ce partage, à moins que l'un des héritiers ne demande une nouvelle estimation, et ne prouve que les biens compris dans cet inventaire n'ont pas été portes à leur juste valeur,

ou à celle qu'ils ont acquise depuis la date de cet acte.

Or, d'après cet article, l'inventaire fait doit servir de base au parlage. Nanette Riez ne conteste pas que l'action en partage n'ait été intentée avant l'ex-piration du terme d'un an, dont parle cet article; ells n'a pas demandé une nou-velle estimation, elle a fait homologuer cet inventaire. Si donc on alloue une récompense à Nanette Riez, on ne prend plus l'inventaire pour base du partage, on viole la loi qui dit que cet inventaire devra servir de base au partage.

Est-il du récompense pour le billet de 1,100 piastres? Pour établir son droit à cette récompense, Nanette Riez se retranche dans le présomption légale; le billet a été payé, dit-elle, neuf mois après mon mariage avec *Phinias Depas*, c'est-à-dire durant l'existence de la communauté. Donc, il l'a été des fonds de la communauté. *Nanette Riez* n'a rien apporté en mariage à son mari, pas un seul meuble; elle n'exerçait aucune industrie, n'avait aucune profession; ce qui ne nous empêche pas de reconnaître qu'elle a dû participer aux bénéfices réels et véritables de la communauté, mais non à ceux qui tent deposer des des la communauté. était en dehors. Le mari est le chef de la communauté, il peut disposer des biens qui la constituent, même pour éteindre ses obligations personnelles. A l'époque de l'échéance du billet de 1,100 piastres, la communauté ne possèdait aucune espèce de propriété, si ce n'est le propre de *Depas* et le fruit de son industrie personnelle d'arrimeur (stevedore.) Si denc à cette époque, la communauté ne possèdait rien, ce n'est pas avec ses fonds que le billet a eté éteint.

Gedge and Rozelius, for the appellant. The defendant is entitled, under the will, to two thirds of the individual estate of the deceased and of his share of with, to two littles of the individual estate of the deceased and of his share of the community property. The will gave her all the disposable portion, and the question therefore is, what could the deceased dispose of by testament? This portion is to be ascertained by art. 1480 of the Civil Code, and not by art. 1745, as the plaintiff contends. Art. 1480 lays down the general rule by which the disposable portion is to be ascertained, and its language is clear and free from ambiguity. If any exception exists to this rule it must be equally clear; an exception to a general and positive law, cannot be created by inference. "All persons may dispose of or receive by donation inter vivos or mortis causa, except such as the law expressly declares incapable." C. C. 1456. If therefore any exception exists incapacitating deft. from receiving the quantum allowed by art. 1480, it must expressly declare it. Is such an exception found in art. 1745? It says, "a man or woman who contracts a second or subsequent marriage, having children by a former one, can give to his wife, &c." This article forms a part of the 9th chap, of the general title of Donations and Testaments, and professes to treat specially "of Donations between married persons, either by marriage contractor during the marriage;" it must therefore be confined to those two cases, and being a limitation or exception to the general rule laid down in art. 1480, cannot be carried further by implication, and as it markets an inventor or the general rule laid down in art. 1480, cannot be earried further by implication; and as it creates an incapacity.

that incapacity must be expressly declared according to art. 1456. This is clearly not a donation by marriage contract; and we have only to accertain whether a testamentary bequest, is a donation during marriage.

Hy our laws all gratuitous dispositions of property are reduced to the two forms of donations inter vivos and testaments (C. C. 1453, 1563); the donation mortis causa being abolished. "A testament is the act of last will, &c." C. C. 1564. Le Nouveau Ferrière, vol. 3, p. 401, says: "Le testament, est une déclàration et une ordonnance solennelle de ce que nous vonlons être exécuté aprés notre mort," "--- qui marque les dernières volontés d'une personne au sujet de ses biens aprés sa mort." "Elle contient une disposition de dernière volontée, qui ne commence par conséquent à avoir effet qu' à près la mort niere volonté, qui ne commence par conséquent à avoir effet qu' àprès la mort du testateur, &c." To the same effect is art. 895, of the Code Nap. Inst. (b. 2, tit. 10, dig. 6, 28, tit. 1,) "Testamentum est voluntatis nostra justa sententia de eo quod quis post mortem suam fieri velit." "Les mots enfin, de 'eo quod quis post mortem suam fieri velit," "Les mots enfin, de 'eo quod quis post mortem suam fieri velit," nons font connaitre que la volonté de l'homme étant ambulatoire jusqu'à sa mort, le testament ne devoit avoir d'effet qu' aprés le décés du testateur. A dater de ce moment, cet acte était considéré comme une loi domestique," D'Esquiron, 7, 200 et rece d'est. vol. 1, p. To the same effect is Grenier, vol. 1, page 396, no. 222, et seq.

A testament therefore has no legal existence until the death of the testator, or, in other words, until the marriage has ceased and been dissolved by that event. Now a donation during marriage evidently means, a donation to have existence and effect during marriage, and must be a donation inter vivos. A donation is a gratuitous disposition of property, and imports, like every other alienation, the transfer of the rights of the donor to the donee, a jus ad rem immediately on its execution, a jus in re immediately on its acceptance. This right is vested irrevocably in donations inter vivos. It is revocable as between husband and wife. "A donation inter vivos, is an act by which the donor divests himself at present and irrevocably of the thing given in favor of the donee who accepts it. C. C. 1454. Code Napoléon, art. 894.

The French commentators draw a marked distinction between Donations and Testaments. Boileux, Com. on the C. N. vol. 1, p. 563 and 564, remarks: "Il existe entre les donations et les testaments des différences essentielles; la donation est un contract, car elle nécessite le conceurs de la volonté du donatour et du donataire; le testament est un acte, car il est l'ouvrage du testateur seul. Le donateur se dépouille actuellement, le testateur ne se dépouille pas; il dispose pour le temps où il n'existera plus. La donation est ivrévocable, le testament peut être révoqué jusqu' au dernier instant de la vie." Vide also Rogron, Com. 441, 442 and 443, and the other authors. By using the terms tes-Rogron, Com. 441, 442 and 445, and the other authors. By using the terms testament, and donation, constantly in contradistinction to each other, both our own and the French law givers have expressed, in the clearest possible manner, the distinction between the two. Both Codes treat especially of "Donations and Testaments," and the testament is never called a donation, but a disposition. How strong is the language of M. Joubert, in presenting the provisions of the French Code: "La distinction des dispositions due to never consist on the constant of the ments et donations à cause de mort ne subsiste plus; on ne reconnait qu'une seule espéce de dispositions de dernière volonté; elles s'appelleront testa-

ents." See Boileux, vol. 1, p. 564. It may be objected that our Code makes use of the term "donation mortis causa," and that a testament is a donation of that kind; but this grows out of a misuse of terms in the text of the Code, when the peculiar sense attached to them has ceased to exist, and been actually abolished by the book itself.

Our law knows but one kind of donation, that inter vives; although it admits

of two methods of gratuitous disposition, the donation and testament—the donation mortis causa has no existence. It is true that arts. 1453 and 1455, and other articles of the Code, make use of the term donation mortis causa, but it is used without definite meaning, or any intention on the part of the legislature to continue or create that species of disposition in the sense and meaning in which it was known to the Roman laws, and merely to designate the difference between the true donation (that inter vivos) and the testament. For the whole title is designated, Of Donations and Testaments; and the chap. 6, treats of Dispositions mortis causa, and art. 1563, sec. 1 of that chapter, says: " no disposition mortis causa shall henceforth be made, otherwise than by last will or testament; all other form is abrogated." A man may call his last will by any

DEPAS

DEPAS RIES.

name he please, but if it be a real testamentary disposition, clothed with all the forms necessary for that act, the law will call it and treat it as a testament, although he may nave termed it a donation mortis causa. Art. 1563. If any thing could be drawn from the previous articles of the Code to create a presumption that the testament was a donation mortis causa, the title of the chapter 6 puts the matter at rest, by professing to treat of Dispositions mortis' causa, when it comes to speak of the testament. We will not quibble at the definition although not strictly correct. The old donation mortis causa, was litterally so, it was always made in prospect or under fear of death or great danger, in contradictinction to the testament which might be made at any time when no such impression was entertained, and was only considered an act of last will; hence the name given to the first, and which was never applied to the latter. The French Code has escaped this inconsistency, and the confusion it may produce to a superficial examiner, by wisely abstaining from the use of a term which could have no meaning, when the thing it represented had ceased to exist in

The difficulties attending the "donation mortis causa" of the old laws, are well known, for time and encroachments had so changed its original and well-marked character, and so nearly assimilated it to the testament, as to produce confusion as to its real nature, or to make it in a measure a substitute for that act. Much of this difficulty grew out of the necessity of acceptance of the donation mortis causa, which, together with its vesting the donee with the just ad rem or in re, gave the act its affinity to the true donation (inter vivos); its revocability gave it its similarity to the testament. It was the object and intention of the compilers of the Code, following those of the Code Napoléon, to abolish forever this ambiguous act, and to reduce all gratuitous dispositions, as they have, to the two forms of donation and testament. Only two forms of donation were ever known, inter vivos and mortis causa. The testament was never called or considered a donation, and we have before shown that it is not so now; and consequently, if the donation mortis causa is abolished, there can only remain the donation inter vivos; and consequently, when the Code treats of "donations between husband and wife during marriage," it has reference to the only donation known to our laws, the donation inter vivos. Unless the wife during research to the only donation to the thing during the presents of the contract the properties. obtain a right in or to the thing during the marriage, there can be no donation to her during that period. Now it is clear that the testament gives no right in presenti, nor could any be claimed or taken under it, during any period of the coverture; for until the death of the testator, it had no effect.

That all gratuitous dispositions are now reduced to the two forms of donation and testament, vid. C. N. art. 893, and Rogron on that art. p. 442. Boileux, idem, vol. 1, p. 563, 564. Grenier, vol. 1, p. 102, et seq. p. 131, &c. Ibid, Traité de Donations, part 3, cap. 4, vol. 2, p. 100 et seq.

The judgment of the court was pronounced by

Rost, J. In this appeal, an action of partition instituted by the only son and heir of a testator against his step mother, who is sole executrix and legates under an universal title, has been, by consent of parties, consolidated with an opposition, made by the plaintiff, to the account of her administration rendered by the executrix.

The consolidated cases present the following questions for our consideration: 1st. To what share of the succession is Nanette Riez, the second wife of the testator, entitled, under a testamentary disposition giving her all that the law permits her husband to dispose of in her favor, either in full property or in usufruct, as she may elect, and dispensing her from giving security in case she should elect the usufruct.

2nd. Could the testator, leaving a forced heir, dispense her from giving security, as he has done?

3rd. What recompense is due to the community for moneys expended during its existence, in useful improvements on a town lot belonging to the testator at the time of his marriage?





4th. Is a recompense due the community for eleven hundred dellars of the price of said lot, paid during the marriage?

5th. Of what property consisted the proper estate of the testator, at the time of his death.

6th. Is the account rendered by the executrix correct, and such as the law requires?

The court below having decided some of those points in favor of each of the parties and against the other, the defendant has appealed, and the plaintiff has asked, in his answer to the appeal, that the judgment be amended as to the points decided against him.

In addition to these consolidated cases, the plaintiff took a rule upon the defendant, to show cause why she should not be dismissed from the office of executrix, for having failed to deposit in bank the moneys of the succession, as required by the 3rd section of the act of 1837. That rule was made absolute, and the defendant appealed. By consent of parties, that appeal comes up in the same record.

I. The first question involved in this controversy was decided by us, in accordance with the view taken of it by the plaintiff's counsel, in the case of the Succession of Hoa, 1 Ann. Rep., 142.

We there held that the testamentary dispositions made by the husband to his wife, when he left children at his death, were governed by art. 1739 of the Louisiana Code, and that the rule laid down in art. 1480 was not intended to apply to donations between married persons. We further held that, the word donations used in art. 1739, was to be understood as embracing testamentary dispositions as well as donations inter vivos. Art. 1739 is not applicable to this controversy, but the interpretation put upon it on that occasion would bring the present case under art. 1745, which provides that a man who contracts a second marriage, having children by a former one, can give to his wife only the least child's portion, and that only as an usufruct, and that, in no case, shall the donation exceed the usufruct of one fifth of the donor's estate.

We have been asked to reconsider that decision, and have been glad to have an opportunity of doing so. The point it determines was never before presented to our courts, and has been considered by many as not free from difficulty. A thorough examination of the context of our Code, and of all the authorities within our reach, bearing at all on the subject, has satisfied us that we had taken at first a correct view of the law.

The error of the defendant's counsel arises from mistaking, as many able men have done before him, definitions for propositions, and arguing upon the supposition that there is in the subject of a definition a fixed idea, other than that contained in its attribute.

Taking the definitions given by the Roman laws, of donations inter vivos and donations mortis causa, as expressive of a fixed idea, independent of the positive enactments in pari materià found in those laws, and testing by the definitions thus understood the meaning of the positive enactments of our Code on the same subject, he has proved conclusively the non-existence of donations mortis causa under our laws. His is nearly the mental process by which Bishop Berkley thought he had proved the invisibility of distance, extension, figure, and magnitude.

Definitions have no meaning beyond that which those who use them intend they should have. When incorporated in a code, they exclusively refer to the DEPAS v. RIEZ. DEPAS o. RIEZ. positive enactments inserted in that code on the subject of which they treat, and have no meaning beyond those enactments.

The intendment of the definitions of the Roman law must be sought in the compilations of Justinian. The meaning of those found in our Code, is to be deduced from that body of laws. It is true that the definition of donations mortis causa, is not in Louisiana what it was in Rome, and that we apply the same name to a different thing; but when it is considered that no two systems of philosophy adopt the same definitions of virtue and of liberty, it will appear neither strange nor unreasonable that the definitions of our legislators should at times differ from those of the Romans. Their definitions of donations mortis causa, is particularly full, pointed and explicit. The very first article on the subject of donations provides that, property may be gratuitously disposed of or acquired, by donations inter vivos or mortis causa, made in the forms established by the Code. Art. 1453. The only forms established or permitted by the Code for donations mortis causa, are testaments.

Art. 1455 defines what our lawgivers consider as donations mortis causa. Every subsequent chapter of the Code on the same subject, recognizes those donations with reference to last wills, and uses as synonymous the words dispositions and donations mortis causa; nay, art. 1563 positively ordains that they shall be considered as synonymous.

"The name given to the act of last will is of no importance, and dispositions may be made by testament under this title, or under that of institution of heir, of legacy, codicil, donation mortis causa, or under any other name indicating the last will, provided that the act be clothed in the forms required for the validity of a testament, and the clauses it contains, or the manner in which it is made, clearly establish that it is a disposition of last will."

It is contended that art. 1745, which we consider as applicable to this case, is found in the chapter of donations between married persons, either by mariage contract or during marriage; that donations made during marriage, must be such as can take effect during marriage; and that, as a testamentary disposition does not take effect till after the marriage is dissolved, such a disposition does not come within the rule.

The difficulty which meets this argument is, that the donation of a child's part, whatever be its form, can have none of the essential requisites of a donation inter vivos; it is revocable at pleasure, and the child's part, which is the thing given, cannot be ascertained before the number of the children, and their shares are fixed by the death of the donor. It is a donation of an uncertain portion of the property which he will leave at his death.

"La donation de ce dont la loi permet de disposer est une véritable donation à cause de mort; car ce n'est qu'au décès du donateur que l'on pourra connaître la consistance d'une pareille donation, qui varie suivant le nombre et la qualité des héritiers, suivant les acquisitions et les dettes qui existeront à cette époque." Dalloz, vol. 5, Dispositions entre-vifs, p. 445. See also 5 Toull., no. 889. Poth., Cont. de Mar. nos. 595, 533, 547, 548. Grenier, Cont. de Mar. no. 684.

So that this argument cannot be carried to its legitimate conclusions, without depriving the husband of the right to make to his second wife a donation of any kind. There cannot be a doubt of the applicability of art. 1745 to testamentary dispositions, and the legacy in this case must be made to comply with its provisions.

The court of the first instance gave judgment in favor of the defendant for

DEPAS v. Riez.

one-fifth of the proper estate of the testator as a usufruct only, and ordered the property of the community to be equally divided between her and the plaintiff. In this we think there is error. Our laws do not justify distinctions founded on the nature or the origin of property. The power vested in the husband to give to his second wife the usufruct of a child's part, not exceeding one-fifth of his succession, extends to all the property of which he may die possessed, whether the same was brought by him into marriage, or subsequently acquired; otherwise the husband who brought nothing into marriage, however rich he might be, could make no donation to his wife. Such is not the intention of the law.

II. Art. 1485 of the Civil Code forbids testators to dispose of the legitimate portion to the prejudice of their descendants, and art. 552, which authorizes them to dispense the usufructuaries from giving security, must be construed with reference to that prohibition. The power to place the property, forming part of the legitimate portion, in the possession of the usufructuary, without such security as will ensure its return at the expiration of the usufruct, would enable testators to evade a regulation of public order. Such a power never can exist. Its existence is denied by the Courts of France, under dispositions of law similar to ours, and the argument upon which their decisions rest, appear to us unanswerable. Dalloz, Dict. de Jurisp. verbo Usufruit, no. 484. Same author, Recueil Périodique, 2de partie, 1826, p. 131. Michel v. Martin, same work, 1833, 2de. partie, p. 188. Soto mayor, v. Guilles. Same work, 1837, 2nde partie, p. 88, Coustard v. His Children. Proudhon, t. 2, no. 824 et seq, 4 Duranton, no. 611.

The court below erred in dispensing the defendant from giving the security required by articles 551 and 552 of the Civil Code.

III. A recompense is due to the community for the value of the useful improvements made during its continuance on the proper estate of the testator; but the distinction attempted to be established by the defendant's counsel between art. 2377 of our Code and art. 1437 of the Napoléon Code, is not perceived by us. The concluding part of the latter article is an explanation, not a limitation, of the first part of it. Both articles lay down the general rule that, a recompense is due the community for the value of the improvements made during marriage on the proper estate of the husband or wife, and the necessary inference from both is that, this value is to be determined, not at the time the improvements were made, but at the dissolution of the marriage. Neither the value of the property at the time of the marriage, nor the actual value of the improvements at the time they were made, are necessary to be taken into consideration. The improvements have benefited the community, by increasing the value and income of the property it has enjoyed to the day of its dissolution; from that day only, have the heirs of the testator profited by them, and the profit can not exceed their value at that time. If they should have cost more than that value, the difference is a bad speculation, a loss of the community, for which no recompense is due. 12 Toull. p. 213. Pothier, Traité de la Comm. vol. 4, no. 636. Same author, Donations entre mari et femme, no. 57. Dalloz, Jurisp. du Roy. Verbo Contrat de mariage. Duranton, vol. 14, pp. 453, 456.

We recognize as proper the rules laid down by the late Supreme Court in the case of *Babin* v. *Nolan*, 4th Robinson, 286, and 6th Robinson, 514, for the purpose of ascertaining the recompense due the community in such cases, and DEPAS O. RIEZ. although those rules have not been strictly pursued in this controversy, the evidence in the record is sufficiently explicit to enable us to do justice.

The mechanic who contracted for and made nearly all the improvements, and the brother of the testator, who knows all the improvements that have been made, proved that they did not cost over \$800. The experts appointed by the judge reported that they were now worth over \$1400, and the witness, Barnett, swears that, without them, the lot in St. Philip street, upon which they were made, would not now be worth, by nearly fifty per cent, what it cost the testator.

Whatever be the present value of the improvements, the recompense due the community for them cannot exceed their cost. See Pothier, de la Communauté, vol. 7, chap. 6, p. 186, et seq.

We infer from the report of the experts and the testimony of *Barnett*, that the improvements gave, at the time of the dissolution of the community, an additional value of \$800 to the lot; this is the maximum of the recompense it can receive.

The assertion that the plaintiff could not disprove the declaration in the will that, the improvements cost \$4,000, requires no answer.

IV. Any legal evidence is admissible to rebut the legal presumption that the note of \$1,100, due seven months after the marriage, was paid out of the community funds. The plaintiff has shown that the defendant brought nothing into marriage, and that she exercised no separate trade or industry of any kind. He has further proved that, at the time of the marriage, the testator had in bank the sum of \$526 25 cents, and that between that time and the maturity of the note, he deposited there \$3,941 25, which, it is contended, could not be profits made at his trade of stevedore in the space of seven months. It would be very unsafe to take the credit side of the bank-book as the measure of the wealth of the testator; but this evidence was probably sufficient to put the defendant upon proof of the manner in which, and the time when, the testator became possessed of those funds, but this has not been attempted. There is, moreover, a circumstance in the cause, which, taken in connexion with that evidence, satisfies us that the note was not paid by the community. The testator describes with minuteness in his will, all the property and credits of the community, and, for the manifest purpose of evading the prohibition of the law, not to impair the legitimate portion of his son, he declares that the community is entitled to a recompense of \$4,000 expended during marriage, in improvements on his proper estate, when, in truth, the sum thus expended did not exceed \$800, and he does not mention the note of \$1,100, as having been paid by the community. We infer from his silence that, it was not.

V. We are of opinion the court erred in considering the \$526 25, which the testator had in bank at the time of his marriage, as forming part of the proper estate left by him at his death. It is shown that most of the sums subsequently deposited by him, were withdrawn almost as soon as deposited, and that what was not so withdrawn, would not have sufficed to pay half of the note of \$1,100. We must presume, therefore, that an amount equal to the deposit, existing at the time of the marriage, was applied to its extinguishment.

The community is entitled to the enjoyment of all the property and effects belonging to the husband at the time of the marriage. Civil Code, art. 2371. We have just held one of the consequences of that legal right to be, that the recompense due the community for improvements made during marriage on the

proper estate of the husband or wife, is not, generally speaking, the whole cost of those improvements, but only their value at the time the community ceased to enjoy them.

DEPAS v. Riez.

The necessary result from this exposition of the law is, that the community owes no recompense for the diminution of value of the effects of the husband or wife, by reason of said enjoyment.

The plaintiff may take out of the community, in the condition in which they were at the death of the testator, the furniture and tools brought by him into marriage, but he is not entitled to be credited for their value, at the time the marriage took place. 'The only proper estate left by the testator, is the house and lot in St. Philip street, valued at \$6,000.

VI. The account filed by the executrix is clearly erroneous. The debts of the community must be paid out of its assets. The property left by the testator, to one undivided share of which she is entitled, is only what will remain after payment of those debts. Whatever portion of the succession is necessary to pay them, belongs to his creditors, not to his heirs or legatees. The account must be amended, so as to charge her with the whole amount of the sums received by her, and also with the rent of the house she occupies, at the rate of \$12 per month, and the hire of the slave Clarissa, at the same rate.

The counsel for the plaintiff alleges that she was not authorized to pay the debts of the succession; but as it is not denied that the debts placed upon the account were due, she must have credit for those she has paid, and account for the balance against her.

The evidence in the record does not show whether or not the property can be divided in kind. In order to ascertain that fact, and to enable the parties to submit to the court of the first instance any questions not settled by this opinion, which may arise in the course of the partition, it is necessary that the cause should be remanded.

It is therefore ordered that, the judgment be reversed, and the case remanded, with directions to the court of the first instance, to cause a partition of the property composing the succession of *Phinias Depas*, to be made between the plaintiff and the defendant according to law, and in conformity with the following rules:

- 1. The lot in St. Philip street, with the improvements thereon, to be considered as the only proper estate of the testator.
- 2. The community to receive a recompense of \$800, for the value of the improvements aforesaid.
- 3. No notice to be taken of the note of \$1,100, given by the testator for the balance of the price of said lot, and paid out of his private funds.
- 4. The account filed by the executrix to be amended, so as to charge her with the sum of \$950 47. This sum, after deducting from it \$807 28, the amount of the debts which, according to the account, she has paid for the succession, will leave against her a balance of \$143 19, for which she must account to the succession, with legal interest from 13th March, 1846, the day of the filing of the opposition to her account.
- 5. A sufficient reserve to be made to satisfy the debts unpaid, and the necessary costs and expenses attending the settlement of the succession.
- 6. Out of the remainder, the defendant to receive one-half of the common property, or of its proceeds, as the case may be; and that, upon giving the security required by arts. 551, 552 of the Civil Code, she further receive one-fifth of

DEPAS v. RIEZ. all the property composing the succession of *Phinias Depas*, or of its proceeds, as the case may be, as a usufruct only.

7. The plaintiff to receive, in full property, the other four-fifths of his father's succession, and the evidence of the securities which the defendant is bound to give.

It is further ordered, that the costs of this appeal be paid by the plaintiff and appellant, in equal portions.

There is no error in the judgment of the court below, dismissing the executrix from office. The 3d sect. of the act of 1837 is imperative, and it is not pretended that she has complied with its requisitions. The allegation that she was dispensed from complying with them by the plaintiff's counsel, is not sustained by evidence. That judgment is, therefore, affirmed, with costs.

MACARTY et al. v. New ORLEANS THEATRE COMPANY.

Where, on an appeal from a judgment perpetuating an injunction staying the execution of a judgment, the record does not state the amount of the judgment enjoined, nor the rate of interest which it bore, no additional interest can be allowed on reversing the judgment below and dissolving the injunction.

APPEAL from the Parish Court of New Orleans, Maurian, J. This case turned upon questions of fact. In delivering their judgment, the court, through SLIDELL, J., say: On the subject of damages for the injunction which the defendants have asked, it is to be observed that the record does not inform us what was the precise amount of the judgment enjoined, nor the rate of interest which it bore, which are indispensable, to enable us to give additional interest. See the case of Smith v. Brownson, 19 La. 313.

Bodin and Pilié, for the plaintiffs. St. Paul, for the appellants.

BEAULIEU et al v. FURST.

A judge can recuse himself, only where the parties would have the right of recusing him.

C. P. 340.

A judge cannot recuse himself on the ground, of one of his relations having an interest in the event of the suit. C. P. 338.

Where an appeal is tried before three judges, the concurrence of two is sufficient to reverse the judgment of the inferior court. Const. art. 68.

A PPEAL from the District Court of the First District, Buchanan, J.

A verdict and judgment having been rendered in this case in favor of the defendant, for \$6,559 87, with interest at five per cent a year, from the 13th October, 1838, till paid, the plaintiffs appealed; and the case having been argued by I. W. Smith and Soulé, for the appellants, and G. B. Duncan, Benjamin and Micou, for the defendant, SLIDELL, J. recused himself, in consequence of the interest of a relation in the event of the suit, when the following opinion of the majority of the court was pronounced by

BEAULIEU v. Furst.

Rost, J. In a small tenement situated on the Metairie road, in the adjoining parish of Jefferson, have dwelt for such a length of time as the memory of man scarcely runs to the contrary, a black woman, at the time the transactions involved in this controversy bear date, over eighty years of age, her two sons and her daughter, all, at this period, much advanced in life. Not one of them can either read or write, and they are remarkable, even among their race, for want of intelligence, and ignorance of the world and its ways. They cultivate, for marketing, a small field of vegetables, out of the proceeds of which they contrive to live. When they lose an ox, they find great difficulty in raising the means necessary to replace it.

On the 28th April, 1837, Le Carpentier, a young man about twenty years of age, and lately arrived from France, came to their house in company with one Emerling, a property broker, and asked them to affix their ordinary marks to some notes made payable in solido, and also to a deed, purporting to be a notarial act before Theodore Seghers, a notary public in and for the city of New Orleans. They did as they were asked. Le Carpentier brought back the act and notes to the office of Seghers, designated to one of the clerks the marks of each of the plaintiffs, and their names were written around them by that clerk, in presence of Le Carpentier. Both signed as witnesses; and the notary, in wanton disregard of his duty and of his oath, authenticated the act as passed before him.

That act is, on the face of it, a conveyance of real estate by the defendant to the plaintiffs, in consideration of the sum of \$13,400, for which it states notes in solido, made payable by the plaintiffs to the order of F. Hazeur, to have been given, and to have been secured by mortgage on the property sold, and also on the homestead of the plaintiffs.

The first note was protested at maturity for non-payment, and the defendant caused the property sold by him to the plaintiffs to be seized under the mortgage. It was adjudicated to a third person for \$7,000.

The second note was also protested at maturity for non-payment, and the defendant obtained against the property of the plaintiffs another order of seizure, which was subsequently converted into an ordinary suit.

The plaintiffs, alleging error, fraud and deception, on the part of the defendant and his agent, and also that the act, under which he claimed, was null and void, because their marks had not been affixed thereto in presence of the notary, or in his office, applied for, and obtained an injunction. They called on the defenddant to answer on oath various interrogatories, which he answered; he further denied all their allegations, and averred the transaction to have been, on his part, fair and unsullied by deception or fraud.

Six juries have been sworn to try that issue. The first four were unable to agree on a verdict; the fifth found a verdict for the defendant. Judgment went in his favor, and, on appeal, it was reversed, and the case remanded on bills of exception. On the last trial, the jury again gave a verdict in favor of the defendant, and the plaintiffs have appealed from the judgment rendered thereon.

We agree fully with the counsel of the defendant that, as a general rule, after two verdicts on an issue of fraud, the court ought not to interfere, unless those verdicts are manifestly contrary to law and evidence; but we must premise that this is a case, in which the arbitration of the jury has not as much weight with us as it would have if the parties to the suit were of equal condition.

BRAULIEU V. FURST. The excellence and safety of jury trials consist in the fact, that the jurors are, or ought to be, the poers and equals of the parties. Juries de medictate lingue, and the frequent resort to special juries originate, to a great extent, in the policy of preserving that equality. In this controversy, the case of the plaintiffs was not tried by their peers and equals, and the fact that, the first verdict gave the defendant a much larger sum than he claimed, and compelled him to enter a remittitur, affords strong evidence that this jury, at least, did not weigh the rights of the plaintiffs with the care required to give authority to their decision. It is our duty to shield the legal rights of the plaintiffs from the prejudices of east; and we deem their dependent condition sufficient to put us upon inquiry, whether impartial justice has been done to them?

The defendant admits that the act under which he claims is not authentic. The plaintiffs, on the other hand, have acknowledged that they affixed their marks to it and to the notes. Does that acknowledgment, taken in connexion with the facts disclosed by the defendant's evidence, prove any thing more than rem ipsam? Does it prove the act—does it establish the fact that the plaintiffs purchased the house and lot from him, and gave him, in payment, their notes, in solido, for \$13,400, secured by mortgage on the property sold, and on their homestead?

Whoever claims the price under a contract of sale must show affirmatively the consent of the purchaser to the contract. If the acknowledgement of the plaintiffs, that they affixed their marks to the act and notes, proves their consent, the defendant should have stopped there, and rested that part of his case upon the written evidence. Had he done so, the naked question of the legal effect of the acknowledgement would have been fairly placed before us. He has seen fit to adopt a different course; he has gone beyond the act, and, by introducing parol evidence, to prove en pais the fact of consent, he has, as it were, dissolved the contract into its original elements. Although a party may object to the introduction of parol evidence to prove the transfer of real estate, if it is admitted without opposition, it is binding upon him; a fortieri, is it binding upon the party who himself introduces it.

Emerling and Le Carpentier were the only persons present when the plaintiffs made their marks. Le Carpentier read the documents to them, and Emerling swears that there was no explanation given them, but by him. His testimony is as follows: He explained the act to them, and they appeared to understand it very well. It does not appear that he mentioned the object of the notes to them. Cross-examined, he says, he asked them if they understood, and knew what they were about. They all answered distinctly that they did. He is a German, has been in Louisiana seven or eight years, speaks French well enough to make himself understood, and spoke to the plaintiffs in that language.

The first objection to this evidence is, that the plaintiffs speak no language save the creole patois, which is not, that we are aware, taught in German universities.

Several witnesses gave it as their opinion that *Emerling* could not have made himself intelligible to them, and that it is impossible he could have made them understand what a mortgage was; and, by-the-by, he is the only witness who testifies that they consented to the mortgage under which the defendant now claims. The testimony of A. S. Lewis, the officer of the court who went to their house to get them to sign the affidavit and the injunction bond in this case, satisfies us that no faith is to be given to that of *Emerling*. This witness en-





deavored three, or four, different times to explain to them the purport of the cath and of the bond, and doubts whether they understood him then. He spoke the creole patois to them, and could not get them to understand French. They appeared to him as ignorant as they could well be, and there was no pretention of ignorance about them. Two other persons, there present, had to assist him in his explanations.

BRAULIEU V. FURST.

Emerling had the property for sale for the defendant as his broker, and received two per cent commission, for the sale of it to the plaintiffs. He has shown himself not over scrupulous, and we have no reason to doubt that he has placed the defendant's rights in the most favorable light, consistent with such a regard for truth as may fit the standard of his morality; but it appears to us that his knowledge of the language of the plaintiffs and of the laws of Louisiana, was inadequate to the task he undertook to perform; and the facts disclosed by his evidence induce the belief that, if it had not been, he would not have cared to teach the plaintiffs what a mortgage was, and in how short a time it could divest them of their home, but would have been content to make up a plausible story and secure his commission.

While acting as broker for the defendant, he made with the plaintiffs a secret bargain, by which he was to receive two per cent commission from them to betray his employer. After the purchase he took possession of the property, worth a rent of \$40 per month, without any authorization from the plaintiffs, and kept it one year to pay himself a commission of two per cent on \$13,200. Subsequently he called upon the plaintiffs, and, instead of accounting to them, insisted upon being paid his commission a second time. No other witness, save Le Carpentier, knows any thing about the sale and mortgage. The fact that the plaintiffs were decoyed by a brace of swindlers to go and visit the house, cannot surely be taken as proof of the subsequent purchase; and the other fact, that they appeared to those who occupied the house not more stupid than negroes generally are, cannot stand in opposition to the testimony of the officer of the court, who, in discharge of his duty, had to test their intelligence.

Had the notary himself been present, and had he testified in the cause as Emerling has done, the trust reposed in him by law in matters of that kind, would have rendered his evidence sufficient.

It may be that the only object of the defendant in introducing the evidence of *Emerling*, was to disprove fraud; but if it discloses a state of facts inconsistent with the hypothesis of consent on the part of the plaintiffs, one of the essential requisites of the contract is wanting, and the mechanical operation of holding the pen while the marks were being made, cannot supply it. It is said that parties affixing their ordinary marks to an act are bound to know, and must be presumed to have known, the contents of it; but we are of opinion that this presumption is not juris et de jure, and that it does not exist where the party claiming adversely to them under the act, shows that they had not the means of knowledge.

We believe that the jury did not take this view of the case, and that, being satisfied that the defendant himself had not committed the fraud alleged against him, they considered themselves bound to decide in his favor. They probably overlooked the fact that, through the acts or omissions of his agent, the sale-might be void for want of consent, although no moral guilt could attach to him-

The inference that the price bargained for was not exorbitant at the time, drawn from the fact that some months previous to the sule, a bid of over \$12,000

BEAULIEU V. FURST. was offered at public auction for the property, was well calculated to mislead the jury. The sudden change which took place in the value and availability of real cetate in the months of March and April of that year, is an historical fact which does not appear to have been noticed. The ignorance and seclusion of the plaintiffs provented their being apprized of the change, and they were probably the only persons living, having any thing to lose, who could have been induced to make the purchase at that time. The fact that they did make it, must, therefore, be placed beyond the reach of doubt. With men as well informed as the defendant, the operation would have been all fair; but we are not prepared to say that it was so, with a superanuated negro woman, brought into the vortex of speculation at that late hour by the arts of such men as Hazeur and Emerling.

The defendant is not shown to have had any participation in bringing about the sale, but the acts of *Emerling* accrued to his benefit.

If the mother were the only party to the contract, the court would have no hositation in remanding the cause. The fact that her sons and her daughter are bound in solido with her, and would be deprived by the judgment of the means of supporting her, does not the less entitle her to relief.

After a long, patient and thorough investigation of this cause, a majority of the court have come to the conclusion that justice requires that it should be remanded, and submitted to another jury.

It is therefore ordered, that the judgment be reversed, and the case remanded to be proceeded in according to law; the defendant and appellee paying the costs of this appeal.

EUSTIS, C. J., dissenting. A very thorough consideration of this case has not embled me to concur with my brethren in the disposition they have made of it. Our difference of opinion relates, I believe, only to matters of fact. I am not aware of any naked question of law which is presented for our determination, concerning which we do not concur. The case turns exclusively on the facts, according to my view of it. Were there any such questions of law, which the court could examine, independent and separate from the facts, and it should be in favor of the plaintiffs, they certainly should have the benefit of it, for I never could consent to surrender the decision of questions of law to a jury.

The point which, it appears, presents the principle obstacle to the affirmance of the judgment, is the want of consent of the Beaulieus to the contract of sale, which is sought to be enforced by Furst; and this defect of consent seems to rest on the want of credibility of a witness, and on their gross ignorance and want of intelligence.

On this subject, I consider that the defendant, Furst, has the verdict of two juries, under evidence which was contradictory, and which it was peculiarly their province to weigh and determine.

In a case of this kind, involving the reputation of a party, the credibility of a witness, and questions of fact resting on contradictory evidence, I do not feel myself at liberty, in the exercise of a sound legal discretion, to set aside this second verdict, which the defondant has had in his favor. A much stronger case than this ought to be made out, before the court would be authorized, in my judgment, to set aside the verdict. I, therefore, dissent from the opinion of the court.

Funer.

The day after these opinions were read, the counsel for the defandant, on motion, obtained an order of court for the appellants to show cause why the decree reversing the judgment of the lower court should not be set uside, and one affirming the judgment be rendered in its place, on the ground that the conatitution of the State orders the judgment of the court below to be affirmed in all cases tried before the four judges of the Supreme Court, unless three of the judges unite in reversing it.

G. B. Duncan, Benjamin and Micou, argued that the judgment of the court below must be affirmed.

Soulé, contrà. The rule taken by the appellee, and the argument at the bar, imply: 1st. That under the present organization of the court, unless three judges should assent to a decree of reversal, the judgment appealed from is to be affirmed. 2nd. That it is not lawful for any judge to recuse himself after hearing a case, and that his abstaining from all participation in the judgment rendered, amounts to an agreement with the minority of the court, and is to be

construed accordingly. 3rd. That the parties litigant have a right to inquire into the motives which may have induced the judge to recuse himself.

From such premises only can be inferred the broad principle assumed by the appellee in the rule, that, as the four judges were present at the hearing of the case, they must be considered as having participated in the decree rendered. dered; and that, therefore, as but two judges were for the reversal of the judgment appealed from, the same ought to be affirmed. The appellee has quoted, in support of his pretensions, article 68 of title 4 of the constitution, and articles 338 and 346 of the Louisiana Code of Practice. The appellants

submit, in answer, the following brief remarks:

I. By the article quoted from the constitution, no decree of an inferior court can be affirmed on the appeal, unless it actually meets with the assenting opinion of at least two judges. Two, when they are equally divided; two, when there is but a quorum of the court. A majority of the four judges constitute a quorum (title 4, art. 64, Const.), and when they are a quorum, they possess the full constitutional authority vested in the court; and this must be based on the presumption that the judge absent or recused would, if present or not recused, have joined the majority; otherwise, the recognition of sufficient power in three of them to act for the whole court would constitute a glaring inconsistency, and defeat the very principle which provides that an equal division of the judges shall enure to the benefit of the party having the judgment of the court of original jurisdiction.

II. That judges may recuse themselves, is not denied, and, indeed, one of the articles quoted from the Code of Practice provides, "that the judge may recuse himself in such cases, where the parties themselves would have the right of recusing him." But it seems to be the opinion of the counsel for the appellee, that this recusation cannot take effect after the hearing of the case, nor without the parties having the opportunity of testing the correctness of the ground upon which it may be founded. Judges, in England, have considered not only that they were at liberty to abstain from giving an opinion after hearing the case, but that they might even participate in the form of the judgment, without at all joining in the opinion of the other judges. In the case of Tatham v. Wright, which had been heard before the Lord Chancellor, assisted by the Lord Chief Justice and the Lord Chief Baron, the Lord Chancellor said:

That he had given no opinion, and should give none; that the judgment was in form his, in substance that of the other learned judges; his former position in form his, in substance that of the other learned judges; his former position as counsel in the case, precluded him from giving any opinion as to its merits." Legal Observer, London, vol. 2, pages 317, 318. But the rule of law which prevails here, being derived from the French Code of Practice, it may not be improper to test its bearing with the French authorities, and to ascertain how in the French tribunals it was formerly understood, and is still now applied. The royal ordinance of 1667, after stating the cases in which judges may be recused by the parties, has this provision: "The judge who is aware of the existence in himself of sufficient cause of recusation, shall recuse himself, without awaiting that he be recused by others." Art. 17. And the article 380 of the French Code of Practice also provides, "that any judge who may be aware of the existence in himself of some cause of recusation, is bound to declare it, of the existence in himself of some cause of recusation, is bound to declare it,

Braulieu Funst. in order that it may be decided whether or not he shall abstain." Under the rule laid down in 1667, it had been contended by some that the recusation, when coming from the judge himself, was to be acted upon by decree and confirmed. Indeed there was an express provision to that effect in article 24 of the ordinance; but, says Favart de Langlade, vol. 4, page 765: "L'ordonance ne s'observait pas à la rigeur dans le ressort de plusieurs parlements, et nombre de juges se déportent aujourd'hui sans qu'une décision de la Chambre ordonne qu'ils s'abstiendront." As to the time when the judge was to abstain, or to recuse himself, the same author adds; "La loi ne fixe pas le temps dans lequel le juge qui reconnaît cause de recusation en sa personne est tenu d'en faire la declaration." Ibid. Nor is any time fixed by the article quoted from our own Code of Practice.

The very point in controversy was brought, in 1832, before the Court of Cassation, under the authority of article 380 of the French Code de Procedure, which is so much more restrictive than our own, and the court held: "that in the case of a judge recusing himself, the question was one of discipline, cognizable only by his colleagues, involving no contradictory proceedings, no debate, arising from the spontaneous declaration of the judge that there exist legitimate reasons why he should abstain, and requiring neither decree nor process-verbal, but a mere mention of the motives that induce him to abstain." See the opinion at length in the Journal du Palais of Ledru Rollin, vol. 24, years 1831,

1832, page 1126.

The appellants maintain: 1st. That a judge may abstain in all cases for reasons which might justify parties in recusing him, and this at all times before judgment. 2nd. That such a recusation is only cognzable by the court in chambers, and need not be preceded by decree, debate, nor proces-verbal. 3rd. That the exercise of judicial authority manifests itself only in the opinions and decrees delivered by the judges, and not in the part which they may have taken in the hearing of the case. 4th. That there is nothing so sucramental in the hearing of a case as should preclude a judge who has participated in it from recusing himself afterwards, if he should discover that there is sufficient reason for doing so. 5th. That the constitution, when determining the number of judges necessary to form a decree, does not compute the judges present at the hearing of a case, but those giving an opinion in the case. Art. 68, tit. 4. 6th. That in the present case but three judges participated in the decision. They formed a quorum. They could not force the fourth to join them in their deliberations. They were bound to dispose of the case. They did dispose of the case. Their decree ought to be maintained, and the rule dismissed.

1. W. Smith, on the same side.

An application for a re-hearing was also presented in this case by the counsel for the defendant.

The opinion of the court on the rule and on the application for a re-hearing, was pronounced by

SLIPELL, J. When the decision of this case was under deliberation, a member of this court, believing that one of his relatives, not however a party to the cause, was indirectly interested in the event of the suit, declined to participate in the decision.

A consideration of the constitution and of articles 338 and 340 of the Code of Practice, and a conference with his brethren, have satisfied the mind of that judge that, he had not the strict legal right to decline giving an opinion in this case. The defendant's counsel having invoked the strict legal rule, we have therefore concluded that, under the circumstances, the whole bench should participate in the decision of this cause.

But while we thus yield obedience to the rigid provisions of the Code, we must, at the same time, take occasion to observe that, when circumstances not strictly within the textual provisions of the Code of Practice, render it disagreeable to a judge to take part in the decision of a case, and there it a quorum of the court without him, we do not believe the general interests of justice would be, in all cases, promoted by the subjection of a right of conscience to a mere

arbitrary rule. It seems to us that a judge's scruples, and the propriety of his joining in the decision of a case, should be left, without discussion at bar, to the consideration of himself and his brethren. Such a course it is desirable that the bench should be left to pursue, and such also appears to us to be the interest and duty of the bar, who are not the mere representatives of their clients, but are also, as was well said by a learned judge, "ministers of justice acting in aid of the courts."

It being the opinion of the court that the defendant, Furst, was, under the circumstances, legally entitled to a decision of this cause by a full bench; and it being also the opinion of the court that he is not, under the constitution, entitled to the specific relief prayed for by his motion, it is therefore ordered that a re-hearing be granted; and it is further ordered that the rule taken by Furst be dismissed.

BEAULIEU V. FURST.

SAME CASE-ON A RE-HEARING.

Judgment below affirmed, the judges being equally divided.

ON the re-hearing of this case, the judges being equally divided in opinion, separate opinions were given.

EUSTIS, C. J., for the reasons assigned in the dissenting opinion pronounced by him on the first hearing, was of opinion that the judgment below should be affirmed.

Rost, J. persisted in the opinion just pronounced by him, adding :

The appellate jurisdiction of this court extends to facts as well as law; it is our duty, therefore, to preserve the purity of the sources from which the knowledge of facts is derived, and this case requires our action in that behalf.

The main witness introduced by the defendant to disprove fraud, has shown himself to be corrupt and unworthy of belief. His testimony taken at different times, is contradictory and inconsistent with that of other witnesses of known good character. The deplorable fact that two verdicts have been rendered in conformity with it, increases the enormity of the offence, but cannot legalize it.

It is nothing to me that the jury may have thought differently of this witness. In passing upon testimony of any kind, I claim the right of private judgment. I will not receive as true, on the faith of others, evidence which I firmly believe to be false.

I admit that I do not know what influence it had upon the jury, nor that the verdict would not have been the same without it; but it is sufficient for the position I take, that it was heard in the trial of the cause, and that it soils now the records of the court.

We have heretefore met all such exhibitions of depravity, in a manner that makes it the interest of parties litigant to avoid having recourse to them. I consider the decree about to be rendered as an unfortunate deviation from that salutary and fruit-bearing course.

I am of opinion that the judgment ought to be reversed, and the case remanded for further proceedings.

King, J. After a careful consideration of the evidence in this cause, I have been unable to convince myself that it supports the verdict of the jury. The difficulties of the case grow out of questions of fact, depending on the weight of testimony and credibility of witnesses. In such cases great respect is due to

BRAULIEU V. FURST. the verdicts of juries. Their decisions, however, on matters of fact as well as of law, have been expressly subjected to revision; and, in the exercise of that jurisdiction imposed on this court, cases most occasionally present themselves in which the mind refuses its assent to the conclusions at which juries may have arrived.

In such cases, there can be no hesitatation between duty and the deference due to the findings of juries.

The facts and reasons which repel the conclusion that the plaintiffs assented to the sale, or were aware that they were becoming purchasers, have been so fully stated in the opinion read by the judge (Rost) with whom I concur, that it is unnecessary again to repeat them.

I think that the judgment of the inferior court ought to be reversed, and the cause remanded for further proceedings.

SLIDELL, J. This case has already been before the Supreme Court, and was remanded for a new trial. The report is in 3d Robinson, page 345; the pleadings are there stated.

The act of sale was manifestly not an authentic act, and this the counsel of Furst concedes. Can it avail as an act under private signature?

This act was not signed by the plaintiffs; not knowing how to write, they affixed their marks. It is said that a sale of immovables cannot be thus made; that the Code recognizes the substitution of a mark for a signature only in acts passed before a notary and two witnesses; that an act not notarial requires the signature of the party. Upon the general question, I express no opinion. But in this case the parties, under outh, in their petition for an injunction of the judicial sale, and in which also they pray that this act of sale and mortgage may be rescinded and cancelled as null and void, have acknowledged that they did affix their marks to this act, and to the notes held by Furst. The will of a party is manifested by affixing a mark, as well as by signing his name. The argument upon the impolicy of binding the rights of the ignorant, upon proof by witnessses, that the ignorant party affixed his mark, fails in a case where the party himself solemnly, in a judicial proceeding, acknowledges the mark. A mark wants the individualizing characteristics of a signature, and perjury has a wider and safer scope in the one case than in the other; but there can be no vestige of doubt of the genuineness of the mark, when the party himself judicially and under oath acknowledges it.

This brings us then to the true enquiry in this cause. Has the fraud alleged by the plaintiffs been committed? The allegation in their petition is, "that the act of mortgage, and the notes or note on which said order of seizure and sale has been granted, are absolutely null and void, and cannot be legally enforced against your petitioners or their said property, but the same ought to be rescinded, cancelled and annulled, because the mortgage and notes have been obtained from your petitioners by the fraud, artifice and deception of Facre Hazeur, a free man of color, acting as agent, and at the instance, of said Furst." Again, going into more minute detail, they say: "The said acts and notes are void, because your petitioners were led into error by said Hazeur as to the nature of the said contract, the said Favre Hazeur acting as agent of said Furst, and, by and with his knowledge and consent, as your petitioners are informed and verily believe, persuaded your petitioners that said Furst, or some one else, was buying their said tract of land at the price of \$60,000, or at a very large price, and that said act of mortgage was their act of sale of their said tract, and not as \$\frac{1}{2}\$

really is, an act of purchase and mortgage on their part. Your petitioners are BEAULIEU ignorant and unfortunate persons, not knowing how to read or write; said acts and said notes were never read nor explained to them, nor understood by them; they were constantly told by said Hazeur, agent of said Furst, that they were selling, at an immense price, their said tract of land, and that they must sign said act and said notes, to complete their sale, and realize an enormous fortune, all of which they believed."

So in their first petition they say "they did affix their marks to said papers, through error." &c.

The question then is, not whether the plaintiffs executed this act and these notes, but whether the fraud alleged has been practised, whereby they, believing themselves sellers, are in reality purchasers and mortgagors?

The duty of the court, in this case, is not free from difficulty. If I had not before me the verdicts of two juries, by which twenty four citizens have, under oath, unanimously declared that this alleged fraud has not been committed, I might, perhaps, have yielded to the views of two of my brethren, for whose opinions I entertain a very great respect, and have consented to the remanding of this cause for a new trial. But great consideration is due to those verdicts. This cause, as stated by the Chief Justice, turns mainly on questions of fact; and it has been the settled jurisprudence of the Supreme Court of this State, since its earliest existence, not to disturb the verdict of a jury in cases of frand, unless manifestly erroneous.

Here are two verdicts in favor of Furst. The previous verdict was disturbed by our predecessors upon a purely technical ground, to wit, that the plaintiffs in injunction had the right of opening and closing the cause before the jury, and that the district judge had deprived them of that right. Both these verdicts were, on motions for new trials, approved by the district judge. To the opinion of the district judge, twice expressed, is added the opinion of the Chief Justice.

It is said, by two of my brethren, that the plaintiffs have not had a trial before their peers, and that it is the duty of the court to shield them from the prejudices of caste. We must take the law of jury trial as we find it. If this cause be sent back, it will be tried again by a jury of white men; and if the argument be a sound one, a new reversal should follow for the same reason. If it can be said that, under our social organization and the provisions of our laws, the trial by jury between the white and colored man is unequal, and the latter must seek protection from the judiciary, it must be remembered, in this case, that the inequality is of the plaintiffs' own seeking, and that the protection was not originally invoked. The prayer for a jury came from themselves; the jury was the tribunal of their own choice,

I must also observe that, in cases involving such questions of fact as are presented in this cause, there is much to sustain the rule of our jurisprudence, which I have already referred to as consecrated by a long series of decisions.

While judges, from the nature of their vocation, are isolated from the everyday walks of life, jurymen, on the contrary, are constantly moving in them. Dealing with the world, and not with books, they are better qualified to appreciate the motives, characters and conduct of their fellow citizens, and have a more practical conception of the bearing of facts. Moreover, jurymen confront the witnesses, and have a better opportunity of estimating their intelligence, their fairness, and the general weight of their evidence. The tone,

Beautitu Fuer. manners and appearance of a witness, his candour, or his reserve, his promptness or his hesitancy, his calmbess or his excitement, these, and other circumstances, are matters that, from their nature, are not susceptible of being inscribed upon the record. It comes before us a cold and inunimate transcript of the mere words that were uttered, and these often inaccurately or ambiguously preserved.

I would not voluntarily abandon our power to reverse the verdict of a jury on a question of fraud; but I hold such a verdict to be entitled to great deference, and not be set aside except for manifest error.*

Such considerations, accompanied by a careful examination of the testimony adduced in this protracted litigation, have induced me, so far as my opinion is concerned, to leave the judgment of the court below undisturbed. It is proper, however, that in doing so, I should briefly refer to some of the prominent facts, which, coupled with the verdicts of the two juries, have led my mind to this conclusion.

First himself stands before us unsulfied by frand. I do not understand the plaintiffs' counsel as imputing it to him. The plaintiffs, by full interrogatories, have appealed to his conscience. He unequivocally denies the charge of fraud, and declares that Hazeur, by whom they allege that they were deceived, was not his agent, but their own; that if any fraud has been practised, it was not by himself, nor by his sanction. I find nothing in the testimony of the other witnesses to impeach the good faith of Furst, or contradict his answers under onth.

To Hazzur also the plaintiffs propounded interrogatories. In his answers under eath he denies the fraud imputed to him, declares that he acted for the plaintiffs, that he endorsed the notes at their request, that they must have known that they were buying Furst's property, since they visited the ground before the completion of the sale, and conversed with him about the sale; that he also believes that they were aware of their mortgaging their property to Fust, that he never attempted to impose upon them, but was their friend, and endeavored to obtain the property for them at as low a price as he could.

It is evident, from other testimony, that *Hazeur* was the confidential adviser and intimate friend of the plaintiffs. He was their agent for the sale of their lands, as is shown by a written instrument executed by them. He is their endorser on their notes.

Furst did not bargain for a price, exorbitant at the time. The price, thirteen thousand four hundred dollars, on a credit, was a fair price at the then rates. We find that in June, 1839, after the effects of the great monetary crisis had matured, it was estimated by judicial appraisers at a cash value of ten thousand dollars. The improvements put upon the property by Furst's vendor, and which were quite new when Furst bought, having been built in 1835, cost aix thousanddollars. This sale was made in the month of April, 1837. In March, 1837, Furst offered the property at auction, at a limit of fifteen thousand dollars; he obtained, but rejected, a bid of thirteen thousand and some hundred dollars, on terms of credit not materially more favorable to purchasers than in the sale to plaintiffs.

These remarks, with regard to juries, will not be considered as made generally. There are many classes of cases which seem to me very unsuitable for the consideration of juries, and in which their intervention is rather an impediment, than an aid, to the administration of justice. Note by SLIDELL, J.

FURST.

At this offering, at public auction, some of the plaintiffs attended to bid upon it. The veracity of the witness who asserts this is questioned, but it derives strong confirmation from the testimony of Manuel Fleitas, a witness whose veracity was neither impeached at the trial, nor questioned in the argument. The witness makes the following statement: "He sold the property to Furst. He saw Bernard, one of the plaintiffs, and one of the women now in court, and probably another woman, on the property visiting it. They went through the house. Witness was yet living in the house when they came there. They told witness they heard the property was for sale, and asked if there was any objection to their visiting it. Witness took them all over the house, and they examined it with care, and seemed to be well pleased. They also went out in the yard, and afterwards came back through the house. This was sometime between the last of January and the last of April. From all that witness saw of them, he did not see that they were so very ignorant; they seemed to be persons intelligent for their walk of life." That the premises were visited by some of the plaintiffs, is also shown by other testimony.

The marks of these purchasers were affixed to the acts and notes, in the presence of two witnesses. Both declared that the plaintiffs understood what they were doing. The veracity of one of these witnesses I did not understand as being impeached; but it was said he was inexperienced. He was a clerk in the notary's office, and was about twenty years of age.

The plaintiffs have executed other acts, both of sale and of mortgage, and have executed other notes.

The answers of some of them, when the notes were notarially presented to them at maturity for payment, negatived the idea that they were ignorant of the execution of the notes.

Several witnesses say the plaintiffs were very ignorant, and that one of them had arrived at an extreme old age. Were she the only purchaser, I might hesitate to affirm the judgment. But the others possessed their faculties, and are stated by some of the witnesses to be shrewd and cautious, and as intelligent as persons usually are in their walk of life Some of them were present in court and were seen by the jurymen. The question is, were they so ignorant as to believe they were selling, when in reality they were buying. The burden is clearly on them. By their own admission, they acknowledge they were making a contract of some kind. The power of attorney to Hazeur, executed in February, 1837, was offered by plaintiffs to corroborate their alleged error. This power authorized him to sell their land for forty thousand dollars; twenty thousand dollars cash, and twenty thousand dollars in notes at one and two years, bearing mortgage. If they thought that what they signed was the contemplated sale, how was it that this large cash speawas not told down to them, and that instead of receiving notes, they gave them. Such a degree of ignorance is conceivable; but what the plaintiffs ask us to believe passes the boundaries of the probable, and verges upon the incredible. Such, at least, was the unanimous opinion of twenty-four jurymen, and of the judge of the District Court, before whom this case was tried six times.

I cannot, however, close this examination of the facts of the case, without joining my colleagues in the deserved rebuke of the conduct of the notary, who, under his hand and seal of office, has declared that these persons appeared pernally before him at his bureau in New Orleans, in the presence of the subscri-

BEAULIEU V. FURST. ing witnesses, when in reality the act was executed in the parish of Jefferson, out of his presence, and in presence of only one of the subscribing witnesses. The office of notary is one of great trust and high responsibility. In the discharge of his official duties he should consider himself the especial guardian of the illiterate and humble, to read and explain to them the effects of what they sign, and to protect them against the superior intelligence of the educated, and the artifices of the designing. His official duty was grossly neglected in the present case.

It remains to notice briefly some points of law presented by the plaintiffs.

It is said there was no delivery of possession; but the act acknowledges possession, and, as between the parties, such acknowledgment is binding. Civil Code, arts. 2417, 2239.

It is said that the verdict rendered in favor of Furst was irregular, because there was no claim in reconvention upon which to found it. This cause was tried, and a judgment rendered previously. It was evidently considered, at the former hearing before the Supreme Court, that Furst's reconventional demand was still pending. See 3 Robinson, 347. The multifarious pleadings with which the record is crowded have been treated by the parties as consolidated, and were properly so considered by the court below.

The objection of a want of parties by reason of the death of M. J. Beaulieu, does not appear to me tenable. There was no action to make new parties by the plaintiffs, themselves the forced heirs of their mother, and she an usufructuary under the father's will. So far as Furst's claim was concerned, he surviving parties were bound to him in solido upon the notes, and against those who were in court, a verdict was properly rendered for the amount of their indebtedness.

The certificate of the parish judge of Jessen, accompanying a copy of the will of Joseph Beaulieu, does not set forth the probate proceedings; but the defect is supplied by a recitation in the act of sale, in which the will is announced as the the title of plaintiss, and is declared to have been duly probated in the Probate Court of that parish.

In conclusion, I must remark, that in this case, the plaintiffs have had the benefit of six trials, and of the services of counsel of great eminence. While no jury has ever found for them, two have found against them. The costs and other expenses of this litigation must have been enormous, and it has occupied over and over again the time of jurymen and judges, during a harassing litigation of more than eight years. It is time this contest should close. Interest reipublicat at sit finis litium.

In my opinion, the judgment of the court below should be affirmed with costs.

Forasmuch as, upon the question of the affirmance or reversal of the judgment upon which the appeal in this cause is taken, the judges of this court are equally divided in opinion, in obedience to the 68th article of the constitution the said judgment stands affimed, the appellants paying the costs of this appeal.

FLEURY v. MURPHY.

A judge must, in all cases, assign the reasons on which his judgment is founded, or it will be null; but the omission to refer to the particular law in virtue of which it is rendered, will not render it null. Const. art. 70.

A PPEAL from the Second District Court of New Orleans, Canon, J. Biron, for the appellant. Redmond and Budd, for the defendant.

The judgment of the court was pronouced by

King, J. The plaintiff has instituted this action to recover the possession of a lot of ground of which he is the owner, and of which he alleges that the defendant, Murphy, has taken and holds illegal possession. He further claims \$500 damages for the alleged wrongful acts of the defendant. The plaintiff's claim was rejected in the court below, and he has appealed.

The principal question presented is one of fact, whether or not the plaintiff leased the lot in controversy to the defendant. One of the witnesses, whose credibility is not impeached, and whose testimony is uncontradicted, expressly declares, that he was present when the parties were treating in relation to the lease, and that the plaintiff verbally let the premises to the defendant at a monthly rent of \$5, and agreed that the lease should continue as long as he remained the owner of the property. Two other witnesses, both tennants of the plaintiff, say that on the day on which the contract is stated to have been made, the plaintiff called on them, expressed his desire to lease the ground to the defendant, and asked their assent to this disposition of it, as its occupation by the defendant might incommode them. Their assent was given. These circumstances strongly coroborate the testimony of the witness, who declares that the contract was positively entered into. A few hours after the agreement for the lease, the plaintiff held a second conversation with the defendant, at the conclusion of which he was asked by one of the witnesses, what was the result? He replied, "Il n'y a rien de fait"; and his subsequent conduct shows that he considered himself at liberty to recede from his engagement, and that he had put an end to the contract, by this early notice of his intention to do so. The defendant, however, insisted on earrying it into effect, and there is no evidence of his consent that it should be rescinded.

There appears to us but slight conflict, if any, between the testimony of Massé and Ames, the witnesses principally relied on by the parties respectively. A conflict could only arise on the supposition that their testimony related to one and the same conversation; whereas the latter details the first conversation, which resulted in a contract, and the former the second conversation, at the conclusion of which he was informed by the plaintiff, that no agreement had been made.

It has been urged that Fleury understood the English so imperfectly, as not to be able to enter into a contract in that language. It is shown, however, that he has made other contracts of lease through the medium of the English, and that Murphy speaks the French. The contract having been entered into, the plaintiff could only dissolve it for a legal cause, and none such has been shown.

It is contended that the judgment appealed from is null, because the judge

FLEURY V. MURPHY. has failed to cite the particular law in virtue of which it was rendered, in violation, as it is urged, of the 70th article of the constitution.

This article is a literal copy of sec. 12, art. 12 of the constitution of 1812, under which it has been repeatedly held that the judge must, in all cases, assign the reasons for his judgment, otherwise it will be null, but that he is not compelled to cite the particular law on which his decision is founded; for, however familiar he may be with the legal principle on which he pronounces, it may be impossible, at the time, to refer to the particular chapter or page at which it is to be found. 3 Mart. N. S. 154. 10 Mart. 162. 4 Mart. 463. 12 La. 144.

The judge has, in the present instance, given the reasons for his judgment at length, and, under the authority of numerous adjudicated cases, has satisfied the constitutional requisition.

Judgment affirmed.

DENTON v. WILLCOX et al.

The purchase of a judgment, from which no appeal can be taken, and which is not subject to be annulled, is not the purchase of a litigious right. The purchase of such a judgment by an attorney at law is not prohibited by art. 2422 of the Civil Code.

Where the parties to an agreement entered into it for the purpose of defrauding their creditors, neither party can maintain any action on it.

A PPEAL from the Commercial Court of New Orleans, Watts, J.

Benjamin and Micou, for the plaintiff. Wilde, for the appellant, Vason.

The judgment of the court was pronounced by

Eustis, C. J. This controversy grew out of an agreement between the plaintiff and J. Willcox, one of the defendants, of which the following is a copy.

"Whereas difficulties and embarrassments exist between G. W. Denton and Jacob Willcox, arising from their business in New Orleans, under the commercial firm of Willcox & Fearn, and from the obligations and endorsements of said Denton for said Willcox, as one of the firm of Willcox, Anderson & Co., and which difficulties the parties have mutually agreed on terms for adjustment of, to wit:- The said Denton, on his part, has agreed that, in consideration of the said Willcox obtaining his release on all the judgment claims held by the Bank of the United States against him, and which are believed to consist of the following, viz: one for the sum of thirty-eight thousand and thirty-three dollars and fifty conts; one for the sum of four thousand four hundred and eightyseven dollars and thirty-nine cents-both with interest from maturity of the different obligations, sued in the Commercial Court of New Orleans; also from the judgment or judgments originally obtained by the United States Bank, against Mr. Denton, and now held by James Erwin, as well as all other claims or implications existing against Mr. Denton, of every nature or kind, for account of Willcox & Fearn, Willcox, Anderson & Co., or Jacob Willcox individually; and further, that said Denton is to retain for his own use the lands entered for their joint benefit, in the States of Louisiana, Mississippi and Arkansas, (remaining unsold,) the titles to all which, with one exception, were taken, and stand in the name of said Denton; also a small lot of ground in the City of New Orleans, adjoining the cotton press on Magazine street; also, to retain all the rent money collected by him, for dues on said cotton press, from J. S. Wood,

"Now, in consideration of the foregoing, the said Denton has agreed to, and hereby binds himself to hand over to said Willcox, as cancelled and satisfied, the notes given to him by said Willcox, in settlement of his claim on assets of Willcox & Fearn, amounting to \$100,000.

"The note of Willcox, Anderson & Co., paid by said Denton to the Union Bank of Louisiana, \$3,870.

"The obligation of H. W. & S. Hills, given him as security or indemnity for any and all losses sustained by him on account of said Willox & Co.

"Also, to reconvey to said Willcox, or such other person as he may name, full titles to the house, slaves and furniture in New Orleans, if in his name, situated in Julia street, (in the Thirteen Buildings,) and now occupied by said Willcox; also, to convey such titles or claims on nine sections of land in Mississippi, as may belong to him, to A. & J. Dennistoun & Co., which are referred to in the offer made them for settlement of their account against said Willcox, and by them accepted.

"And the said Jacob Willcox, on his part, hereby covenants and agrees with the said G. W. Denton, for and in consideration of the foregoing, on his part, to have him released from any and all claims under the judgments referred to as belonging to the Bank of the United States, or their assigns, or any other claims they may hold on him, for account of said Willcox, in any manner whatever; also, to relieve the name of said Denton, as endorser on the paper of Willcox, Anderson & Co. It being well understood, that Willcox will need the aid of security the house will give, to complete the agreement on his part, the transfer of title will be made, when so required, for the purpose named.

"In witness of this agreement, the parties have affixed their signatures, and interchanged the same.

"New York, October, 1844.

(Signed)

"JACOB WILLCOX, "G. W. DENTON.

"It is expressly understood by the parties to the above agreement, that all expenses attending the transfers therein named, are to be at the expense of Jacob Willcox."

Vason, another of the defendants, had become the owner of the judgments recited in the agreement as belonging to the Bank of the United States. They were against Denton, Willcox and Huntington, one for \$38,146 83, and the other for \$4,551 16, both bearing interest. There is a discrepancy between the extract from the judgment docket and the mortgage certificate, as to the dates and amounts of these judgments; but no question as to their identity is made, and we assume the dates recited in the mortgage certificate, the 11th of March, 1843.

The plaintiff obtained an injunction against the issuing of execution on these judgments, tendered a performance of his part of the agreement, and prayed for a perpetual injunction against any future execution on them, and that they be deemed to be satisfied, on the ground that Vason held them subject to the conditions of the agreement, that Willcox was bound to release Denton from the judgments, under the agreement, that Hills & Co. purchased them from the trustees of the Bank of the United States on account of Willcox, that they were, in fact, parties themselves to the agreement, and on the purchase Denton ceased to be bound as a defendant by the judgments, and that Vason, holding the judgments through Hills & Co., could derive no greater rights than they possessed, and was subject to all the equities which Denton had against the

DENTON E. WILLCOX. DENTON O. WILLCOX.

original purchasers under the agreement. Hills & Co. were made parties defendant, but, disclaiming any interest, withdrew from the suit. Willcox was made a defendant, and answered on the merits. No judgment was asked against him; and the issue is between the plaintiff and the defendant Vason.

It is charged also in the petition that Willcox, or some other person for his use, has an interest direct or indirect in the claim under these judgments, and that if they should be satisfied out of the proceeds of Denton's property, part of them will inure to the benefit of Willcox. Vason denies, in most positive terms, the allegations, so far as they affect him or his rights, which he asserts as a bond fide purchaser of the judgments, without notice or combination, from A. T. Burnley & Co., to whom they were sold by Hills & Co.

The judgment of the court maintained the injunction, except for the sum of \$7,971 61, the amount paid by Vason to A. T. Burnley & Co. for the judgments, and the defendants Vason and Willcox have appealed, and Denton has united in the appeal.

It is charged in the petition that, the purchase by Vason was of a litigious right, which, as an attorney and counsellor at law, he was prohibited from making, under the article 2422 of the Code.* We do not conceive that the judgments purchased by him come within the prohibition of that article, and we take this opportunity of remarking that, if there was any thing exceptionable in this transaction on the part of Mr. Vason we should feel ourselves bound to notice it, but we are of opinion that he did what he had a right to do, and that his purchase was bond fide, and that his conduct is not obnoxious to censure.

An exception has been taken in this court to the plaintiff's right of action, that the agreement which the plaintiff seeks to enforce was illegal, immoral and fraudulent throughout, conceived and carried on for the purpose of screening the property of both *Denton* and *Willeax* from their creditors, and consequently that a court never can lend its aid in carrying it into effect.

If the agreement be, and it is alleged, tainted with those vices, our duty is plain, and leaves us no discretion in its performance; and, in order to form a correct opinion of its character and object, it is necessary to go back to its origin.

The plaintiff and Willcox were merchants, doing business in New Orleans under the name of Willcox & Fearn. They had purchased out the interest of Fearn. Denton was a silent partner, and by an instrument under private signature, on the 15th June, 1840, sold his interest in the partnership to the defendant Willcox for \$100,000, for which the latter gave the plaintiff his notes; and, as a further consideration for the sale, Willcox agreed to pay a balance appearing to be due Denton on the books of the firm of Willcox & Fearn, and assumed the payment of the losses on cotton in 1839, which amounted to \$66,000, of which Denton's share was one half. For the purpose of securing the performance of the conditions of this agreement, which embraced not only what is before stated, but provided for the protection of Denton against the debts of the firm of Willcox & Fearn, and all his liabilities on account of Willcox personally, or of the house of Willcox, Anderson & Co., (a new firm which succeeded Willcox & Fearn,) it

^{*}The counsel for the plaintiff cited, in support of the position that the purchase by Vason was that of a litigious right, Civil Code, arts. 2422, 2623, 3522, no. 22. The counsel for Vason, on the other hand, cited Favard, verbo Droits Litigieux. Troplong, Vente, nos. 200, 201, 202 and authorities there cited. Merlin, Rep. verbo Droits Litigieux. Code Nap. Annoté. art. 1700. Code, lib. 8, tit. 37, de Litigiosis. 1 Maynz, Droit Romain, 326. 9 Mart. 183.

was provided that, the titles to the real estate belonging to that partnership, and also that belonging to Willcox personally, should stand in the name of Denton, and be retained by him as hypothecated for that object. Willcox reserved, the privilege of selling any of the real estate or slaves thus mortgaged, on tornishing satisfactory security in liou of that disposed of. Willcox assumed all the debts of Willcox & Fearn, and Denton was to be held harmless.

It appears that this property, which figures in the agreement of 1844, and which never ceased to belong to Willcox, was in the name of the silent partner of the bankrupt concern of Willcox & Fearn, and by the agreement of 1840 was so to remain. It is stated in the printed argument of Willcox that, it had been so placed originally for the purpose of facilitating the transfer of it, should it be required, Denton being the only unmarried man of the firm; but it appears that the real object was equally well attained after the marriage of Denton, and another purpose was also effected, to which neither of these parties could be strangers—by the property being in the name of Denton, it was supposed to be beyond the reach of Willcox's creditors. At this time, on the 15th June, 1840 there were these judgments recorded against him, which, in September, 1845,

1st. A judgment against Willcox, Anderson & Co., jointly and severally, for \$7,493 50, with interest from the day of the date thereof, 23d November, 1837.

stood on the books of the recorder of mortgages:

2nd. Another, against the same parties, for \$5,158 64, with interest from its date, November 22nd, 1837-

3rd. Another, against the same parties, for \$9,760, with interest from its date, 12th May, 1838.

Having these judgments to meet, besides the loss of the cotton speculation of 1839, \$66,000, it is obvious, with all the real estate of the late firm of Willcox & Fearn, as well as his own dwelling house, slaves and furniture in the name of the silent partner Denton, there were other objects effected by that state of things besides the facilities of conveyance, which no professional man can ask a court of justice to countenance.

The agreement of 1840 was the basis of that of 1844, on which the plaintiff rests his claim for relief. This agreement, made in New York four years after, provides for the conveyance of the Julia Street property, (the dwelling house of Wilcox,) his slaves and furniture, the delivery up of the notes of \$100,000 and others held by Denton, to Willers, in consideration of the latter's procuring the release of the former from certain judgments which are set forth in the plaintiff's petition, and certain other claims which it is not material now to notice. The last clause of the agreement is the key to the whole, and discloses the original purposes of these parties: "It being well understood that Willcox will need the aid of the security the house will give, to complete the agreement on his part, the transfer of title will be made when so required for the purpose named." That is, is in order to enable Willcox to buy up these judgments, the means must be furnished by Denton's uncovering the title and conveying the house; but not to him, Willcox, for then it would come under the general mortgages recorded against him, but to Willcox, or such other person as he may name.

The counsel of the plaintiff gives this view of the matter in his printed argument. "After the arrival of the procuration to Josephs, difficulties arose in reference to the transfer of the property. There were numerous judgments against Willcox, many of them, and of large amounts, of prior dates to the

DESTON v. WILLCOX.

DENTON U. WILLOOK.

judgments now in question; hence Willcox did not desire that the property should be transferred to himself, because that step would have placed it most effects by beyond his control."

The judgments recorded against Willcox taking precedence of those montioned in the petition, rendered the latter without value, so far as his name was concerned; and it is apparent that, as Denton merely held a mortgage on the property in his name, whenever the debt for which it was given became extinguished, the property must of right fall under the mortgages recorded against the owner, and they also have the benefit of any diminution of the debt. The first mortgage creditor is first in right, and any disposition of the property to his detriment is a fraud, and any agreement between parties, having that for in object, is illegal. Denton had no right to give any such direction to property on which he only had a mortgage to the manifest loss of bond fide mortgages. A release of his mortgage could not inure to the benefit of Willcox at the expense of his creditors.

There were other judgments against Willcox, of which we will take the plaintiff's own account. We find what follows in the printed argument of his counsel:

"Willcox met with other serious difficulties in his negotiations. In addition to the judgments of which his friends had obtained the control, there were others against him originally belonging to the United States Bank, but which had been sold by the sheriff, at the sale of the various credits belonging to that institution. They were adjudicted to W. A. Gasquet and G. Morgan, and by them transferred to A. Erwin. It would seem that Erwin had acquired them under some secret understanding with Willcox, and that there was a difference between them as to the balance due, Erwin claiming \$7,500, and Willcox contending that he was bound only for \$5,000."

These judgments are also referred to in the agreement of October, 1844. Willcox contracted to release Denton from them, as well as from those held by the United States Bank. In the agreement they are said to belong to James Erwin, but he held them as agent of A. Erwin.

But there is another branch of the affair between Denton and Willcox which is in keeping with the rest of it, and discloses the purpose of their combinations. Denton was a silent partner, and in solido bound for the debts of Willcox & Fearn, and was also involved to the extent of \$66,000 on cotton shipments made with Willcox in 1839. He held, in his own name, real estate in New Orleans, and lands and slaves in Mississippi and elsewhere, belonging to the firm or to Willcox, and retained them as a security for the performance of the condition of the agreement of the 15th June, 1840.

But by the agreement of 1844, on which the plaintiff has founded his action, her etains for his own use the lands entered for their joint benefit in the States of Louisiana, Mississippl, and Arkansas, remaining unsold, and a small lot of ground in New Orleans, &c., to the detriment of creditors, who, from the secrecy of his relations towards Willcox as a partner, were in the dark as to the ownership of the property and his responsibility as a partner.

That there were unsatisfied claims against Willcox & Fearn results from the agreement of 1844, by which Willcox binds himself to procure the release of Denton from them, and there is a provision in the agreement for the conveyance of lands in Mississippi belonging to Denton, to A. & J. Dennistown & Co., in settlement of their accounts against Willcox.





This looks very much like a joint effort of partners to enable a secret purtner not only to avail himself of the ignorance of creditors to enable a secret purtner his liability in solide, but to close his own account by the appropriation of partnership property to his exclusive benefit.

Having ascertained, as far as it can be done from the documents before us, the position of *Deuters* and *Willeax*, let us examine that of the plaintiff in respect to these two judgments.

The first (5023) was obtained in a suit against Denton and others on a bill of exchange, on which Denton was an endorser, which was protested in New Orleans, on the 13th June, 1840, for non-payment-

The second (5069) was obtained on Denton's own notes, three in number, each dated May 23rd, 1840, payable at thirty, forty-five, and sixty days respectively, to the order of Willcox, and each amounting to \$5,000, protest of which was waived by the endorser, and on three notes of Willcox, Anderson & Co., endorsed by Denton, and protested before the 15th June, 1840, the date of the first agreement.

These suits were instituted on the 5th and 19th April, 1842, respectively, and judgments were obtained on them only in 1843; but on the 6th June, 1842, the plaintiff confessed a judgment in the Parish Court of New Orleans, in favor of James Erwin for 63,000 with interest, a portion of which related back to 1837. In December following the confession of judgment, it appears to have been transferred to Andrew Erwin, of Tennessee, and being recorded before the two judgments under consideration were rendered, operated as a general mortgage to their detriment on all property in the name of Denton. The verity and validity of this judgment is assailed by the defendant Vason, who charges that it was a mere cloak, and afforded the means to Denton to defy his creditors and those of Willcox and weary them out, by standing in the way of a pursuit of their lawful rights.

Bearing in mind the statement of the plaintiff's counsel concerning the relations between Willcox & Erwin, which we have just recited, let us hear what his witness says concerning this judgment.

Jacques, a witness examined in New York, after stating the understanding between Denton and Hells & Co. in relation to the purchase of the judgments, says: "Denton positively said that he would make title to the house, negroes and furniture, if the latter was in his name, immediately on his arrival in New Orleans; that he was unable to do so at that present time, in consequence of Mr. James Errom holding a certain judgment against him, taking precedence on record to those held by the United States Bank, but that judgment was under his, Denton's, control; that he would write to Erroin on that day to facilitate his action in the matter on his arrival in New Orleans, when he would make title to the house, &c., aither by directing Errois to waive the judgment held by him, or by a formal sale under that judgment, which ever might prove the most feasible plan,"

This account of the judgment, of the power Denton had over it, and of the purposes to which he could apply it, was given by Denton to Hills & Co., on the 19th of November, 1844, previous to the purchase of the judgments held by the trustees of the Bank of the United States. Its effect would be weakened by any comment.

A letter of May 11th, 1845, addressed by one of the Messre. Hills to their agent, which was produced at the request of the plaintiff, is to the same effect.

DENTON ... WILLCOK. An extract is to this purport: "Denton stated to me, in the presence of a witness, that he had the control of the judgment against him held by Mr. Erwin, as well as the titles to the house and lot in Julia street, and, he believed, the negroes and furniture, and would immediately on his arrival in New Orleans make good and sufficient title to the same to you, or our agent," &c.

Huntington, another witness for the plaintiff, proves that the plaintiff put another valuable piece of property in the city which belonged to him, the Harper property, as it is called by the witnesses, in the name of another person.

James Erwin released the property from the judicial mortgage, by an act to that effect, dated the 31st of May, 1845, passed by him as attorney in fact of Andrew Erwin.

If we consider this Erwin judgment as the plaintiff himself has treated it, what weight can be given to it, or to its transfer to Andrew Erwin? We can only treat it as an instrument in the hands of the plaintiff to coerce his creditors to sell their just claims on him to some mutual friend for a bagatelle; which instrument he used most effectually, and to enable him to complete and accomplish his ends he appeals to the ministers of the law.

The circumstances attending this judgment, its transfer, its non-execution, and the payment of no portion of it for so long a period, its amount, and the uses to which it has avowedly been applied, produce the conviction on our minds as to its origin and purpose, which we cannot avoid, and the whole complexion of the testimony, oral and documentary, without one single exception, fortifies that conviction.

There are a number of letters before us from Hills & Co. to their agent in New Orleans, Mr. Josephs, who was examined as a witness. They were produced at the instance of the plaintiff. They unmask the whole business. They establish conclusively that it was understood between the parties, that the Erwin judgment was a mere cover to prevent the Bank of the United States from recovering their debt; that their judgments, which Hills & Co. purchased, were perfectly good for their amounts independent of the contrivances with which these parties embarrassed their collection, and which had enabled Hills & Co. to buy them for about a fourth of their value from those who were in charge of the wreck of the late Bank of the United States.

A paragraph from Mr. Josephs to Hills & Co., mentioned in one of these letters, is strongly expressive of his opinion of the transactions which are the subject of our enquiry.

"Mr. Denton will not take any step adverse to your interest. I know his situation well, and even if he feels disposed to pursue the course apprehended by you, he would not dare attempt it, or provoke the publicity it would occasion."

Concerning the law applicable to this case there can be no question. We have been called upon to apply it in the cases of Bernard v. Auguste. 1 Annual Reports p. 70, and in Davis v. Holbrook, Ibid. 176.

All the evidence in this case points to one conclusion, and renders impossible any other hypothesis under the most charitable construction which we are permitted to put on the actions of men. These parties were bankrupt merchants, and it is proved by the plaintiffs own showing that they combined for the purpose of putting their property out of the reach of their creditors, for the object of defrauding them, by first depreciating their debts, by unlawful means, and thereby enabling themselves to purchase them up at an inconsiderable price; that the agreement of 1844 is in furtherance of that combination and plan, and was

entered into with that view alone; that it is immoral and fraudulent, and that no action for relief can be based on it.

The judgment of the Commercial Court is therefore reversed, and the plaintiff's petition dismissed, with costs in both courts.

DESTOR

Johnson v. Johnson.

Where a slave was diseased at the time of the sale to the knowledge of the vendor, and the disease is proved to have rendered her use so inconvenient and imperfect that it must be supposed the purchaser would not have bought her if he had been aware of its existence, she becoming incapable shortly after the sale of doing the work for which she was sold, and continuing so, the sale will be rescinded, and the vendor condemned to repay the price, with interest from the day of sale, and the cost of her medical treatment while in the hands of the purchaser.

A PPEAL from the District Court of the the First District, Bucchanan, J. M. M. Reynolds, for the plaintiff, cited Civil Code, articles 2451, 2496, 2504. 5 Mart. 434. 1 La. 311. 7 La. 517. 19 La. 519,

Moise, for the appellant.

The judgment of the court was pronounced by

Rost, J.* This is an action of redhibition. The plaintiff alleges that he purchased from the defendant, with full warranty, for the sum of \$400, the female slave, Winney, about eighteen years of age; that a few weeks after the sale, he discovered that said slave was, and had been before and at the time of the sale, afflicted with an incurable chronic disease; that the use of said slave is, by said disease, rendered so inconvenient and imperfect that the petitioner, had he been aware of it, would not have purchased her at any price whatever: that the defendant knew of the existence of the disease at the time of the sale, and fraudulently concealed it from him: that he has made a tender of the slave to the defendant, and made of him a demand of the price; and finally that he has sustained damages by the fraudulent conduct of the defendant, as well as by expenses incurred for medical attendance on said slave, and loss of time. He prays that the sale be rescinded, and the defendant adjudged to pay him the sum of \$400, within the test and damages. The petition also contains a prayer for general relief.

The answer of the defendant is a general denial. The judgment of the court below was that the sale be rescinded, and that the plaintiff recover from the defendant \$400, with legal interest from the date of said sale, and the further sum of \$21, expanses incurred in medical treatment of said slave, and that the plaintiff restore the slave Winney to the defendant. From this judgment the defendant has appealed.

Five physicians have testified in this controversy. The testimony of two of them supports the allegations of the petition, and is in direct opposition to that of the three others, not only as to the nature of the disease, but also as to the facts of its external appearance. When doctors disagree it is difficult to decide, but we console ourselves with the reflection that the accurate diagnosis of the disease is not perhaps as important as the ascertainment of its effect upon the patient. It is positively proved that, shortly after the purchase, the slave was

Johnson. Johnson.

ME PROPERTY TO THE PARTY OF

confined to her cabin, and continued incapable of doing the work for she was sold by the defendant.

The defendant was aware that she had a disease of some kind. When he was about selling her, he asked the physician who was in the habit of attending his slaves, whether he could guaranty her as sound. That physician asked her the usual questions to ascertain the symptoms attending a disease of the womb. She replied in the negative, and from the cursory examination he made of her, he told the defendant that he thought he could guaranty her as sound. A short time before she had a miscarriage on board of a vessel on her way to Louisiana. Whether her illness was the result of that accident, as one of the physicians seems to believe, or whether it was produced by a disease independent of it, the slave was unsound at the time of the sale, to the knowledge of the defendant, and her disease is proved to have rendered the use of her so inconvenient and imperfect, that it must be supposed that the plaintiff would not have purchased her if he had been apprized of its existence.

We incline to the opinion of the court below, that the testimony of the two physicians who have attended the slave since she is in the possession of the plaintiff, is entitled to more weight than that of physicians who saw her but once, in relation to the disease alleged. Whether that disease be curable or not, may be a matter of conjecture; but it is an undeniable fact that thus far it has not been cured, and that the plaintiff has not what he bargained for.

Judgment affirmed.

IN THE MATTER OF THE MERCHANTS BANK OF NEW ORLEANS.

Where a statute directs that the salaries of the commissioners for the liquidation of a bank shall not, after its passage, exceed a fixed sum, the court may, on the suggestion of counsel, amend a tableau of distribution in which the commissioners have allowed themselves a larger sum, by reducing the allowance, though no opposition was made to the allowance by any creditor of the bank.

Where a statute expressly provides that it shall have effect from its passage, it will have effect from that date, and not from the time of its promulgation only.

The second section of the stat. of 6 April, 1843, reducing the compensation, allowed by sec. 25 of the stat. of 14 March, 1842, to the commissioners appointed under that act, did not impair any contract. The 25th section of the act of 1842, allowing such compensation, created no contract with the commissioners.

A PPEAL from the District Court of the First District, Buchanan, J.

The commissioners appointed under the act of the 14th March, 1842, to liquidate the Merchants' Bank of New Orleans, having filed, in the District Court for the First Judicial District, their final tableau of distribution, and prayed for its homologation, the usual order of publication was granted.

The publication having taken place as required by law, various creditors filed oppositions, insisting on their right to be placed on the tableau, and to be paid in preference to other creditors, &c. These oppositions were tried, and the court settled the rank of the opposing creditors, and from the decision thereon none of them have appealed. In the course of the argument on the oppositions, Mr. Barker, one of the counsel in the case, suggested to the court that, the commissioners were only entitled to a compensation of \$1,000 per annum,

agreeably to the act of 1843, instead of \$3,000 per annum, that fixed by the Menchants tableau. The judge reduced the compensation of the commissioners accordingly, from which decision Calhoun and Conrey, two of them, have appealed.

Schmidt, for the appellants. The judgment below was erroneous:

I. Because there was no opposition filed by any one to the compensation allowed them by the tableau. By the 24th section of the act of 1842, (Sessions acts, p. 246), "the powers, duties and liabilities of the commissioners, are the same as those conferred or imposed on syndics of insolvent estates, and the proceedings are the same as those provided for by the acts now in force, relative to the voluntary surrender of property." By the 36th section of the act relative to the surrender of property, (B. & C's Dig. 494,) it is provided that, after a tableau has been filed and notice given, the creditors who have any objection to the distribution "shall file their opposition in the clerk's office, together with the motives on which the same is founded," &c. Vido Kirkland v. His Creditors, 7 Mart. N. S. 131.

The judge is not authorized to reform the tableau of distribution, unless there be: 1st. A written opposition filed, explaining the motives why the reform is required; and 2nd. Unless such opposition come from a creditor, that is, from a party who is not a mere volunteer, but who has a direct interest in the question. Here, no opposition has been filed with the clerk, and there is no evidence to show that Jacob Barker is a creditor. The judge had no power, ex

officio, to make such changes in the tableau as he thought proper.

There are cases in which the court will officially apply the law, but they will be found to class themselves under two heads, viz: 1st. Those relating to the powers of the tribunal before which a suit is brought, or, in other words, questions of jurisdiction. The reason of this is, that questions of this nature fall peculiarly within the province of the judge, who cannot, without a dereliction of duty, and disregard of his official oath, assume an authority with which the legislative power has not chosen to entrust him. 2nd. Those in which the legislature, from motives of policy, has thought proper to refuse relief to a party aggrieved. In such cases, the judge may, ex officio, refuse his aid, if the fact appear plainly from the pleadings.

II. Because the construction which the inferior court put on the act of 1843, gives that law a retrospective effect, and violates the contract, by virtue of which the commissioners acted, contrary to the true intent and meaning of the legislature; and because such a construction would discharge the sureties of the commissioners, and leave the creditors without any other guarantee than their personal responsibility, which can never be presumed to have been intended by

the legislature,

Any alteration of the original agreement, whether injurious or beneficial to the surety, will discharge him. Miller v. Stewart, 9 Wheat. 680. Wright v. Johnston, 8 Wend. 512. Moore v. Payne, 12 Wend. 126. Colemard v. Lamb, 15 Ibid. 329. Miller v. McCann, 7 Payne, 451. Doe v. Postmarav. Lamb, 15 Ibid. 329. Miller v. McCann, 7 Payne, 451. Doe v. Postmaraer General, 1 Peters, 325. United States v. Stansbury, Ibid, 475. Hunter v. United States, 5 Ibid, 173. Douglass v. Reynolds, 7 Ibid, 113. United States v. Orr, 8 Ibid, 399. Sprigg v. Bank of Mount Pleasant, 10 Ibid, 257. Same case, 14 Ibid. 201. United States v. Boyd, 15 Ibid, 187. Pothier, Traité des Oblig. 406. Roman v. Peters, 2 Robinson, 479.

III. Because the inferior court makes the law take effect from the day it was approved by the governor, instead of twenty four hours after its promulgation. The act of 1843 (Sessions acts, p. 65) was approved 6th April, 1843, and promulgated the 13th April following; it did, consequently, not go into operation

until the 15th April, 1843. Acts in fine.

C. C. Parkhill, contra. The stat, of 1843 did not impair the obligation of any contract. The stat. of 1842 created no contract. 6 Cranch. 135, 145. Wheat. 611, 616, 661. 4 Devereux, N. C. Rep. 14, 20. 3 Story on Const. 260. The stat. of 1843 expressly provides that it shall go into effect immediately after its passage.

The judgment of the court was pronounced by

EUSTIS, C. J. On the 14th day of February, 1845, the commissioners of the Merchants' Bank of New Orleans, in liquidation, Peter Conrey, Jr., Robert Copland and John Calhoun, filed their final tableau of distribution and account in the clerk's office of the District Court of the First Judicial District, and notice

MERCHANTS BANK. thereupon issued, in the manner and form required by law, to all creditors and others interested, to show cause, within ten days, why it should not be homologated. In this tableau, the commissioners allowed themselves a salary at the rate of \$3,000 per annum, from the 7th April, 1843, to 7th February, 1845, amounting to \$5,500 each, or \$11,000 for the two appellants, Convey and Calhoun.

After trial of the oppositions, the court rendered judgment on the 23d February, 1846, amending the tableau in several particulars, and homologating it as amended.

The judge says: "My attention has been called by Mr. Barker, one of the counsel in the cause, to the charge for salary made by the commissioners. That charge is at the rate of three thousand dollars per annum, for each commissioner. I consider myself bound to examine into its legality, when that is brought to my notice, even in this informal manner; and am referred to the 2d section of an act of the legislature, approved 6th April, 1843, (page 63 of Sessacts) which declares, that the commissioners of the banks in liquidation shall, in future, be entitled only to a yearly salary of one thousand dollars each, free from the expenses of office. This law is perfectly unambiguous, and must regulate the allowance of the commissioners, from the day of its date. It is therefore adjudged and decreed that the tableau be amended, by reducing the salary of each commissioner of the Merchants' Bank of New Orleans to the rate of one thousand dollars per annum, from and after the 6th April, 1843, until the date of the filing of the tableau, and that the tableau, so amended, be homologated."

From this judgment, two of the commissioners, Peter Conrey, Jr. and John Calhoun, have appealed, and assign as errors:

First, that the court undertook to reform the tableau of the commissioners, as to their commission, without any opposition whatever, either special or general, and upon the suggestion of a person who does not appear to have any interest in the matter, or to represent any one interested therein.

Secondly, that, even if the court was right in this respect, the judgment is erroneous in decreeing a reduction of the salary from the 6th April, instead of of the 15th April, being 24 hours after the promulgation of the law, which was not published until the 13th April, 1843, in the official gazette of the city of New Orleans.

Charles C. Parkhill and others, stockholders, make answer to the petition of appeal, praying for a confirmation of the judgment, and damages for a frivolous appeal, taken for the purpose of delay.

We think the judge did not err. The law reducing the salaries of the bank commissioners is imperative, and the court was bound to carry it into effect. It took effect from its passage, by virtue of an express proviso.

But, it is said, that the 25th section of the act of 1842, providing for the compensation of the commissioners appointed under the act, was a contract, and to change the amount by legislation, is to impair the obligation of a contract, in its constitutional sense.

A contract fixing the compensation of commissioners for a term of years, without the salutary control of the legislature, would convert the commission into a job, and defeat the very object of the law. Such a construction is totally repugnant to its intendment, and is supported by no sound rule for the interpreting of statutes.

Judgment affirmed.

Fisk v. Fisk et al., Executors.

An order appointing a tutor provisionally, but reserving to the court the right of determining the legality of the appointment whenever the question may be brought before the court, can confer no authority. Provisional tutors are unknown to the law.

An appointment by the court is necessary, even when the tutorship is applied for by the

father. C. P. 949. He must be appointed like any other person.

Art. 946 of the Code of Practice, which provides that "where the father and mother of a minor reside out of the State, and are not represented in it, and the minor is also absent, he may be provided with a tutor or carator by the judge of probates of the place where he has interests to assert or defend," is an exception to the general rule prescribed by art. 944, that the appointment belongs to the judge of probates of the domicil or usual residence of the father or mother, if either be living. The object of art. 946 was to authorize the appointment of a tuter ad bona, to take charge of the minor's property in this State. A tutor appointed under its provisions cannot remove the minor's property out of the State. A tutor so appointed holds acivil office to endure as long as the minority lasts, or until he is legally superseded, and binds him to account to the domestic judge at the expiration of the tutorship. C. C. 350.

The statute of 1 April, 1843, recognizes as valid and binding upon the courts of this State, appointments of tutors or guardians of minors residing out of the State, made at the place of the minor's domicil, if within the United States; and, under the second section of that act, any such foreign tutor or guardian may, at any time, on making a proper showing, compel a tutor ad bona appointed here to account to him, and may remove the minor's property out of this State, upon proof of his authority to do so under the laws of the minor's domicil.

Though by the laws of the State in which the minors reside, their father cannot become their tutor or guardian, and consequently cannot receive property belonging to them in this State, he may take all the steps necessary for its preservation; he may have any claims due to them liquidated, and the amount brought into court, and invested for their benefit. C. C 348.

PPEAL from the Second District Court of New Orleans, Canon, J.

Stebbins Fisk. by his last will, bequeathed the sum of \$100,000 to his brother Abijah Fisk, for his sole use and benefit, without any security whatever. during his lifetime, and at his death to be divided and given equally between the children of Sereno Fisk, his youngest brother. Abijah Fisk, who resided in New Orleans, received the money, and used it during his life: upon his death, Sereno Fisk, who, with his children, resided in the territory of Wisconsin, appeared in New Orleans, and applied for the tutorship of his children, under the laws of Louisiana: he prayed to be appointed natural tutor of three of his minor. children, whose mother was dead, and that his right to administer the property. of two of his children, whose mother was still living, might be recognised. Upon this petition, the judge of the Court of Probates made the following order:

"I understand that by the laws of Wisconsin, the father cannot obtain the administration of his minor children, without giving bond and security for his faithful administration. These laws of the domicil are personal statutes, and follow the petitioner wherever he goes. Yet, I will grant the application, reserving to myself the decision of the question which may hereafter be raised in relation to said appointment, whenever the subject is brought before the court: therefore let the prayer of the within petition be provisionally granted." An under tutor was appointed, and Sereno Fisk was sworn and duly authorized, in conformity with our law, to act as the tutor of his minor children. Thus qualified, he demanded of the executors of Abijah Fisk, the legacy left to his children by Stebbins Fisk: upon their refusal to pay the amount, he instituted the present suit.

Fisk.

This action was excepted to by the defendants, upon various grounds: 1st. That the order of the Court of Probates appointing the plaintiff natural tuter of his children, is not valid in point of form, and therefore confers no power upon the plaintiff. 2d. That the plaintiff should have qualified as guardian of his children, at his place of domicil, in the territory of Wisconsin, and that he could not legally qualify as tuter here. 3d. That as, by the laws of Wisconsin, the plaintiff could not become guardian of his children, without giving secrurity for his administration, he cannot become their natural tuter in Louisiana, without giving such security here as the laws of Wisconsin require guardians to give in that territory. These objections were sustained by the judge of the lower court, and the plaintiff appealed.

Elmore and W. W. King, for the appellant. The order of the Probate Court was sufficient to authorize the plaintiff to act as tutor. The plaintiff was entitled to the tutorship, and the word "provisionally," inserted in the order of appointment, should be regraded as mere surplusage. The Second District Court of New Orleans had no authority to set aside an appointment made by the Court of Probates. Leckiev. Fenner, 9 Rob. 189. The plaintiff could only

qualify as tutor of his children here.

All the rights of foreign administrators rest either upon some positive legislative provisions of the country, or upon the comity of nations. So far as these rights depend upon the consty of nations, Judge Story says, in his Conflict of Laws, no. 499, that "in America, in the States acting under the jurisprudence of the common law, the rights and powers of guardians are considered as strictly local, and not as entitling them to exercise any authority over the person or personal property of their wards in other States, upon the same general reasoning and policy which have circumscribed the rights and authorities of executors and administrators." Again, no. 504: "No one has ever supposed that a guardian appointed in any one State in this Union had any right to receive the profits, or to assume the possession, of the real estate of his ward in any other State, without having received a due appointment from the proper tribunals of the State where it is situate." "The same rule is applied by the common law to moveable property, and has been fully recognised both in England and in America. No foreign guardian can, virtute officia, exercise any rights or powers, or functions, over the moveable property of his ward, which is situated in a different State, or country from that in which he has obtained his letters of guardian ship; but he must obtain new letters of guardianship from the local tribunals authorised to grant the same, before he can exercise any rights, powers or functions over the same. Few decisions upon the point are to be found in English or American authorities, probably because the principle has ulways been taken to be unquestionable, founded upon the close analogy of the case of foreign executors and administrators." He refers to many authorities, and, in note to no. 513, to a great number of cases. The case of *Morrell* v. *Dickey*, 1 Johnson's Ch. Rep. p. 153, was decided by Chancellor Kent, and is a case strictly in point. This State has gone farther than any other in the Union, in prescribing that property in this State shall be governed by our own peculiar laws, and no distinction exists in this respect between moveables and immovables. C. C. arts. 9, 10, 483.

To remedy the inconvenience of subjecting foreign guardians to the necessity of qualifying again in this State, the act of 1843 was passed, (Acts, p. 97,) by which it is declared, that a foreign guardian shall be entitled to sue for and recover property. &c. of minors in this State, "without being under the necessity of qualifying as tutor of said minor, according to the laws of Louisiana." "Provided, that nothing in this act shall authorise any such tutor or guardian to take possession of, or remove from the State, the property of any minor or estate, unless satisfactory proof be furnished to the court that the debts of the succession are paid, or that none exist in the State." There is no doubt that foreign guardians may be recognised here under the above law; but it would be a perversion of the meaning and intention of the act, to say that, because this liberty is granted to foreign guardians, therefore, our own laws for the appointment of tutors are repealed, and that all persons residing out of the State must be qualified as guardians where they reside, and cannot be

qualified here. The very language of the act takes it for granted that such persons could be qualified here, and the act was passed to dispense with that necessity. There are many provisions of our law which do not leave the plaintiff's right to the tutorship of his children, as a mere matter of inference.

Fisk.

The minors, in this case, reside out of the State; their property is here; ex necessitate rei, there must be some one to take care of their interests. Our Code says, art. 294: "Whenever a circumstance occurs which makes the appointment of a tutor necessary, information thereof to the competent judge may be given by any one." Succeeding articles provide for the appointment of a tutor. The Code of Practice provides, art. 946, "If the father or mother resides out of the State, and are not represented in it, and the minor be also absent, he may be provided with a tutor, or curator, by the judge of probates of the place where he has interests to assert, or defend." Art. 947, makes it the duty of all persons to give information of the necessity for the appointment of a tutor. Art. 948, directs the judge, when the information is given, to appoint a tutor. Art. 949, provides that, "If it be the father of the minor who presents the potition, claiming his tutorship, the judge shall confer it on him, only requiring of him an oath to perform the duties well and faithfully." In the case of Harman et al. v. McCawley, 9 La. 571, the court distinctly recognised the right of the Court of Probates to appoint tutors to administer the property of minors residing out of the State. In the case of Berluchaux v. Berluchaux, 7 La. 543, the court say: "A mother, residing in a foreign State, or country, with her children, who inherit property in this, on coming here, and making application to the proper authority for that purpose, would be preferred to all others, in obtaining the administration of the property thus inherited." The Civil Code, art. 326, provides that, " No cause of exclusion or removal from the tutorship of his children, is applicable to the father, except that of unfaithfulness of his administration, and of notoriously bad conduct." Art. 269, declares that, tutors by nature are not compelled to give security; and, by art. 268, fathers are entitied to be the natural tutors of their children. Art. 321 declares that, the father cannot excuse himself from the tutorship. These authorities show, not only the right of the Court of Probates to appoint a tutor here, but also the right of the father to become the tutor, without giving any security.

But the law goes even further. Arts. 275 and 237 of the Civil Code give the surviving father, or mother, the right of appointing a tutor to their minor children. If the father has the right of appointing another, certainly he has the right of acting himself. But it has been urged, on the other side, that the plaintiff cannot act as the tutor of his children, because he resides out of the State, and that, by art. 298 of the Code, absence from the State is made a cause for depriving a tutor of his office. We have seen that by art. 326 of the C. Code, no cause of exclusion applies to the father, except unfaithfulness in his administration, or notoriously bad conduct. To give the construction contended for, to article 298, would render it inconsistent with article 326. But the Supreme Court has repeatedly decided, that art. 298 does not apply to natural tutors of minors out of the State. We cannot better reply to the objection, than by quoting a paragraph of the decision in the case of Delacroix v. Boisblanc, 4

Mart. 716:

"The question, if it be one, may be reduced to this: Can the law appealed to by the applicant embrace cases where a parent, leaving the State, takes his children along with him? That all men have the right to expatriate, at least when by such removal they cause no prejudice to the community of which they were members, is not questionable in a free country; that a natural tutor expatriating, has a right to take his children with him, is still less disputable. How, then, could the law providing for the nomination of another tutor, be carried into effect in such a case? A tutor is appointed principally over the person of the minor, but here the minors are gone. He is to take care of them in the manner prescribed by our laws, but they are beyond the reach of those laws. It is clear the provision alluded to is made for cases where the tutor alone is going away, and where he can be prevented from taking his ward out of the State. This would take place, we presume, where any other tutor than a parent would be about absenting himself. Such a tutor being merely the creature of the law, would probably not be at liberty to carry his ward where the law does not extend. The nomination of another tutor is then obviously necessary. But when the ward himself is removed where our laws can no longer protect hun,

there must be an end to the interference of our courts in his behalf." See, also,

Robins v. Weeks, 5 Mart. N. S. 384.

The doctrine we are combatting is directly opposed to the decision in the case of Berluchaux v. Berluchaux. The power of the parent to remove from the

State with his child results necessarily from the parental authority.

If his removal from the State with his children, and their property, be no cause for the destitution of his tutorship, there is no reason why his residence

out of the State should debar him from the tutorship.

Generally the interests and wants of minors residing out of the State require that their property should be transferred to the place of their domicil; it may be absolutely necessary for their support. Our law does not forbid the removal of the property of minors, residing out of the State, to the place of their domicil. What objection then can it be to the appointment of a tutor, that he resides out of the State, with the minors? If the father should leave the State permanently, with his minor children, leaving property of theirs behind, and no one to represent him, then art. 946 of the Code of Practice, gives the court a right to appoint a tutor; but in this case the plaintiff was here at the time of his appointment; non constat, that he will leave the State before the administration of his children's property is closed. If he does, he has a right of appointing some one to represent him, or of appointing a tutor. C. C. 275. If he should desire to remove the property of his children after he has gained posession of it, to their domicil, when it arrives there, he will be compelled by the courts of that country to qualify as guardian under their laws; if he does not, he will be deprived of the property and his guardianship.

As to the third exception that, admitting the plaintiff has the right of qualifying as tutor here, he cannot do so without giving such security as the laws of Wisconsin prescribe. If he has the right to apply here for the tutorship, it follows, as a necessary legal consequence, that he is to apply under our own law, and must comply with its requisitions. The plaintiff has complied with all the requisitions of our law, and is fully qualified to act as tutor. Natural tutors are not required to give security for their administration. C. C. arts. 263, 330. C. P. art. 949. The father is entitled to the administration of the property of his minor children, whose mother is still living. C. C. arts. 267, 239, 532.

Watts, for himself and his co-defendant. A non-resident father, of non-resident children, cannot become tutor in Louisiana, and receive the property of his children, without having become guardian to those children at the place of his residence, where he would be required to give adequate security for its

preservation and restoration.

A non-resident, who would be placed under obligations and restrictions at the place of his domicil, has no right to come to a foreign State, and demand advantages peculiar to that State, and which would be refused to him at home, especially when he does not place himself under the restrictions and vigilaace of the foreign law, whose immunities he invokes. A natural father in Louisiana is tutor to his children without giving security; but he is compelled to make an inventory, to be placed under the espionage, not only of the court, but, in particular, of an under-tutor. The relations and friends of the minor, who are usually the relations and friends of the testator, or relative through whom the property comes, are also the watchmen of his conduct, and his property is placed under a tacit mortgage.

The naked question is presented to this court, whether it will permit a father, who resides in Wisconsin, where the minors also reside, to demand and receive the sum of \$100,000, without having given security, according to the law of the place of his and their domicil, and where neither the courts of Louisiana, nor any other power or person, can control him in the administration of his trust, when once he has received it?

The Civil Code is not to be construed as a statute. It contains many statutory provisions which are to be strictly observed, but much the larger portion of it is a body of general rules, subject to all the modifications which circumstances may require. I refer to arts. 2, 21, 958, 1959, 1960, 2278, 2837, 3077, for the extensive equity powers of particular courts in cases not coming strictly within its provisions. Surely, the non-residence of a father and minors constitutes a peculiar and important circumstance, which, in the language of art. 2, exempts the case from the operation of laws which relate to what passes in the ordinary course of affairs, and places it under the equity power of the court, which

FIAR U.

is to provide for solitary and singular cases. The Civil Code, art. 21, declares that, "In civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent." These directions apply forcibly to the present case. This mode of reasoning enables me at once to put aside all the articles of the Code cited by the counsel for the plaintiff, as inapplicable to the present question. The case cited by them are easily disposed of. In Berluchaux v. Berluchaux, 7 La. 543, the court says, that the natural tutor, who demanded the property, had come to Louisiana, but it is not said whether to reside, or only for the purpose of demanding the property. Admitting that she was not to reside, her domicil was under the dominion of the Spanish laws, where there existed an under tutor to watch her, a tacit mortgage upon her property, and relatives to guard the interests of the minor. The minor, therefore, had the same protection that he would have had in Louisiana; but this decision cannot be an authority in a case where, by the laws of the domicil of the party, security must be given, and where there is no under tutor, nor tacit mortgage, and no knowledge in the court that the minor had property. To the quotation from Delacroix v. Boisblanc, I answer that, however eloquent or rhetorical it may be, in twenty-seven States of the Union, the father would not be permitted to carry the property of his minor children out of the jurisdiction of the court, unless he had first shown that, at the place of his new domicil, he had applied for and obtained the apappointment of guardian of his children, made an inventory of their property, and given corresponding security according to the laws of the new domicil

The act of I843, is a positive repeal of those rules of law which render local the office of guardian, and gives that office the same universality which that of an executor now has; but, in such cases, where security is to be given by the guardian, it is incumbent on the court which is about to surrender the minors' property to the foreign guardian, thoroughy to investigate and ascertain that the security is corelative to, and is given in view of, the amount and value of the property about to be surrendered. This is a full answer to the text quoted by the plaintiff's counsel from Story's Conflict of Laws and cases cited. But, even in the case cited, (1 Johns, Ch. R. p. 153, Morrell v. Dickey,) if Mrs. Morrell had obtained her appointment in Pennsylvania, and given security in express relation to the New York bequest, she would have been entitled to re-

ceive it.

If Sereno Fisk had applied to the proper court in Winconsin, had there suggested that his minor children were entitled to a legacy of \$100,000 from one uncle, had stated that he was desirous of demanding this legacy from the executors of another uncle, had prayed that he might be permitted to give security adequate to the trust, and that he might thereupon be appointed guardian, and had all this been done in due form he would have come within the provisions of the act of 1843, and the defendants, after inquiry into the sufficiency of the security, might have felt bound to comply with the plaintiff's demand. If Sereno Fisk had remained in Wisconsin, he could not have been tutor, and have received the property of the minors, except by strict compliance with the laws of Wisconsin: and his presence in Louisiana, for a day, week or month, cannot entitle him to the tutorship and possession of the money.

Micou and Prentiss, on the same side.

The judgment of the court was pronounced by

Rost, J. The plaintiff, who resides in the territory of Wisconsin, acting as tutor of three of his minor children, and by virtue of the paternal power in relation to two others, whose mother is living, seeks to recover the sum of \$100,000 dollars, alleged to be due his children, by the succession which the defendants represent.

The defendants having excepted to his capacity to sue as tutor, he adduced, in support of it, the following appointment of the Court of Probates of this parish:

"I understand that by the laws of the territory of Wisconsin, the father cannot obtain the administration of the estate of his minor children. These laws of the domicil are personal statutes, and follow the petitioner wherever he goes.

Piek e. Fun. Yet I will grant the application, reserving to myself the decision of the question which may hereafter be raised in relation to said appointment, whenever the subject is brought before the court: therefore, let the prayer of the within petitioner be provisionally granted."

The judge of the court below disregarded the order, and was of opinion that the plaintiff must qualify as tutor or guardian at the place of his domicil. He

maintained the exception, and the plaintiff appealed.

Provisional tutors, for the purpose intended in this case, are unknown to our laws; their powers and duties are nowhere defined, and the court did not err in disregarding such an appointment. Tutorship is an institution of public order, which has no existence unless it is established in strict conformity to law. If the governor were to send to the Senate provisional nominations of judges, reserving the right to revoke them at pleasure, they would not be constitutional nominations. If, in adjudicating upon an action of debt, a court were to say: "I understand that in the territory of Wisconsin, where the debt accrued, the plaintiff has no right of action; the law of the contract ought to follow him wherever he goes: yet I will give him a judgment, reserving the decision of the question which may hereafter be raised as to its validity; let the prayer of the petitioner be provisionally granted "—such an order would have none of the requisites of a judgment, and would be an absolute nullity.

A receiver may in certain cases be appointed provisionally to take charge of property; but a legal function, the duration of which is fixed by law, never can be provisional.

It is said that no appointment is necessary, where the father applies for the the tutorship: but art. 949 of the Code of Practice expressly provides that, the judge shall confer the tutorship on the father. He must, therefore, be appointed like any other tutor. Berluchanx's case, 7 La. 539.

The question whether the plaintiff is entitled to an appointment of tutor in our courts, for the purpose of receiving and carrying out of the State the sum he claims, remains to be examined.

It is provided by art. 946 of the Code of Practice, that if the father and mother of the minor reside out of the State, and are not represented in it, and the minor be also absent, he may be provided with a tutor by the judge of probates of the place where his principal property is situated, or where he has intérests to assert or defend. This is an exception to the general rule prescribed by art. 944 of the Civil Code, that tutors shall be appointed by the judge of the minor's domicil, and its object cannot be misunderstood. Generally speaking, the first object of the tutorship is the care of the person of the minor; the second, the preservation of his property. When the minor is absent, the tutor appointed here exercises no control over his person. He is exclusively tutor ad bona; but so far as relates to the administration of the minor's property, he is a domestic tutor; he holds under the laws of the State a civil office, which is to endure as long as the minority lasts, or until he is otherwise legally superseded. See Proudhon, Droit des Personnes, vol. 2. His appointment binds him to account to the domestic judge at the expiration of the tutorship. C. C. art. 350. Until the rendition of his account and the delivery of the vouchers in support of it, every agreement between him and the minor arrived at the age of majority, is null and void. C. C. 355.

It would be a mockery of justice as well as a flagrant violation of our laws, to appoint a tutor under their stringent provisions, for the purpose of enabling him

Fisk v.

to remove the property of his wards beyond their jurisdiction. The appointment of an under tutor to watch over his administration, and the stern rules which prescribe his duties and secure his accountability, would, under such an hypothesis, be vain things. The law does nothing in vain. It does not confer the power to defeat its commands. No domestic tutor can, by virtue of his appointment, remove the property of his wards out of the State. To obviate in part that difficulty, the act of 1843 has recognized as valid and binding upon the courts of Louisiana, the appointment of tutors or guardians made at the place of the minor's domicil, within the limits of the United States; and there is no doubt that, under the second section of that act, all such foreign tutors or guardians may, at any time, on making a proper showing, compel a tutor adbona appointed here to account to them, and that they would be authorized to remove the property of the minors out of the State, upon proof that they had authority to do so by the laws of their domicil.

In Wisconsin the rule is that moveables follow the person, and are subject to the laws of the domicil. The sum claimed in this case, is viewed there as if it were within the limits of the Territory, and under the jurisdiction of its laws. It is admitted in the record that, under those laws, guardians cannot receive sums of money due their wards till they have given security to account for those sums. An appointment of guardian there, would consequently give no power to receive and carry away the sum claimed in this case, till it was shown that the security furnished was correlative to, and given in view of, that

We will not assist the plaintiff in violating the laws which protect his children, and surrender to him \$100,000, without security, against their express inhibition.

In the case of Berluchaux, 7 La., 543, it does not appear that the property of the minor was to be removed out of the State, and we must presume that it was not. As observed by the court, in the case of Delacroix v. Boisblanc. 4 Mart. p. 716, fathers have the right to expatriate themselves, and to take their children wherever they go; but when they do, the law presumes in them the intention to return, and, if their children have the property here, under the custody of our laws in consequence of the death of their mother, that property cannot be removed from the State till the father has been qualified as tutor or guardian at the place of his new domicil, and given there, with reference to that property, such securities as the law may require.

The plaintiff's conusel allege that it is not in his power to give security. The opposite counsel aver, on the other hand, that he has received a legacy of \$70,000, and that he must be able to comply with the laws of Wisconsin, if he is trustworthy. However this may be, we must enforce our laws, as we understand them; his incapacity to receive the sum claimed, may inure to the benefit of his children and can cause them no injury.

He can under the laws of Wisconsin as a prochain ami, and under those of Louisiana as a father, take all necessary steps for the preservation of such funds belonging to his children, as he is not authorized to receive. The claim may be liquidated, and the amount allowed be brought into court, on his application, and, if necessary, either lent upon mortgage, or invested in real estate for the benefit of the minors, under the equity powers of the court, and the reason and object of art. 348 of the Civil Code.

Fisk.

An analogous proceeding is usually resorted to for the benefit of usufructuaaries, who are unable to give the security required of them by law. C. C. art. 556.

The plaintiff may proceed in the present suit as the father and the friend of the minors, to liquidate their claim, and cause the amount of it to be brought into court; and, if he cannot ultimately give security, he may provoke the investment of it in real estate or the loan of it on mortgage, to be made by order of court, rendered on the advice of a family meeting, held in presence of the under totar.

It is therefore ordered that the judgment be reversed, and the case remanded to be proceeded in according to law, with leave to both parties to amend; the defendant and appellees paying the costs of this appeal.

CITY OF NEW ORLEANS v. FISK et al., Executors.

Where a posterior testament contains no disposition from which a change of intention in the testator, with regard to a legacy in a prior will, can be presumed, the legacy will not be revoked. C. C. 1683, 1684, 1686.

A PPEAL from the Second District Court of New Orleans, Canon, J.

Morel for the plaintiffs. Prentiss, Finney, Benjamin and Micou, for the appellants.

The judgment of the court was pronounced by

Rost, J. The facts of this case are similar to those which gave rise to the controversy lately determined by this court between J. H. Lyons and the same defendants. I Ann. Rep. 444. The first will of Abijah Fisk contained the following disposition:

"I give, devise, and bequeath to the City of New Orleans, my house at the corner of Custom-House and Bourbon streets, on condition that it shall be applied to the keeping of a library for the use and benefit of the citizens of the said city, to be used for no other purpose."

The City of New Orleans accepted the legacy with its conditions, and this action was brought to compel the executors to deliver it. The defendants resisted the claim of the plaintiffs on the ground that, the will under which it is claimed was ipso facto revoked by a posterior will of the testator, which they allege is alone valid. The court below gave judgment in favor of the plaintiffs, and the defendants appealed.

The judgment is in conformity with the opinion of the court in the case of Lyons, already adverted to. The will under which the plaintiffs claim was not revoked, and the posterior will contains no disposition, and shows no act of the testator, from which a change of intention, with regard to that legacy, can be presumed. Civil Code, arts. 1683, 1684, 1686.

and the error of the property of the state of the control of the state of the state

Judgment affirmed.

a Age should be from the second report of state of the

section there by thought and not of or your whiteen in withour

MARSHALL v. McCREA.

Compensation must be pleaded specially. C. P.367.

The right granted by art. 2692 of the Civil Code, to a person against whom a litigious right has been transferred, of releasing himself by paying to the transferree the real price of the transfer, with interest from its date, can be exercised only during the continuation of the litigation. When judgment has been rendered the litigation has ceased, and with it the defendant's right.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Stevens and Grymes, for the appellant. Eggleston, for the defendant and intervenor.

The judgment of the court was pronounced by

KING, J. This action was instituted to recover from the defendant, McCrea, who resides out of the State, the amount of several promissory notes. The suit was commenced by an attachment, under which the plaintiff caused to be seized a judgment which had been rendered against him, and in favor of McCrea. McMasters intervened in the suit, and claimed the judgment attached, under an assignment from Mc Crea, made while the cause in which the judgment was rendered was yet pending on appeal. The plaintiff answered the intervenor's demand by denying the transfer of the judgment, and alleging that, if it had been made, it was fraudulent and void. A judgment was rendered in the court below in favor of the plaintiff and against the defendant, for the amount of the notes, with five per cent interest from the date of protest, subject to two small credits admitted in the petition, and the intervenor was decreed to be the owner of the judgment attached. The plaintiff has appealed, and contends: 1st. That the judgment attached was extinguished by compensation, previous to the purchase by the intervenor. 2d. That it was a litigious right at the date of the assignment, and that he should be permitted to liberate himself from it, on paying to the intervenor \$500, the price for which he purchased it. 3rd. That the court below should have allowed him eight per cent interest on the amount of the notes from their date, instead of five per cent from the date of their protest.

I. Compensation has not been pleaded either in this court or in the court below. The issue has not been made, and the plaintiff cannot avail himself of that ground of defence against the intervenor's demand, without pleading it specially. C. P. art. 367. It may further be remarked that, this ground assumed by the plaintiff is inconsistent with the averments of his petition, where it is alleged that the judgment was the property of the defendant at the date of the attachment, subject to seizure. It could not have been a subsisting debt, subject to attachment, at a time when it had been extinguished by compensation, as it is now contended.

II. The demand purchased by the intervenor was unquestionably litigious at the date of the transfer, as it was the subject of a suit then pending between Marshall and McCrea; that litigation, however, had ceased before the inception of the present suit, and with it had ceased Marshall's right to claim a release from the judgment, on paying the amount for which it had been purchased by the intervenor. The demand had lost its litigious character by a judgment, which had finally determined the rights of the parties. The object

MARSHALL V. McCrea. of the law relating to the sale of such claims is to suppress litigation. That object no longer exists, when the controversy between the parties has been finally adjudicated upon. Marshall could only have exercised the right granted by art. 2622 of the Code, during the pendency of the suit between himself and McCrea, while the demand retained its litigious character. He had then the alternative, upon being notified of the transfer, either to persist in defending the suit, or to be released from the demand by paying the price for which it had been transferred. He chose the former. Duvergier, de la Vente, nos. 374, 375. Troplong, de la Vente, no. 987. Bulletin des Arrêts de la Cour de Cass, 1 Jan., 1831, vol. 33, p. 55. The evidence shows that the judgment was assigned to the intervenor in good faith, of which the plaintiff was duly notified, long prior to the attachment.

III. There is a stipulation in the notes for the payment of eight per cent interest from their date. The judge below has allowed but five per cent from the date of protest. In this respect the judgment is erroneous, and must be corrected.

It is therefore ordered and decreed that so much of the judgment appealed from as condemns the defendant to pay the plaintiff five per cent interest on the sum of \$1,200, from the dates of the protests of the notes sued on, and decrees to the defendant a like rate of interest on the credits allowed in said judgment of \$80 and \$250, be avoided and reversed. It is further ordered that plaintiff have judgment against and recover from the defendant eight per cent yearly interest on said sum of \$1,200, from the 30th day of April, 1842, until paid, and that a like rate of interest be allowed on said credits of \$80 and \$250 from the dates when they were respectively paid. In other respects said judgment is affirmed, the defendant paying the costs of this appeal.

FRENCH et al. v. THE NEW ORLEANS AND CARROLLTON RAILROAD COMPANY.

By the laws of Spain servitudes were divided into the two classes, of urban, or those which one house enjoys on another, and rustic, or those which one estate enjoys on another. Partida 3, tit. 31, law 1. The servitude of view is exclusively urban, such as a house only can acquire on another. Such a servitude could never be acquired by unimproved lands on other lands. Partida 3, tit. 31, law 2.

By the Spanish laws a servitude could be acquired in one of three ways only: first, by an express grant for a valuable consideration; second, by last will; or thirdly, by use and lapse of time.

Where a proprietor of lands dedicates to public use two streets, reserving a strip of land between them, the use made by him of the land so reserved at the time of the dedication, will not deprive him, or his assigns, of the right of appying it afterwards to other uses.

A PPEAL from the District Court of the First District, Buchanan, J. In the year 1788, Bertrand Gravier established on his plantation the fau-bourg St. Mary, now a part of the city of New Orleans. The faubourg extended back to St. Charles street. Poydras street was marked on it as having a width of seventy feet. After the death of Bertrand Gravier, his brother. Jean, in the year 1797, became the proprietor of his estate, and he subsequent-





ly extended the faubourg beyond St. Charles street, first to Circus, then to St. Paul, and finally eight squares further. At the point where an extension of New Orleans Baronne (then called Salcedo street) would have intersected Poydras street, a Baronne (then called Salcedo street) would have intersected Poydras street, a AND space of ground, one hundred and eighty feet square, was reserved by Jean RAILROAD CO. Gravier, and on it, as marked on the plan of the first extension made by him, is written the word Basin. The upper line of Poydras street was prolonged far as the faubourg extended, but the width of the street was reduced from seventy to forty feet. There was, at this line, a plantation ditch, running parallel to a continuation of the side lines of Poydras street, and included within them, which was used by Jean Gravier to drain his plantation and to transport timber from the swamp. Adjoining the lower line of the prolongation of Poydras street, J. Gravier reserved a slip of land thirty feet in breadth, through which the ditch ran. Adjoining the lower line of this slip, he dedicated to public use another street, parallel to the continuation of Poydras street, forty feet in width, to which he gave the name of Canal street. The ground adjoining the lower line of Poydras street as far as the square of one hundred and eighty feet, and that adjoining the lower line of Canal street beyond that square, was divided into lots, and sold by J. Gravier, or by the sheriff under execution, as fronting upon those streets respectively. The city of New Orleans accepted the dedication of Canal street and of the continuation of Poydras street, Gravier reserving the basin and slip of land of thirty feet as his private property.

This action was commenced, in 1838, by an injunction. The plaintiffs prayed that the defendants might be restrained from erecting certain buildings on the space reserved for the canal and basin, and that they might be compelled to remove certain sheds, fences and other obstructions, already placed thereon; that they might be compelled to excavate said canal and basin, and to make it navigable to the bayou St. John, or that they be compelled to abate the nuisance occacioned by its unfinished condition, by filling it up. They also prayed for ten thousand dollars damages, and for general relief.

The defendants answered by a general denial; averred that they were the absolute and unconditional owners of the ground mentioned in the petition, and described as intended for the canal and basin, and that it never was public property; and that they are not bound to make any canal or basin thereon, but have a right to build thereon, or to sell the ground for building lots. They pray that the action may be dismissed. No further proceedings were had till 1844, when John McDonogh purchased some of the squares fronting upon Canal and Poydras streets, and intervened in the suit, praying for such a judgment as was seked for by the plaintiffs, and that it may be decreed that the defendants have no other right of property or ownership in the land in dispute than that of making a canal and basin thereon. There was a judgment for the defendants, from which the plaintiffs and intervenor appealed.

Roselius, for the appellants. The only question presented for decision is, whether the defendants have a right to erect buildings on the space or strip of ground which, according to the original plans, made by the founder of the suburb, is covered by the canal and basin, without the consent of the front preprietors? The counsel for the defendants contend that this question was virtually decided in their favor, in the case of the Carrollton Railroad Company v. Municipality No. Two, 19 La. p. 62. This is a mistake. In that case it was decided that the locus in quo had not been dedicated to public uses. This decision rests principally on the ground that there was no acceptance shown on behalf of the public. The court observes: "If any dedication was ever intended, it remained inchoate until some evidence of acceptance was exhibited. None has been shown." But the question which arises in this case was ex-

pressly reserved. The court say: "The plaintiffs complain of the judgment of the Parish Court, because the judge declined deciding to what uses they not apply the canal and basin, and ask us to amend the judgment in that particular. This request we must decline, as we do not think proper to give such an opinion in the present state of the case." p. 71.

The next case on which the defendants rely, is that of Livaudais v. Municipality No. Two, 16 La. 509. It was contended by the defendants in that case that the plaintiff, who was the founder of the faubourg Annunciation, had dedicated a square of ground to the public, by writing the word "Colyéée" over it, on the original plan. The court decided that this was not sufficient to support the alleged dedication. But the reasoning of the judge who delivered the opinion fully sustains the position taken by the plaintiffs and appellants. Judge Martin says, at p. 513:

Martin says, at p. 513:

"There is no evidence of the dedication out of the plan in this case, and none is the plan out of the word 'Coliseum.' In this same plan, is marked a locus publicus, called 'la place Annunciation,' in the middle of which is a spot designa as a place for a church. If the plaintiff did not by this designation contract the obligation of building a church, he certainly renounced the right of appropriating it to any other object. The erection of a church by him could not be resisted by it to any other object. The erection of a church by him could not be resisted by any body." In the concluding part of the same opinion, the judge remarks: "It is not for us now to say whether the purchaser of lots from the plaintiff, in reference to this plan, acquired rights or not on this square? If they did, whether those rights were personal or real, in the nature of a servitude, and whether the lots were the creditor estates, and the square the debtor estate of the servitude? The rights of the purchasers of lots, whatever they may be, cannot be acted on in a suit to which they are not parties, by themselves or their legal representatives. The Municipality is without authority to represent them." them."

Much importance seems to be attached to the fact that, one of the forks of Poydras street is called Canal street. It is submitted, however, that this circumstance cannot be considered as very material in the present enquiry. do not insist that the defendants should be compelled to keep the canal open for navigation; but we contend that they have no right to raise buildings on the site of the canal and basin. They have succeeded to all the rights of Jean Gravier; and therefore can excercise no other or greater rights than he might himself have done. Then the question recurs, can a person who has sold property, not only in conformity to a plan, but with reference to an existing state of things, afterwards arbitrarily make a material change, to the injury of those who have acquired their titles from him? The court perceives that this question, properly speaking, is neither one of dedication nor of servitude. It may perhaps be considered as partaking of both the one and the other. The question is of great importance, not only as regards the parties to this suit, but it will virtually decide another question of much more interest to the inhabitants of New Orleans, i. e. whether the navigation company can erect buildings in the centre of Canal street? The analogy between the two cases is so complete that it is impossible to discover the slightest difference between them. The following authorities. I believe, support the claims of the plaintiff

The following authorities, I believe, support the claims of the plaintiff The following authorities, I behave, support the claims of the plainting to the fullest extent. 1 Wendell, 262, In the Matter of the application of the Mayor &c. of the city of New York, relative to the opening of Seventeenth street in the twelfth, late ninth, ward of the city Wyman v. the Mayor &c. of New York. 11 Wend, 487. Barclay et al. v. Howell's Lessee, 6 Peters, 498. City of Cincinnati v. Lessee of White, Ibid, 431. McDonogh v. Calloway, 8 Rob. 92. Rez v. Lloyd, 1 Camp. 262. 2 Blackstone, 36. 3 Mason, 250. 5 Saunton, 311. 1 Saundors, 323.

Carter, on the same side.

Carter, on the same side.

L. Janin, for the defendants. The canal and basin were decided by the Supreme Court to be the property of the plaintiffs, in the case of the Carrollsupreme court to be the property of the plaintiffs, in the case of the Carrotton Railroad Company v. Municipality Number Two. See 19 La. 63. The plaintiffs in that case are the defendants in this action. The question is thus again presented, whether the defendants can use this ground for building lots or should be restricted to using it as a canal? The court in the case in 19th La. say, (p. 70): "All the evidence, both of plaintiffs and defendants, shows that Jean Gravier always considered the basin and canal as his own. He used them; he contracted with Goodwin and others to enlarge and deepen the canal;

FRENCH

he always asserted and maintained his possession until 1825, when the property was seized and sold under execution to Gordon, who purchased for the Orleans
Navigation Company. They remained in undisturbed possession until 1833, New ORLEANS
when a sale was made to the plaintiffs. Immediately after the sale, the old
CARROLLION
COPPORTION OF THE PROPERTY OF THE PROP ceiving from them a grant of two pieces of ground, for the purpose of prolonging Baronne and Poydras streets, in consideration of which, they gave the company the use, during the existence of their charter, of a portion of the Place Gravier, to be used as turnouts for their roads, a shelter or depôt for their cars, and other purposes specified in the deed. In July, 1836, the defendants recognized the interest and right of the plaintiffs, by a resolution calling on them to fill up the canal; and in the month of September, in the same year, actually purchased from them all the space between Baronne and Circus streets, and and have built a market house on it, which was one of the conditions of the

Agam, at p. 71: "What constitutes a dedication to public use, has been so much discussed in this court lately, as not to need repetition now. There must the a plain and positive intention to give, and one equally plain to accept. The form is not material. We see nothing in the evidence to prove a dedication of the basin and canal; on the contrary, such a purpose was always repudiated by Jean Gravier. Upon that point we see but little difference between this case and that of Livaudais v. The Second Municipality, 16 La. 509. If any dedication was ever intended, it remained incheate, until some evidence of acceptance was exhibited. None has been shown. The defendants or the public never used the basin or canal in any manner, and it was in fact not susceptible of use, except by *Gravier*, and his agents or lessees, who used it to transport wood from the swamp, and to supply clay for making bricks. As the defendants have failed to prove a dedication, they have no legal title to the premises

in question." It is contended by the intervenor that, as Gravier sold a number of lots as "fronting on Canal street or on the canal," this implied an undertaking on his part to make a canal on the reserved space, or at least to leave it open. It is true that Gravier sold, in 1805, to Ross, a square "facing the canal;" that, in a mortgage to the Orleans Insurance Gompany, he speaks of "divers terrains situs sur le bord du canal." But the plan annexed to this last mentioned act, and afterwards to an act of January 15, 1818, shows that these lots fronted on Canal street, a street of forty feet in width, which separated them from the canal; and all the other lots on the same street were sold as fronting on "Canal This is a much weaker case than that of the front proprietors in faubourg St. Mary, who purchased "frente al rio," or "frente à la levée," and yet did not take the batture. 8 Mart. N. S. 576. 9 Mart. 656. How could it be pretended that the naming of a street after a neighboring object, a garden for instance, or the sale of a lot as "facing the garden," could impose upon the

seller the obligation of keeping this ground forever as a garden?

The dedication of ground to public use when town lots are laid out, is a species of urban servitude. To be binding upon the grantor, it requires a distinct acceptance. The Supreme Court held, in 19 La. 71, that the facts of that, and consequently of the present case, afforded no proof of an intention to dedicate, or of the acceptance of the pretended dedication. Much light is thrown upon this subject by the decision of the Supreme Court in the case of Livaudais v. Municipality Number Two, 16 La. 509. Livaudais laid out and sold faubourg Annunciation, in 1807, according to a plan, on one of the squares of which was written "colisée." The Municipality having subsequently enclosed this square, and claimed it as public property, Livaudais instituted a petitory action.

The following extracts from the opinion of the court in that suit bear upon

the present case:

"Had the plaintiff designated on his plan places for a theatre, a ball room, a concert room, or a a tennis court, would this designation be considered as a dedicate them out cation of those places to public use, divest him of his title, and place them out of commerce? If it did, what remedy would there be if these places were not applied according to the dedication? Who should be put in mora? And against whom should the process be directed for the purpose of setting the dedication aside!"

"As to the erection of this edifice, who has put him in mora? If the building is not necessarily to be erected by him, who has offered to erect it? Who

NEW ORLEADS has accepted the donation which results from the dedication?"

CARROLLEOS

"They (the Municipality) contend, that this property is their own, and all RALEBOAD Co. their efforts in this case have tended to show that the plaintiff has been divested of his title. The action being a petitory one, this would suffice to prevent a recovery, but, as we have said, there was no dedication. Had there been one, it was incohate only, until the acceptance of the party for whose benefit the dedication was intended. Of the acceptance there is not the least title of

From this decision it may be collected: 1st. That a dedication to public use, inferred from a plan of division into town lots, must be confined to those parts which are necessary for the use of the public, and which from their nature can

not remain private property, such as streets and squares.

2nd. That if such a plan should contain indications that the proprietor intended to apply certain portions of ground to the construction of buildings, or other improvements, which, while they are not indispensable to the use of the lots sold, may yet tend to the comfort and advantage of the public, and be a source of emolument to the proprietor, a hotel for instance, such indications will not imply a dedication of those portions of the ground to the public. Or if they could imply a qualified dedication, they would require, to be binding upon the proprietor, a separate and distinct acceptance by the public, and an express engagement on its part to make the contemplated improvement.

The solid distinction recognized by the court rests on the difference between

improvements, such as streets, squares, &c., without which the substantial intention of the parties, viz, the establishment of a suburb, could not be carried into effect, and those improvements, such as churches, places of public amuse-ment, hotels, which are not essential to the execution of the main purpose. The former fall exclusively under the administration of the public authorities, and have to be made at the public expense; the latter class of improvements

are private undertakings or speculations.

It is a proposition too clear for argument, that the founder of a suburb does not contract the obligation to build a church, a theatre, or an hotel, by merely writing those words on different portions of his plan; nor will it be pretended that, by simply approving his plan of division, the public authorities assume the obligation of constructing those improvements, if he should neglect to do so. Assuredly if the public could claim such property, it would be only for the purpose of making the proposed improvement, and this is entirely beyond the power and authority possessed by city administrations in the United States.

The judgment of the court was pronounced by

Rost, J. Bertrand Gravier established the present faubourg St. Mary, in 1788, as far back as St. Charles street. Poydras street was marked upon the plan of it as being seventy feet wide. Bert-and Gravier died in 1796, and the following year his entire estate was adjudicated to his brother Jean Gravier, who, at various times during his ownership, extended the faubourg beyond St. Charles street. There was at that time on the land, in a direction parallel to the continuation of the side lines of Poydras street, and included within them, a plantation ditch, used by Gravier for the purposes of draining, and also to boat timber out of the swamp, for the use of his plantation and of a pottery he worked at the time. In the plan of the first extension of the fanbourg made by him in 1802, the word Basin was written on a square lot situated at the upper end of the drain; the upper line of Poydras street was prolonged as far as the faubourg extended, but below the square marked Basin, the width of that street was reduced from seventy to forty feet. Adjoining the lower line, Gravier reserved a breadth of thirty feet of land through which the drain passed, and adjoining that land below, he dedicated to public use, another street forty feet wide, to which he gave the name of Canal street.

All the adjoining lower lots of this and the subsequent extensions of the faubourg were sold, either by him or by the sheriff under execution, as fronting NEW ORLEANS upon Poydras street above, and upon Canal street below, according to the plan of division of the faubourg. The city corporation accepted the dedication of RAILEOAD CO. Canal street, and of the centinuation of Poydras street, for the public use; but did not, and could not accept the dedication of the space between them, Gravier having at all times expressly reserved the right of property to it. That strip of land and the basin were subsequently sold under execution as the property of Gravier, and the defendants hold them under a sale that binds them not to make a canal.

The question of dedication in relation to that property, came before the Supreme Court in the case of the Carrollton Railroad Company v. Municipality No. Two, and it was held that no dedication had ever taken place, and that the title was in the assignees of Gravier; but after expressing this opinion, the court further said:

"The plaintiffs complain of the judgment of the Parish Court, because the judge declines deciding to what uses they should apply the Canal and basin, and ask us to amend the judgment in that particular. This request we must decline, as we do not think it proper to give such an opinion in the present state of the case. The plaintiffs have a regular title from Jean Gravier, and are vested with all his rights; as to the manner in which they may choose to exercise them, we will not express an opinion in advance."

This suit was instituted in 1838, by various purchasers of property fronting upon the aforesaid streets, for the purpose of obtaining the decision of the court on this single point. The plaintiffs allege that the site of the canal and basin can only be applied to the purposes for which they were intended by Gravier; that the defendants have no right to enclose the same, nor to erect sheds or buildings thereon, so as to interfere with the right of view of the petitioners; they pray that the defendants be compelled either to dig out said canal and basin, so that the same may be navigable to the bayou St. John, or to abate the nuisance occasioned by its unfinished condition, and to fill it up in conformity with the police regulations of the city, and that they be enjoined from erecting buildings thereon. The defendants answered, alleging their perfect ownership of the property, and their right to use it as they may think proper, without hinderance from the plaintiffs. No further steps were taken in these proceedings till 1844, when John McDonogh, a purchaser at sheriff's sale of some of the squares fronting upon Canal and Poydras streets, and situated beyond eight squares from the inhabited part of the faubourg, intervened. The original plaintiffs appeared to have abandoned the suit, and the contestation is now exclusively between the intervenor and the defendants. The court of the first instance gave judgment in favor of the defendants, and the intervenor appealed.*

His counsel has argued that the question presented by the issue, is neither one of dedication nor of servitude, but he has failed to show how it can be any thing else; he admits that there was no divestiture of the title, and therefore no dedication. If it be true that, although the title has remained in the defendants, they can neither enclose their land nor erect buildings upon it, theirs is, in legal parlance, an imperfect ownership. The only imperfect own-

^{*} The plaintiffs also appealed.

PRESCE

9.
NEW ORLEANS
ASD
CARROLLTON
BAILROAD Co.

nerships of immoveables recognized by our laws are those which result from the immovable being charged with an usufruct, a right of use or a servitude. Civil Code, arts. 482, 484.

It is not pretended that the immovable is charged in this case either with an usufruct or a right of use; and if the intervenor has any right at all to control the use of it, that right must be founded upon a servitus realis. His counsel, well aware of the necessities of his case, has alleged that he had acquired the right of view, by the disposition which Jean Gravier had made of the land in controversy in the plan of the faubourg, and that the erection of buildings upon that land or of enclosures placed around it, would abridge that right and render it imperfect. We must therefore inquire whether a right of view is a servitude which unimproved lands can, in any case, acquire upon other lands, and, if so, how it was acquired to the lands of the intervenor?

The laws on servitudes in force at the time those faubourgs were created, are found in the Partidas. The law 1st, tit. 31st, of the 3d Partida divides them into two classes. The first constitutes those which a honse enjoys on another house; these are named urbana. The second, are those which an estate enjoys on another estate; they are called rustica. The second law of the same title describes the right of view as being exclusively urban, and such as a house can acquire over another house.

The intervenor is the owner of swamp lots; it is not pretended that there were any houses on them when he purchased them, nor that there are any now. If then the right of view presupposes the existence of a house at the time it is alleged to have been acquired, how can the intervenor avail himself of it under the state of facts disclosed by him. He was clearly entitled to a right of way from the lots to the inhabited parts of the city, and he obtained it by the dedication of Canal and Poydras streets; but a right of view was not in the contemplation of the parties at the time, and is not a servitude that attaches in favor of waste lands. If it did, it is not perceived how the intervenor ever acquired it.

"Servitudes not established by law could, at that time, be acquired in three ways only: 1st. By the grant of the owner to the persons who were to enjoy them, and for a valuable consideration. 2d. By his last will establishing the servitudes. 3d. By use and lapse of time. Law 9th, tit. 31st, Partida 3.

The intervenor claims under an implied grant from Jean Gravier; but the laws then in force did not recognize such an implication, and required the grant to be expressly made to the party who was to enjoy it, and a consideration of some kind to be given by that party. "Non enim per solam promissionem acquiritur servitus, nisi realiter constituatur. Gregorio Lopez, on the law cited. Here there was no contract, no acceptance, no consideration. Jean Gravier never offered to dedicate the land in controversy to public use; but, on the contrary, retained it as his own, and subsequently tried to form a company to whom he might sell it for \$100,000, on condition that part of the price should go to the construction of the canal. In this attempt he failed, and the land remained as if the old drain had never been upon it.

If a right of view could be implied from such facts, the law in force at that time limited that right to the neighboring estate. The words neighboring estate had a technical meaning under the Roman law and the laws of Spain, which, on this subject, are the same. They meant the estate contiguous to that in fa-

FREECH .

NEW ORLEANS

vor of which the right was claimed. See Pardessus, Disser. p. 353, and authorities there cited. Domat, Legum, p. 31, tit. 2.

Now, in this case, Canal street and the continuation of Poydras street had been dedicated to public use, and were placed out of commerce by the accep- RALLROAD Co. tance of the dedication. They were the neighboring estates of the squares and lots fronting upon them, and if the right of view could attach at all, before houses were built, in favor of the purchasers of those lots and squares, that right would not extend beyond the breadth of those streets. The designation on the plan of the actual use of the strip of land situated between them, did not affect the right of property of Gravier, and left him at liberty to use it in any other lawful manner he saw fit.

To illustrate this position, let it be supposed that Gravier had extended the faubourg only on the lower side of Canal street, and that above the upper line of said street the words-plantation of Jean Gravier-had been inserted on the plan made of it. According to the argument of counsel, the intervenor would have acquired by that fact a right of view over the whole plantation, and Gravier and his representatives would have been forever debarred of the rights of extending the faubourg there, and of dividing the plantation into building lots. An argument that would lead to such consequences cannot be well founded in law. and the cases quoted in support of it are all based upon an entirely different state of facts. The analogy attempted to be established between the rights of the defendants, and those of the Navigation Company to the middle of old Canal street, entirely fails. That street was laid out as a single street, and the proprietors on both sides of it purchased their lots with reference to that previous destination. The authority given to the Navigation Company to extend their canal through the middle of it, was a change of destination of public property, not a divestiture of private ownership.

Here Gravier gave to the public, who accepted them, two distinct and separate streets, and reserved, as his own, a strip of land thirty feet wide between them. The dedication was accepted with that reservation; the city of New Orleans never attempted to interfere with his ownership; and the intervenor purchased the squares he owns, with full knowledge of those facts. The fact of his purchase did not impair the right of ownership of Jean Gravier to what he did not sell, nor was the subsequent use which he, or his assigns, were to make of it, fixed by the use to which it was applied at the time of the formation of the faubourg. They may now divide it into town lots, provided they dedicate to public use those portions of it included within the lines of the cross

There is no error in the judgment appealed from.

Judgment affirmed.

GRIDLEY et al. v. CONNER.

Where a partner, pending a suit for the settlement and liquidation of the partnership, collects money belonging to it,, under an appointment from the court, he has no right to withhold from the court the money so collected, under any plea or pretence personal to himself. To retain funds so collected is a flagrant breach of trust, and the court may compel their immediate production.

GRIDLEY CORPER. After the dissolution of a partnership and pending its liquidation, a partner is not permitted to do any act, still less to make use of the partnership funds in a manner inconsistent with the purpose of a just and proper settlement.

It is not necessary that the creditors of a partnership should be made parties to an action between the partners for a settlement of the parenership affairs.

Commercial partners being bound in solido the debts due by them are indivisible, and no settlement of the partnership can be effected without their payment.

The creditors of a partnership have a privilege on the partnership property entitling them to be paid in preference to the creditors of the individual partners; and any partner ultimately bound for the partnership debts, may maintain an action against his co-partner, to effect a proper application of the partnership property to the extinguishment of the partnership debts. C. C. 3794.

Wherein a suit for the settlement of a partnership the appointment of a receiver becomes necessary to effect the object of the suit, the court may appoint one. The power to do so belongs to the class of incidental powers. C. C. 21. C. P. 130.

Partners are bound to pay interest on sums taken out of the partnership funds from the time they are so taken. C. C. 2829.

Attorneys in fact are bound to pay interest on any sums belonging to their principals, which they have applied to their own use, and on any sum which they are in default in paying over. C. C. 2984.

A PPEAL from the District Court of the First District, Buchanan, J.

Roselius, for the plaintiffs. Elmore and W. W. King, for the appellant.

The opininion of the court was pronounced by

EUSTIS, C. J. This suit was instituted on the second June, 1840, and was before the late Supreme Court in May, 1843. The report of the proceedings had up to that period, is found in 4 Robinson's Reports, p. 445 et seq. The protracted and useless litigation which has signalized this cause was noticed in a very appropriate manner by the court, without, however, producing any result as to the litigants. The case was remanded to be tried before a jury, unless the parties should submit the matters in dispute to arbitration. Conner had asked for a trial by jury on the whole case, and it was for the purpose of enabling him to exercise this right that the cause was remanded. A trial was accordingly had before a jury, who have rendered their verdict, so far as Conner is concerned, on three distinct issues, to wit: 1st. The responsibility of Conner to the partnership of Conner, Gridley & Company, under the allegations of the petition, of having withdrawn money from the partnership for his private use, made false entries in the books, and done other unlawful acts, for the purpose of defrauding his co-partners. 2d. His responsibility for debts due to the partnership, collected by him as receiver under the appointment of the court-3d. The responsibility of one of the plaintiffs, Whitehead, growing out of his receivership, to which trust he had been also appointed by the court, and under which he is still acting. The responsibility of the plaintiffs was also involved in the first issue, which was made up by the answer of Conner to the original petition of the plaintiffs.

The verdict of the jury was that Conner re-imburse the partnership \$9677 29, Gridley the sum of \$5855 23, James R. Conner, as receiver, the sum of \$4290 63, and Whitehead, for fees paid the clerk of the Supreme Court, the sum of \$41.75; that the amount so received, as well as the other assets to be collected, should be paid into court and distributed under its direction; and so was the judgment of the court. Gridley has not appealed; Whitehead asks that the judgment be confirmed; and Conner, in a very elaborate argument by his counsel, has scrutinized and drawn in question both the legality of the pro-

ceedings, and every matter of fact which was considered as having any bearing on the verdict.

GRIDLEY V. CORNER.

For all the purposes of this enquiry we consider, that we have before us the action brought by two of the partners against the third partner, who is the defendant, for the liquidation and settlement of the partnership of Conner, Gridley & Company, in which object both the plaintiffs and the defendant concur in their petition and answer, in which is now included the liability of the two parties, Whitehead and Conner, growing out of their several trusts as receivers of the partnership, which they at different times exercised under the authority of the court.

The question of the dissolution of the partnership has settled itself. The whole litigation has been thrown en masse before the jury, and if great confusion were to be the result of this anomalous mode of settling the complicated concerns of a partnership, Conner is the only party concerned who cannot complain of it. A party comes with a very bad grace to ask relief against the confusion which he has done so much to create, as the conduct of Conner proves that he has done in the course of this litigation. It is difficult to divest one's self of the impression that, it was a matter of calculation with him in order to cover up his acts, and, in the midst of this confusion, to avoid meeting his just responsibilities to the co-partnership, or to harrass and wear out the patience of his adversaries by vexatious delays. But the verdict of the jury has systematized the subject, and, by classing each sum awarded under its proper head, has afforded us the means of reaching some of the grounds upon which it is founded.

Before we examine the verdict rendered on the different matters which have been cumulated and presented to the jury, lest it should be supposed that we approve what has been done, we deem it proper to state what we conceive to be the law in relation to the obligations of a partner, who, pending a suit for the settlement and liquidation of a partnership, collects money belonging to the partnership under an appointment from the court. A partner so receiving it, has no right to withhold it from the action and control of the court, under any plea or pretence personal to himself. He cannot be permitted to defeat the very object of his appointment, by violating or evading his trust. If receivers, partners or others, are thus permitted to retain the funds from creditors, and, as the cause progresses, involve them in new litigation, how can the partnership be settled in the presence of these hydra pretensions.

The retention of funds collected under the authority of the court is a flagrant breach of trust, and the power to compel their immediate subjection to its control is unquestionable; and, without a vigilant and efficient exercise of this power on all proper occasions, the judicial settlement of the concerns of a partnership would become a mere farce.

After the dissolution of a partnership, and pending its liquidation, a partner is not permitted to do any act, still less make use of the partnership funds in a manner, inconsistent with the purpose of a just and proper settlement; and it has been held that, where a partner has collected partnership money under circumstances from which an agreement on his part not to receive it can be inferred, and where his receiving it was contrary to good faith, he may be held to pay the money into court. Collier on Partnership, p. 166. Gow on Partnership, p. 121

In this case Conner was permitted to retain as a partner the money he has collected as receiver, and confound it with the partnership affairs. We think

GRIDLET W. CONFES. think the money thus collected ought to have been paid into court, and that Conner had no more right over it than his co-partners had.

It is urged by the counsel for the defendant that the creditors of the partnership were not, and ought to have been, made parties to this suit. Conser could have made them parties, had he considered it his interest so to do. That they should involve themselves willingly in this labyrinth, which he has done everything in his power to prepare for them, was not to be expected. Nor is there any necessity for their intervention. They have a sufficient representative for all present purposes, in the present receiver, Whitehead, and the court will see that their interests are fully protected.

Objections have also been taken to the right of the plaintiffs to maintain this action, and also to the sufficiency and effect of the verdict.

A statement of our views of the law, in general terms, we consider will have some advantages over answers to each objection in detail.

The action and mode of proceeding in this case are as ancient as the law of partnership itself. They form the actions pro socio and communi dividendo of the Roman law combined. They exist under every system of jurisprudence, and are the means by which the rights of partners and creditors are mutually protected. Story on Partnership, 326. Our own Code makes provisions for cases of this kind. The rules concerning the partition of inheritances, the manner of making them, and the obligations which result between heirs, apply to partners. Civil Code, art. 2861.

The first step to be taken towards the completion of a partition, is the settlement of the amount which each of the heirs owes the succession, and of the amount which he is bound to collate; and where there is to be a final liquidation and settlement of a succession or partnership, it is obvious that the result cannot be effected without a payment of the debts, or, in a succession, by a division of the debts among the heirs.

The debts due by commercial partnerships are indivisible, as the partners are bound in solido; the debts must therefore be paid.

In this case there is a particular fund affected by privilege in favor of certain debts, and the present action has for one of its essential objects, the subjection and application of this fund to the payment of these debts.

The creditors of Conner, Gridley & Co. have on the partnership property a privilege and preference over the individual creditors of the partners, and it is competent for one of the partners, who is ultimately bound for the debts, to maintain an action against his unwilling or defaulting co-partner, for the purpose of effecting this just and proper application of the partnership property to the extinguishment of the partnership debts. Civil Code, art. 2794. Story on Partnership, § 326. In the case of the partition of an inheritance, it is always competent to an heir or legatee to demand a separation of patrimony, or the marshalling of assets. Civil Code, arts. 1402, 1403.

We consider the power of the court to appoint a receiver in a case of this kind, to be necessary for the purpose of effecting the object of this suit, which is the liquidation and settlement of a paatnership, and it falls within that class of incidental powers which courts have full authority to exercise. Story on Partnership, § 333. Civil Code, art. 21.

Our courts are not organized with the proper machinery for the settlement of complicated partnership concerns. They are still obliged to determine and conclude matters of this kind, and they have the powers necessary for the exercise of their jurisprudence, although such powers may not be expressly given them by law. Code of Practice, art. 130.

GRIDLET, CONNER.

It is reasonble that, where a partner insists on throwing the whole partnership concerns before a jury, and the verdict is rendered on the books of the partnership, and the evidence of both parties is fully before the jury, the verdict ought not to be disturbed, and the party selecting this mode of settling the party nership relieved from its effect, unless some rule of law has been violated, or manifest injustice has been done, by the verdict. The verdict against the defendant under the issue between him and his partners, was for the sum of \$9677-29. In the report of the auditors, Conner was charged with the deficiency in the cash, and the balance due by him on that account, was fixed at \$6007-96.

The defendant insists that there is no ground whatever for obliging him to bring back any other sum than the latter amount, and that the verdict is wrong in exceeding it. We adopt the conclusions of the counsel for the plaintiffs in relation to this part of the case.

The jury were bound to make the partners contribute equally to the mass. Their accounts could be adjusted on no other principle. We do not consider this part of the verdict in any manner contradictory to the report of the auditors, but, on the contrary, as authorized by it. The amounts which Conner and Gridley are each bound to contribute by the verdict, place them on an equal footing with Whitehead, their co-partner, and this is a right which Whitehead has by the verdict secured to him. The sums are not in strict accordance with this principle, but the difference is not material. The jury had all the partnership books before them in evidence; they were not regularly kept, and we have no means of ascertaining on what particular evidence the jury arrived at the different conclusions which resulted in their verdict. But as to the correctness of the principle on which the jury acted, we do not entertain a doubt. Whitehead had taken comparatively nothing out of the partnership, Conner had, on the contrary, drawn a very large sum, and the intention of the jury evidently was to put Whitehead on an equal footing with Conner, by compelling him to bring back what he had thus withdrawn, and furnish such an additional sum as would equalize his position as to the partnership with his co-partners.

In relation to the claim against Conner as receiver: The sum of \$4844 54, was found due by him by the first judgment, rendered on the second of May, 1842; the present verdict against him is for \$4290 63, and the court below has refused to open it for further investigation, and we concur in the correctness of that opinion.

We are satisfied that no injustice has been done by the verdict for the aggregate aum found by the jury. Partners are bound to pay interest on sums taken out of the partnership fund, from the day they are received. Civil Code, art. 2829. Attorneys in fact are bound also to pay interest for the monies of their principal which they have applied to their own use, and, in all cases, for sums which they are in default in paying over. Civil Code, art. 2984.

Conner is not charged with interest on either of these accounts, for both of which he is liable; and were he held to pay interest on the deficiency of the cash, with which the auditors charge him in their report, which is homologated, and on the amounts he has most unjustifiably retained, which he collected under his authority as receiver, the judgment against him would have to be increased. Stoughton v. Lynch, 1 Johnson's Ch. Rep. 467, et seq.

GRIDLEY V. CORRER. We find no sufficient ground for disturbing the verdict, so far as it relates to Whitehead.

For the amount of this judgment it is competent for Whitchead to issue execution. When the creditors shall have been paid, it will be his duty to divide the residue, if any remain, among the partners under the direction of the court, in accordance with the articles of partnership, and their respective interests in the fund.

We believe that we have thus determined all the questions which have been raised in argument by the counsel who have argued this case, and we have done it under the hope that this will close the warfare which has so strongly characterized its proceedings, and that, for the little which remains to be done, the pariners themsleves may co-operate to effect the object which they both avow in their pleadings they have in view—the liquidation and settlement of the partnership concerns.

It must rarely happen that in the settlement of a partnership by the verdict of a jury, full justice is done to the parties. The relations of partners are too intimate, too confidential, to be determined otherwise than by a spirit of truth and justice among themselves. They are the agents of each other, in many circumstances completely in each others power, and socium vero cavere qui possumus.

The ancient laws of this land declare, that great advantages arise from such an union, when it is formed between good and honest men, for then they mutually assist one another as if they were brothers. Partida 5, tit. 10, law 1. Recte igitur majores eum, qui socium fefellisset, in virorum bonorum numero non putarunt haberi oportet. Cicero pro Roscio. It is by the parties themselves, by arbitration, or the judgment of mutual friends, and not by an embitagred litigation, that cases of this kind are best determined.

Judgment affirmed.

AKIN v. DRUMMOND.

Parol evidence is admissible to prove that an authoritic act, attesting the cancelling of a lease and the payment of rent, was executed through error, caused by the fraud of one of the parties. Art. 2256 of the Civil Code, which forbids parol evidence to be received against or beyond what is contained in certain written acts, applies only to contracts relating to real estate. Other acts are subject to the general rules of evidence, which permit mistakes, or fraudulent omissions, to be proved.

A memorandum in writing, aigned by a party, and loft by him and the other party with a notary for the purpose of preparing an authentic instrument in conformity therewith, is as obligatory between the parties as the authentic act itself, and if any of its covenants are not embodied in the latter, they will not, for that reason, become inoperative. The two instruments are parts of the same contract, and must be construed together.

A PPEAL by the plaintiff from a judgment of the District Court of the First District, Bucchanan, J., in favor of the defendant.

Livingston, for the appellant, on the question of the admission of parol evidence to explain the authentic act, cited Civil Code, art. 2256. Goodloe v. Hart, 2 La. 449. Badon v. Badon, 4 La. 166. Henderson v. Stone, 1 Mart. N. S. 639. Clark v. Farrar, 3 Mart. 250. 2 Mart. 78. 11 Mart. 630. 13 Mart. 684. 2 Mart. N S, 361. 1 Rob. 358.

Preston, on the same side.

DEUMMOND.

Frazer and Roselius, for the defendant. Where fraud is charged and error alleged, parol testimony is admissible to contradict even an authentic act. See Broussard v. Sudrique. 4 La. 347. Keys v. Powell, 9 La. 574. Badon v. Badon. 6 La. 255. Gale v. Kemper's Heirs, 10 La 209. Palangue v. Guesnon, 15 La, 311, and the authorities there cited. Also 2 Starkie on Evidence, pp. 555, 558. 1 Greenleaf on Evidence, §§ 296, 305. Morris v. Nixon et al., 1 Howard, 119. 2 Story on Equity, § 1531. A notarial or authentic aet has no more force or effect between the parties to it than an act under private signature. C. C. 2239.

The prohibition contained in arts. 2255, 2256 of the Civil Code, has relation particularly to immovables, and is not applicable to other contracts; they are governed by the general rules of evidence. C. C. art. 2257. Clamagaran v. Sacerdottee, 8 N. S. 541, 542. Bradford et al. v. Clark, 7 La. 147.

The judgment of the court was pronounced by

Kino, J. The plaintiff instituted this suit, claiming originally from Drummond, the defendant, \$3,500, which he alleged to be due by the latter for rent; and two unaccepted drafts, given by the defendant on one Dupuy, were annexed to the petition as evidences of the debt. The lessor's privilege was claimed, and the property of the defendant on the premises leased was provisionally seized, to secure the payment of the debt. The plaintiff subsequently amended his pleadings, increasing his demand to \$5,040 73, which he alleged to be the full amount of rent due to the 1st of January, 1845.

The defendant, in his answer, denied that he was indebted to the plaintiff, He admitted the alleged lease, which commenced on the 28th day of February, 1839, and by its terms was to have expired on the 1st of October, 1849, but avers that, in consequence of a misunderstanding which arose between Akin and himself, in relation to the arrears of rent due, the former proposed that, if defendant would pay him \$3,500 in cash, he would give the defendant an acquittance for all rents due and to become due until the 1st of January, 1845, and cancel the lease, to take effect on that day, which offer was accepted; that the parties went before a notary, for the purpose of causing the agreement to be embodied in an authentic act; but the notary being unable to prepare the act on that day, at the urgent solicitation of Akin, the stipulated sum of \$3,500 was then paid, and a receipt given for that sum in full of all rents due and to become due up to the 1st of January, 1845, which was left with the notary, with instructions to prepare the act. He further alleges that, if the act prepared by the notary, and signed by the parties, be susceptible of any other interpretation than that of a receipt in full for all rents due and to become due up to the 1st day of January, 1845, that he signed it in error, which error was caused by the fraud and deceit of the plaintiff.

It appears from the evidence that, the plaintiff and defendant went before a notary public for the purpose of annulling the lease in question. The hour being late, the notary stated that the act could not be prepared on that day. The defendant, nevertheless, paid Akin \$3,500; and the following memorandum in writing was prepared by Akis, signed by him, and left with the notary:

"Mr. Lewis T. Caire: Please cancel the lease granted by David Akin to J. Drummond, and witness the present payment by Drummond to Akin of \$3,500, and embody the same in the act of annulment, as a receipt in full to the first of January next therefor.

(Signed) D. AKIN.

An act was prepared by the notary, which was signed by *Drummond* three days after its date, and two days later by *Akin*. It recites, that *Akin*, "for and in consideration of the sum of \$3,500, to him in hand paid, does resiliate,

ARTH U.
DRUMMOND.

cancel and annul a certain lease, granted by the said Akin to the said Drummond, on the 28th day of February, 1839. But it is well understood and agreed upon between the parties that said Drummond shall have the right of occupying and using the aforesaid described premises, as heretofore, until the 1st day of January, 1845. Now therefore, in consideration of the said sum paid as aforesaid, the said David Akin does, by these presents, exonerate the said lease from the obligations by him assumed in the aforesaid deed of lease, and does hereby consent that the same be, from the first of January next, considered null and void."

No reference is made in the act to reuts due, or thereafter to accrue. plaintiff contends that, the sum of \$3,500 was paid, in consideration of his annulling an onerous lease, which had several years to run at a heavy annual rent. The defendant, on the contrary, insists that, by the agreement, the sum paid was in full of all rents due up to the 1st of January, 1845, and for the annulment of the lease; and, in support of that position, relies on the receipt, or memorandum, left with the notary. That memorandum was withdrawn by the plaintiff a few days after the execution of the public act; a copy of it, however, was preserved by the notary. The plaintiff was ordered, on the usual showing, to produce the original on the trial, but declared his inability do do so, as it had been lost or destroyed. The defendant then offered to prove, by parol. its contents, as well as the agreement and intention of the parties. This evidence was objected to, on the ground that it was inadmissible to vary or contradict a written instrument. The objection was overruled, and the plaintiff excepted. We think that the court did not err. The defendant expressly avers that, if the act be susceptible of any other interpretation than that for which he contends, it was signed through error, which error was caused by the fraud of the plaintiff. Parol evidence to establish these allegations was admissible.

The plaintiff invokes in support of his objection the 2256th article of the Code, which forbids parol evidence to be admitted against or beyond what is contained in the written act. The prohibition of that article has been held to apply only to contracts in relation to real estate; other acts are subject to the general rules of evidence, which permit mistakes or fraudulent omissions to be proved. No writings are more frequently extended and explained by parol than receipts. 8 Mart. N. S. 541, and the authorities there cited. 4 Starkie on Evidence, 1015, 1016, 1018.

The original memorandum, prepared by Akin and left with the notary, contained the agreement of the parties, and is as obligatory between them as the authentic act. If any of its covenants were not embodied in the authentic act, the latter was not the depository of the whole intentions of the parties. The omitted stipulations did not, for that reason, become inoperative. The two instruments are parts of the same contract, and must be taken and construed together. The contents of the memorandum have been proved, and show a receipt from the plaintiff "in full to the 1st of January." Those words appear to us clearly intended to include rents to the 1st January, at which date the lease was made to terminate.

If any doubt, however, remained, it would be removed by the testimony of the witnesses, who show the agreement of the parties to have been in strict conformity with the meaning, which we think obviously attaches to the expressions used in the receipt.

ARIN v. DRUMBOND.

Lusk, one of the witnesses, states that when Akin returned from the north, in November, 1844, he appeared to be uneasy in consequence of Drummond's failure to make certain payments on account of rents, which had been expected from him during the summer. That after some negociations, in which the witness acted as the intermediary between the parties, it was agreed, that Akin should take \$3,500, for the back rent, and annul the lease, allowing the defendant to keep the premises, free of rent up to the first of January; and that it was, for the purpose of carrying this agreement into effect, that the parties appeared before the notary. This witness shows that the parties disagrees in relation to their accounts, the defendant contending that he owed only \$3,538 17, while the plaintiff claimed \$5000 to be due. After the execution of the act, the witness had several conversations with Akin, who seemed to be satisfied with the arrangement. He spoke of the matter as settled, and said that the deduction he had made was the only means by which he could have saved the sum that he had received.

Gothiel, another witness, states that Drummond offered, in December, 1844, to sell to him his foundry establishment, in consequence of which the witness applied to Akin, to know whether he had a privilege on the machinery and tools of the defendant, and was answered that he had none. Akin offered to lease the premises to this witness, for about half the sum for which they had been rented to Drummond, and advised him to purchase Drummond's machinery and tools.

These and other witnesses detail circumstances connected with the drafts referred to in the petition, by no means creditable to the good faith of Drummond. It is shown that he gave them at a time when he held other accepted drafts for the same debt, and knew that those given to the plaintiff would not be accepted, that he resorted to misrepresentations to prevent those given to the plaintiff from being presented for acceptance, and finally, when about to be detected in the deception he was practicing, that he avowed that other drafts had been accepted, or notes had been given by Dupuy, for the debt, which he refused to deliver to the plaintiff's agent, assigning as a reason for withholding them, that he desired to be the plaintiff's debtor, for the purpose of protecting his property from seizure by other creditors.

We think that the testimony of the witnesses shows, that Akin desired to be rid of a tenant with whom he could not agree, on whose punctuality he could not rely, and whose bad faith in a recent transaction gave him just reason to apprehend that he would be unable to collect his rents; that these considerations induced him to compromise his difficulties, and accept, in cash, a sum somewhat less than that actually due at the time, and to dissolve a lease which, under other circumstances, would have been much more advantageous than any he could then expect to make of the property.

The judge below rejected the plaintiff's demand, and we think that there is no error in the judgment.

Judgment affirmed.

many particular and the second was not assumed that

come in once the famous and remainful to be of with the

SUCCESSION OF PACKWOOD.

Where property of a succession, ordered, at the instance of the tutor of certain minor heirs, to be sold after being appraised, is adjudiented to a purchaser for a price less than one-half of its appraised value, the sale is null.

A PPEAL by one Peirce from a judgment of the Second District Court of New Orleans, Canon, J., dismissing a rule taken by him on the executor of Packwood, to show cause why a title should not be made to him for certain property purchased by him at a sale of the effects of the succession.

Race and Roselius, for the appellant.

Lockett and Micou, contra. The order of the court under which the sale was made, required an appraisement. That order was the authority of the auctioneer, and he was bound to obey it. He could not disregard the appraisement, and any adjudication made under it was null. The question is not whether a sale might not have been ordered, without appraisement, if the creditors had so required, but whether the auctioneer could disregard the order as it was actually rendered.

The judgment of the court was pronounced by

SLIDELL, J. In this case *Peirce*, a purchaser at a probate sale, took a rule on the executer, to show cause why a notarial title should not be made to him of the property adjudicated. The defendant in the rule answered by a general denial, and also pleaded specially that the property did not bring its appraised value.

It appears from the record that, on the application of a creditor, the court had ordered the executor to sell sufficient property of the succession to pay its debts. This order was vaguely expressed and did not specify what property should be sold, nor whether it should be sold for cash, or how otherwise.

After this order, no further action was taken by the creditor, nor does he appear in any of the subsequent proceedings. There was a subsequent decree, obtained at the instance of the executor, to sell certain specified property for cash, and upon appraisement. After this, on the 20th April, 1846, there was still another decree, rendered upon a proceeding instituted by a tutor of certain minors interested in the succession against the executor, ordering the lots in question to be sold at a credit of one and two years; and, in consequence of a complaint by the tutor that the appraisement theretofore made was too low, the same decree contained an order for re-appraisement, which was made.

Under this state of facts we do not consider the question before us, whether the sale of the property of a succession may not be made for less than its appraised value, at the instance of a creditor. This sale was made under the decree of the 20th April, 1846, above stated. That decree was the auctioneer's sole authority. It expressly ordered an appraisement, and contemplated a sale accordingly. The price at which the two lots in question were adjudicated, was \$3,100; the appraisement was \$6,500. The decree under which the sale was made having been violated, the adjudication was illegal, and the rule taken by the purchaser was therefore properly dismissed.

Judgment affirmed.

SUCCESSION OF NICOLAS.

The holder of a note endorsed in blank is presumed to be the owner, until the contrary be shown.

Where there are several applicants for the curatorship of a vacant succession, which exceeds three thousand dollars in value, the judge is bound to appoint two of them, provided they have the requisite qualifications. C. C. 1116, 1117. There is no difference as to the rights of applicants for the curatorship, founded on the amount of their claims.

In appointing a curator to a vacant succession, creditors must be preferred to those who are not. C. C. 1114.

A PPEAL from the Second District Court of New Orleans, Canon, J.

Grandmont, for the appellant. Seghers, pro se. Lisbony, on the same side.

The judgment of the court was pronounced by

King, J. This is a controversy among several applicants for the administration of the vacant estate of *Jacques Nicolas*, deceased. The judge below conferred the appointment on *Julien Seghers* alone, and from his judgment, *Albuzzi*, one of the applicants, has brought up this appeal.

The first application for the curatorship was made by Seghers, who represented himself to be a mortgage creditor of the deceased. The second was presented by Laneuville, and subsequently withdrawn. The third was made by Albuzzi, who alleged that he was a creditor of the deceased, that the succession exceeded \$3,000 in value, and asked to be appointed jointly with Seghers. Salvatory opposed all these applications, and claimed the exclusive administration for himself, on the ground that he had been the agent of the deceased, possessed his confidence in his life-time, and was conversant with his affairs. In his opposition, he alleges that Seghers is not a creditor of the deceased; and that the mortgage notes held by the latter, belong to Theodore Seghers, whom he represents as agent. These notes are endorsed in blank by T. Seghers, and are in the possession of Julien Seghers, who is presumed to be the owner until the contrary be shown. No such adverse ownership has been made to appear. His application was the first in point of time, and no other applicant having established a superior right, he is entitled at least to a share in the administration. The succession, however, exceeds \$3,000 in value, and the Code requires imperatively, in such cases, that two persons be appointed to the administration, when there are several applicants who have equal rights, and possess the requisite qualifications. Civil Code, arts. 1116, 1117. 11 La. 290.

Albuzzi is shown to be a creditor. It is urged that his claim is small and insignificant, in comparison with that of Seghers. The law makes no distinction, in this respect, between the rights of applicants for the administration of estates. He has not opposed the application of Seghers, nor claimed for himself the exclusive administration in virtue of any superior right, but only asserts an equal right to it as a creditor. We think the court erred in rejecting his claim. As creditors, and as earlier applicants, the claims of Seghers and Albuzzi are both preferred to that of Salvatory, who is not a creditor. Civil Code, art. 1114.

For the reasons assigned, it is ordered that so much of the judgment of the District Court as rejected the application of *Philip Albuzzi* to be appointed the curator of the vacant succession of *Jacques Nicolas*, deceased, be reversed.

Succession of It is further ordered that, said Albuzzi be appointed curator of said succession Nicolas. jointly with J. Seghers; and that, in other respects, the judgment be affirmed, the costs to be paid by the succession.

SUCCESSION OF NICOLAS.

A PPEAL from the Second District Court of New Orleans, Canon, J. Buisson and Barthe, for the appellant. Grandmont, for Albuzzi. Seghers, pro se. Lisbony, on the same side.

The judgment of the court was pronounced by

King, J. This appeal has been taken by Salvatory from the judgment of the District Court, rejecting his application for the curatorship of the vacant succession of Jacqués Nicolas, deceased. We have stated the nature of his claim to the administration, in the opinion rendered on the appeal of Albuzzi in the same proceeding. For the reasons there assigned, the judgment of the District Court, rejecting the application of Salvatory to be appointed the curator of the vacant succession of Jacques Nicolas, is affirmed, with costs-

Succession of Ducloslange.

Where a wife dies leaving neither ascendants nor descendants, nor legitimate relations, but natural brothers and sisters, and a husband not separated from bed and board, the surviving husband will inherit the estate to the exclusion of the natural brothers and sisters. C. C. 918. The last exclude only the State. C. C. 917, 923.

A PPEAL from the Second District Court of New Orleans, Canon, J.

Grivot and Roselius, for the appellants. The only question which this case case presents is, whether the natural brother and sisters, or the surviving husband, are the irregular heirs of the deceased? The parties rely, in support of their respective pretensions, on two articles of the Civil Code, which apparently contain contradictory provisions. The natural brothers and sisters found their claim on the 917th article, and the surviving husband on the 918th article.

To understand these articles, they must be examined in connection with others of the Code: In the 3d chapter, under the title of Succession, the Code treats of irregular successions and irregular heirs. The 912th and 913th articles provide for the cases in which natural children are called to the succession of their father and mother. The 914th article declares that adulterous and incestuous bastards shall in no case inherit the succession of their natural father or mother. In the 915th article, the general principle is laid down that, the law grants no right of inheritance to natural children to the estate of legitimate relations of their natural father or mother. By the 916th article, the father and mother are called to the succession of their natural child, duly acknowledged by them, who dies without posterity: and the 917th article provides that, "if the father and mother of the natural child died before him, the estate of such natural child shall pass to his natural brothers and sisters, or their descendants."

The two last articles of the Code relate to a particular description of successions and heirs. The general rule is that natural children belong to no family, and are entitled to none of the ordinary rights conferred by relationship and eensanguaity. The Code contains many enactments illustrative of this princi-



NEW ORLEANS, JANUARY, 1847.

ple, and among others, the provisions of article 915. But whilst recognising the Succession of general principle, the law has made exceptions to it, by admitting the rights of Duclostasce. inheritance of the succession of the natural child who dies without posterity, in favor of the father, and mother who have acknowledged him; and, in

in favor of the father and mother who have acknowledged him; and, in case of their previous decease, in favor of the natural brothers and sisters, or their descendants. This can only be considered as special legislation, in relation to the successions of natural children who die without posterity. Viewed in this light, the apparently inconsistent provisions of the 917th, 918th and 923d articles of the Code can be reconciled, and full effect given to all; for articles 918 and 923 relate to the successions of legitimate relations, and merely contain a reiteration of the rule laid down in article 915, that natural brothers and sisters have no right to the inheritance of the succession of their legitimate brothers or relations generally; and, for the same reason, the legitimate children have no right to the successions of their natural brothers and sisters. The rule is reci-

procal.

This distinction is clearly established by the law itself. In articles 916 and 917, the successions of natural children are expressly spoken of, and special rules for their inheritance are prescribed. In all the preceding and succeeding articles of the same chapter, no reference is made to the successions of this class of persons; nay, by article 923, the State is called to the succession in the absence of a surviving husband or wife, and natural children. This last article is clearly not applicable to the successions of illegitimate persons, as was decided by the Supreme Court in the case of Laclotte's Heirs v. Labarre, 11 La. p. 179; and article 918 refers to the same class of successions as article 923, i. e. the succession of legitimate persons. The idea that art. 918 contains an exception to the general rule laid down in art. 917, is inadmissible. The two articles treat of different subjects altogether; it is absurd to say that the one contains an exception to a general rule established in the other. In the case of Laclotte's Heirs v. Labarre, 11 La. 179, the late Supreme Court expressly decided that, "where a natural child dies, leaving neither ascendants nor descendants, his natural brothers and sisters will inherit his succession, to the exclusion of all others." So in the case of Layre v. Pasio, 5 Robinson, p. 9, the late Supreme Court again say: "Natural brothers and sisters will inherit from each other, where their father and mother died before the child from whom the estate descends." The decision in the case of Victor v. Tagiasco, 6 La. p. 644, is in direct contradiction to the two cases just cited.

Benjamin and Micou, contra, cited C. C. 918, Victor v. Tagiasco's execu-

ters, 6 La. 642.

. The judgment of the court was pronounced by

Rost, J. Jean Ternoir, the surviving husband, not separated from bed and board, of Eulalie Ducloslange, who died leaving neither descendants nor legitimate relations, asks to be put in possession of her succession, under art. 918 of the Civil Code. The natural brother and sisters of the deceased, together with the minor children of one of the sisters of the deceased, resist his application, and claim the succession in their own right, under art. 917 of the Code. The court of the first instance decreed the succession to the surviving husband, and the other parties have appealed. The case of Victor v. Tagiasco's Executor, relied on by the appellee, is in point. 6 La. p. 644. The court there, upon an issue in all respects similar to the present, sustained the claim of the surviving husband. After mature consideration, we are satisfied that, the opinion in that case contains a correct exposition of the law of irregular successions. Our Code divides successions into testamentary, legal and irregular, and establishes for legal and irregular successions the order of descents. In legal successions, the children and other lawful descendants are first in rank; in irregular successions, the surviving husband or wife takes precedence of all other classes of persons called to the inheritance. C. C. arts. 871, 883, 911. Even the natural

Succession or children of the father, duly acknowledged, are made to give way to the survivDucloslands ing wife, and take the succession to the exclusion of the State only. C. C. art.

913. An exception is made to the preference given to the husband by the provisions of art. 918, that he shall not inherit from his wife, if she has left natural
children; but the appellants do not come within the exception, and must therefore be submitted to the rule that, natural fathers, mothers, brothers and sisters,
take rank after the surviving husband.

Art. 923 provides that, in default of lawful relations, or of a surviving husband or wife, or acknowledged natural children, the succession belongs to the State. This article again gives precedence to the surviving husband or wife, and would seem to exclude natural brothers and sisters. In the case of Laclotte's Herrs v. Labarre, 11 La. p. 179, the late Supreme Court, construing it with art. 917, had to invoke the legal maxim, in dubiis semper contra fiscum, in order to sustain the claim of the natural brothers and sisters against that of the State. This decision is undoubtedly correct, but it is far from supporting the pretensions of the appellants. It settles the principle clearly resulting from the order of irregular successions established by the Code, that natural brothers and sisters, and their descendants, exclude the State and the State only. The necessary inference from that principle is, that they are excluded themselves by all the other classes of persons called to the inheritance, except the State.

In the order of irregular successions established by the Napoléon Code, natural children and other natural relations stand first; the surviving husband or wife comes next; and, in default of surviving husband or wife, the State inherits. All the commentators upon that Code agree that the surviving husband or wife excludes the State only, and is excluded by all other classes of irregular heirs. See 2d Delvincourt, p. 24 and notes. 4th Toullier, no. 269. With us, natural brothers and sisters, and their descendants, occupy the same position which the surviving husband or wife occupies in France, and it is equally true of them that they are excluded by all save the State.

The petition of *Philippe Ducloslange* to be appointed administrator of his sister's estate, was properly dismissed, and there is no error in the judgment appealed from.

Judgment affirmed.

SHEPHERD v. THE ORLEANS COTTON PRESS COMPANY.

The omission to re-inscribe a mortgage on the books of the register of mortgages within ten years from the date of the first inscription, may be opposed by the parties themselves or by any third person having an adverse interest, although charged with notice. C. C. 3333. If the time be suffered to expire without a re-inscription the mortgage will lose its rank, and a subsequent re-inscription will give it effect only from the time of such re-inscription. Even the sale of the property mortgaged will not, where the purchaser fails to pay the price, dispense with the necessity of a re-inscription, which must be continued until the proceeds of the property are reduced to possession. By the omission to re-inscribe, the effect of the first inscription ceases, not the effect of the mortgage itself.

A description of the property mortgaged is essential in a re-inscription. A reference to previous mortgages will not cure the defect of a want of such a description. Per Curiam: The object of the re-inscription is to dispence with the necessity of searching for the evidences of

mortgages more than ten years back.

PEAL from the Fifth District Court of New Orleans, Buchanan, J. Several mortgage creditors have appealed from the judgment, settling the order in which the mortgage creditors of the defendant are to be paid out of the COTTON PRESS proceeds of certain property, and ordering the erasure of the other mortgages. The mortgages to be classed are as follows: 1. A mortgage to secure the payment of certain bonds, all dated the 15 March, 1834, which was inscribed on the 26th of the same month, and not re-inscribed until the 21 April, 1845. 2. A mortgage to secure the payment of certain bonds, dated 15th January, 1836, and recorded on the 30th of that month. An attempt was made by Shepherd, a holder of some of this series of bonds, to re-inscribe this mortgage so far as he was concerned. The following entry appears on the books of the register: "13th January, 1846. By act before H. B. Cenas, notary, dated 12 Jan., 1846, R. D. Shepherd declared that he is the holder of 82 bonds of the Orleans Cotton Press Company, signed, &c .- and numbered &c .- each of which is for \$500, more fully described in the inscription thereof, all of which bonds are signed "ne varietur" by said H. B. Cenas, notary, for the purpose of identifying the same with the act passed before the said notary on the 13th January, 1846, recorded in this office, in B. 30, F. 542, by which the Orleans Cotton Press Company granted a special mortgage in favor of the purchasers and holders of the said bonds in order to secure the payment thereof with the interest accruing thereon, subject to mortgages inscribed in B. 30, F. 542, of which this is a partial re-inscription, or B. 27, F. 215, or other mortgages which might have been recorded up to this day. The desire of said R. D. Shepherd is to procure a re-inscription of the aforesaid special mortgage, so far only, however, as the same relates to or affects the above described 82 bonds, in order to inverrupt according to law the prescription that might otherwise shortly bar the

3. A mortgage in favor of Leeds & Co., inscribed on the 29th July, 1840. 4. One given to secure certain bonds of the defendants, inscribed on the 14 December, 1841. 5. A judgment obtained by R. D. Shepherd, on certain bonds of the second series, against the defendants, registered 3 February, 1846.

anme."

There was judgment below ordering the proceeds of the property to be applied: 1. To pay the costs in the suit in which the property was sold and in this suit, 2. To discharge the mortgage of Leeds & Co. 3. To pay the balance due on the mortgage recorded on the 14 December, 1841, with interest. 4. To pay the balance due on the mortgage re-inscribed on the 21 April, 1845, with interest. 5. To pay the principal, interest and costs due on the judgment of R. D. Shepherd. Bringier, Phelps, Dodge & Co., and McCawley, as tutor, appealed from this judgment, and the other creditors have prayed that it be amended.

L. Peirce, for Phelps, Dodge, & Co., appellants. Phelps. Dodge, & Co. claim with others, holders of the second series, that they come next in rank to the holders of the first series, because although the first series were not re-in-scribed until the expiration of the "temps utile," and admitting for the present that the re-inscription of the second series was defective, as regards all the present opposing creditors, no re-inscription was necessary to give rank to the first and second series; and that it is only "lorsque l'inscription a été néces-saire pour opérer l'hypothèque, que le renouvellement est nécessaire pour la conservation." Persil, Hypoth., sur l'article 2154, vol. 2, p. 91-2. Boileux,

There are two articles in the Louisiana Code, (3314 and 3315,) which are not in the French Code: "Art. 2148 of the latter has only the first sentence retained in art. 3330; and it is upon these differences that we base our position

that, as to all parties to this suit, no inscription is necessary.

COMPANY.

SHEPHERD

ORLEANS

Art. 3314 says that, "mortgages are only allowed to prejudice third persons, when they have been publicly inscribed on records kept for that purpose, and in the manner hereafter described." Art. 3315 provides that: "By the word third persons used in the foregoing article, are to be understood all persons who are not parties to the act or judgment on which the mortgage is founded, and who have dealt with the debtor in ignorance or before the existence of this right." Here the contending parties cannot be called third persons, because they did not deal or become creditors before the existence of this right; and they did not deal with the debtor in ignorance of this right, as each had it reiterated to him in writing, at the time of making the several contracts. If these mortgages had never been inscribed, the present parties not being third persons, could not take the unjust advantage now claimed, because their knowledge is "equipollent" to one continued inscription. This makes the difference between our law and that of France. In France, besides requiring that the party shall make an inscription, with a long list of formalities, (art. 2143, C. N.) the non-inscription and non-obedience to what they consider substantial formalities is considered fatal, and witnesses and persons having full knowledge of the inconsidered fatal, and witnesses and persons having full knowledge of the incumbrances may take a subsequent mortgage, and by inscribing it before the prior one, in bad faith secure themselves priority. Sirey 14, 2, 62. This most unjust law has been wholly excluded from our system by art. 3315. Troplong, Hyp. § 569, p. 424, vol. 2, says that, "pard es motifs d'interêt générale la loi avait exigé que l'hypothèque soit inscrite, toute hypothèque non inscrite est reduite "ad non esse" à l'égard des tiers, soit qu'ils aient eu connnissance de l'hypothèque, ou qu'ils aient ignoré; une circonstance particulière, telle qu'une notice extrajudiciare, ne peut pas fléchir de de législateur."

Brown Code a potice terresieudiciare. By our Code a notice "extrajudiciare" would not "faire fléchir la volonté du legislateur," should effect be given to it; for it is expressly enacted that, it shall exclude whoever has received it, from the class of third persons. Vide Grenier, Hypoth., vol. 1, pp. 131, 125. In France, all are thirds persons but the debtor. and the mortgage has no existence, without inscription, except towards the debtor. Boileux, Com. Hyp. p. 349, vol. 2.

The mortgage there has no rank "among creditors," without inscription; and it is because the words of the law make no distinction, that "le Code Civil n'attache

la publicité, et par conséquent la conservation de l'hypothèque qu'à l'inscription 'sans distinction.'" Grenier, vol. 1, p. 237 and 238, 1 partie, cap. 1, ss. 2 and 3; and see his report in note, p. 238, of the judgment of the Court of Appeals of

Turin, in 1811.

All this French law is inapplicable to us—is wholly adverse to the spirit of our law—of the law of the United States and England, where extrajudicial

our law—or the law of the United States and England, where extrajudicial notice is always, when brought home, equipollent to the recording or inscription required by the text of the law. Story's Equity, § 397, p. 385–399. 6 Mart. N. S. 716. 8 N. S. 140, 246. 8 La. 296.

There can, therefore, be no defence made by the opposing creditors, but that they received the bonds after their issue to others, and that when they received them they did not know of the prior encumbrances. To this we answer, that you could not have known that the bonds were secured by my mortgage, without looking at the wortgage aftered to on the focus and when you without looking at the mortgage referred to on the face; and when you saw your

security you also saw the previous encumbrances recited.

It cannot surely be urged that because the first and second series of bonds were regularly inscribed at their first issue, that the holders are in a worse condition than if they never had been inscribed; this would be a deductio ad absurdum. If we are safe, as we have proved, without inscription, our having been inscribed ten years cannot injure us. Article 3333 has been quoted to show that after a ten year's inscription, the mortgage becomes a chirographic debt as to the contracting parties. It says: "The registry preserves the evidence of mortgages and privileges during ten years, reckoning from their date. Their effect ceases even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made." The obscurity produced by the word their is removed by the French text, which reads: "Les inscriptions conservent l'hypothèque et le privilège à compter du jour de leur date ; leur effet cesse, même contre les parties contractantes, si ces inscriptions n'ont été renouvellées avant l'expiration de ce delai, de la manière qu'elles ont été prises." The use of the word their was a mere mis-translation, and to retain the word registry, and refer "their" to

mortgages and privileges, would produce the following consequences: Articles 3314 and 3315 would be wholly annulled after the lapse of ten years. The mortgage or privilege would frequently be extinguished, as between debtor and creditor, and the parties, before the debt itself would become due. The creditor would be punished for his diligence; for if he had never inscribed, articles 3314 and 3315 would have been in force for his benefit. Finally, this loss of all his security is based upon no motives of private good, or public benefit or policy.

It is contended that, the re-inscription was wholly void under art. 3333,

which enacts that the mortgage shall be re-inscribed in the same manner as re-

quired by art. 3330.

It is true, that our Code requires the production of the act or authentic copy when enregistered, and the same form when re-inscribed; but this is not a cause of nullity; when being once duly produced and copied, the register or re-in-scription does not mention the production of another copy, but contents himself with referring by page, book, letter, &c. on his register to the original inscription. "Le defaut de représentation du titre serait il une cause de nullité? il faut juger du merite d'une inscription par ce que se trouve relaté sur les registres du conservateur ; or on ne fait pas mention de cette representation sur les registres? l'inscription ne peut des lors être attaqué pour cette cause." "La representation du titre constitutif n'est donc pas tellement de rigueur, qu'elle ne puisse pas être executée par equipollence." Boileux, vol. 2, p. 606.

"L'inscription prise sur la representation d'une signification, contenante copie du titre est même valable." Cass. 1833, Sirey 33, 1, 641. 1823, Sirey 23, 1,

"Une inscription n'est pas nulle par le defaut d'enonciation expresse du titre constitutif de la créance, lorsque ce titre est rapellé dans l'acte en vertu duquel l'inscription est prise, et si d'aileurs les tiers peuvent y trouver tout ce qu'ils ont interet de savoir (Cass) 3 février, 1819. Boileux, vol. 2, p. 610. D. 17,

326,31

"Une autre difficulté qu'on propose sur la représentation du titre-le créancier, dit-on, est-il obligée à peine de nullité de l'inscription de représenter l'acte en vertu duquel il la requiert? D'une part il semblerait que toutes les formalités étant de rigueur en cette matière, celleci devrait être exactement suivie, mais en y refléchissant on demure convaincu que la représentation du titre n'est pas une formalité substantielle de l'inscription; que co ne pourrait être que par excès de rigueur qu'on pourrait regarder comme un vice radical; en esset, on concoit aisément qu'un conservateur puisse se resuser à faire l'inscription lorsqu'on ne lui représent pas le titre qui eut fait la base, mais ce qu'on ne peut imaginer c'est qu'on puisse le regarder comme nulle; des qu'elle est faite, l'inscription une fois existante sur les registres rien n'atteste le représentation du titre, et cependant tout le mode sait, et la cour de cassation la déjà décidé, qu'on ne juge du mérite et de la validité d'une inscription que pour ce qui se trouve relaté sur les registres du conservateur; or, comme nous l'avons déjà indiqué, la loi n'exige pas qu'on fasse mention de la représentation du titre, et expérience prouve que les registres n'en contiennent jamais la preuve. Ainsi nous tenons que s'il se trouvait un conservateur assez complaisant pour ne pas exiger la représentation du titre, l'inscription une fois faite n'en serait pas moindre valuable. Persil, Hyp. vol. 2, p, 26.

"Une constitution d'hypothèque et une inscription hypothécaire ne peuvent étre annullés, pour ne pas contenir une désignation suffisante de la nature ou espèce de biens hypothèques, si d'ailleurs ces biens sont indiques d'une manière précise, et si les tiers n'ont pu être induits en erreur," &c. Boileux, vol. 2,

"Comme le disait M. Daniels dans les conclusions de 1807, &c., l'objet de la loi en traçant les formalités d'inscription a été, de donner des moyens assez efficaces pour empécher que celui qui va preter son argent, ou qui veut acheter un immeuble, ne tombe dans un piège par l'ignorance des charges qui prèsent sur le debiteur. Ce qu'il y a donc de substantiel dans l'article 2148, c'est ce qui eclaire le preteur de fonds, ou l'acquéreur sur la position du debiteur; ce sont les formalités qui étant omises peuvent induire en erreur ceux qui veulent contracter avec ce même debiteur. "Les autres formalités ne sont qu'accidentelles ou précautionelles, et l'on ne voit pas de raison pour dire que leur omission doit produire une nulité, car cette nulllité n'est ni prononcée par la loi, ni conseillée par l'èquite." Troplong, vol. 3, Hyp. p. 74.

ORLEARS
COTTON PRESS
COMPANY.

So, in our Code, arts. 3317 and 3330 do not pronounce any nullity upon the non-observance of form. The inscription is good, if sufficient to put others upon their guard, and of course if the re-inscription be made with the same substantial compliance, that is also good, for the re-inscription is not required to be made more perfect than the original inscription. Dalloz, Dic. de Jurisp. vol. 3, p. 123, § 15. "Au surplus ce systeme des equipollens aboutit d'une manière indirecte à faire triompher notre opinion. Nous demandons seulement qu'on l'applique sans restriction," &c. . . . "La cour de cassation a decidé que les erreurs non préjudiciables ne sont pas suffisantes pour annuler

l'inscription." 3d Troplong, Hyp. p. 131.

E. Briggs, for Phillips. praying for an amendment of the judgment below. Phillips, one of the appellants, is owner of a number of the bonds, secured by mortgage, bearing date 15th March, 1834. This mortgage was, on the 26th March, 1834, duly inscribed in the office of the recorder of mortgages of this city, and was re-inscribed on the 21st April, 1845. By the judgment of the court below, the rights of this appellant are made secondary to those of other claimants, on the ground that, at the expiration of ten years following the inscription of his mortgage, its effect, as against third parties, ceased, and was revived only from the date of its re-inscription already referred to; and that the claim of Leeds & Co., creditors under a mortgage recorded on the 29th July, 1840, and of those claiming under the mortgage recorded 14th December, 1841, were entitled to priority. In these two mortgages, as well as in all others granted subsequently to that under which he claims, his mortgage is recognized, it is certified to exist by the recorder of mortgages, and recited as existing by the act under which their rights, as mortgagees, are created. The claimants under the various judgments are all mortgage creditors, holders of bonds or obligations secured by the mortgages of the 15th March, 1834, 15th January, 1836, 20th July, 1840, and 9th December, 1841, and in each of them his mortgage is acknowledged.

It will be conceded that, the only object of inscription is, to give publicity to the charge created by the mortgage or judgment inscribed. "L'inscription est d'après notre article 2134, C. N., l'instrument, le vehicule de la publicité; mais elle ne fait pas l'hypothèque, elle la met seullement en action." "L'effet de l'inscription est de determiner le rang des hypothèques entre creanciers." Troplong, vol. 2, p. 382, art. cit. no. 466. "Puisque l'inscription n'est requise que pour assurer le rang des hypothèques entre creanciers, il suit qu'el n'est

requise à l'égard du debiteur. No. 477, Grenier, t. 1, p. 137, § 66.

Parties to the act, and those who have dealt with the debtor, with notice of the right, or after its existence, cannot take advantage of the nonsinscription of a mortgage; and, as a corollary, the contracting parties, their heirs, and their witnesses; and consequently, notice as to them is equivalent to registration.

Art. 3333 of our Code is copied from the Code Napoléon, with the exception of the words to which so much force and importance has been attributed; and it is fair to assume that, the framers of our Code were conusant of the construction given to their model by all French jurists. The language of the Code Napoléon refers to the registration, and does so necessarily, because, if the lapse of ten years destroyed the obligation, re-inscription after that period could not have revived it, which we know it did. The omission derogated from the rank, but did not disturb the fond de droit. Rogron, art. cit. Troplong, vol. 3, p. 173, Hypothèques, no. 716, bis. Favard, Inscrip. Hypoth. sec 6. Paillet, Droit Civil, art. cit. Boileux, Com. Hypoth. art. cit.

All French jurists concur that, the limit put to the period through which an original inscription should be valid, was induced by considerations which concerned the convenience of the register alone: "Le motif pour lequel cette péremption a été établie, est, que si on n'eut pas annulé les inscriptions après dix ans, les retherches eussent été herissées d'un grand nombre de difficultés, à raison du laps du temps." Treplong, vol. 3, p. 167, no. 713. Rogron, art. cit. Favard, vol. 3, p. 68. It is clear, therefore, that those who framed the French Code did not intend to apply this article to the extinguishment of the

obligation.

The author just quoted, with reference to the mode in which re-inscription should be made, states, that the Code does not specify the form. In no. 715, (vol. 3, p. 169,) he draws a distinction, sustained by the authorities he quotes, between re-inscription by direct reference to the original act, and cases in which

no such reference is made, and says: "Si elle s'y refère, dans ce cas la cour de Cassation a décidé par deux arrêts, l'un du 3 février, 1819, l'autre du 22 février, 1825, qu'il n'etait pas nécessaire que le renouvellement d'inscription fut accompagné de toutes les formalités et énonciations exigées par l'art. 2148. Corron Press Ainsi est valable l'acte de renouvellement dans lequel le créancier s'est borné à exprimer qu'il entendait renouveller une inscription prise par lui tel jour sur les biens d'un tel, son debiteur, enregistré dans tel, volume et dans tel numero." "Le non renouvellement peut être opposé par les créanciers entre eux et par les tiers acquéreurs, en un mot par tous ceux qui, fondant leur sécureté sur la publicité des hypothèques, ont intérêt à soutenir qu'ils ont eu juste sujet de croire que l'inscription non renouvellée était périmée. Du reste; la peremption de l'inscription ne fait perdre que le rang, et nullement le fond du droit, à moins qu'il n'y ait purgement." Ibid, 716, bis.

The law, then, is clear, that a re-inscription after ten years would re-establish the mortgage in all its force, subject, however, under the French law, to the

rights of all mesne incumbrances, whether with or without notice.

"L'effet de l'inscription dure pendant dix ans, c'est à dire, qu'elle conserve pendant cet espace de temps, dans toute son integrité les privilèges et hypothèques qui y sont énoncés. Lorsque l'inscription est renouvellée avant l'expiration des dix années, ce renouvellement opère la prorogation de l'effet de l'inscription primitive, et l'hypothèque conserve son rang, à la date de son inscription primitive. Mais si l'inscription n'est pas renouvellée dans les dix ans, le rang que l'inscription première avait attaché à l'hypothèque, est irrévocablement perdu, et l'inscription qu'en en serait faite postérieurement ne serait plus un renouvellement de l'inscription primitive, mais une nouvelle inscription, qui n'aurait d'effet et ne prendrait rang que du jour de sa date." Favard, vel. 3,

p. 65. Rogron, Pailliet, and Troplong are to the same effect.

The French and Louisiana systems differ in many essential points. Both require registration; the French Code, in accordance with formalities not required by our laws. Both require re-inscription at the end of ten years. The French Code is silent as to the mode in which this is to be effected: our Code requires that it should be done in the mode prescribed for the original registration, which merely exacts the presentation, by the party or his agent, of an authentic copy of the act, without any direction as to the mode in which it is to be recorded. The French Code gives, as has been shown, preference to the inscribed creditor, however formal may have been the notice he has received of the prior incumbrance: our Code excepts from those entitled to this preference, parties who have received notice of the prior charge. The French Code admits the effect of re-inscription after the lapse of ten years, subject to mesne incumbrances: our Code, according to the doctrine of our opponents, not only derogates from the rank, but annihilates the fond de droit. Both codes, at the same time, admit that registration, as between the contracting parties, is a useless formality.

Let us see what is the position of the parties under the law, as I understand The bondholders, under the first emission, are secured by a mortgage dated March 15th, 1834, recorded the 26th of the same month. Those claiming under the second mortgage, of the 15th January, 1836, recorded 30th of the same month, advanced their money and received their security, with full knowledge of the existence of the first. It is not only set out in the certificate of the recorder of mortgages, but is formally recited in the act of mortgage given to secure the bonds. The act of mortgage granted to Leeds & Co. is accompanied with the same recital; it is the act they signed, and it is to be presumed they read it; and lastly, in the mortgage recorded 14th December, 1846, all

these prior incumbrances are as formally deatailed.

Can any doubt exist in the mind of the court that these parties are affected by the doctrine established by 3315th article of the Civil Code? Can they be classed with persons who have dealt with the debtor in ignorance, or before the existence of the right? They are, independent of their character of mortgagees, creditors claiming under judgments, based on titles which exhibited and made patent the prior incumbrance, and at the same time their knowledge of its existence; and they ask the court, under the color of a solitary article of the Code, at variance with every principle established by it, and evidently de pendent for its force on false translation, unceremoniously to extinguish this jucumbrance, and distribute the only means of payment amongst them in liquiORLEANS COTTON PRESS COMPASY.

dation of their subsequent claims, as though it had never been created. They contend that, so positive is the declaration of legislative will, that re-inscription cannot revive the obligation thus extinguished, which I have shown is contrary to the received doctrine in France. The mortgage given to secure the first series was re-inscribed on the 21st April, 1845, and, consequently, prior to the mortgage of 1846; but it avails us not. The fend de drout is destroyed, and the obligation, originally to mature at the expiration of twelve years, is dissolved at the end of ten. Can this court sanction a doctrine so monstrous?

But I contend that, in recording each and every mortgage subsequent in date to the first, that that mortgage was re-inscribed, so as to answer all the requirements of the law. It is true that original inscription requires the presentation of the authentic act, or private writing, and re-inscription is to be attended by the like formalities. So does the French law, as regards original inscription. re-inscription, under this system, has no particular formula; and it is held that, the same formality was not required, as I have before endeavored to show. "On a demandé si le conservateur des hypothèques peut se refuser à renouveler l'inscription alors qu'on ne lui presente pas le titre originaire. Il faut repondre que non. Car si la loi exige la representation du titre lorsque il s'agit de prendre une premère inscription, c'est pour que le conservateur soit pleinement assuré que l'individu qui requiert l'inscription n'est pas sans qualité. Mais lorsque l'hypothèque a été dej renscrite, il n'a plus les mêmes craintes à avoir. Il ne peut appendique de la requisition à fa plus les mêmes craintes à avoir. pas douter que la requisition à fin de renouvellement ne soit fondée sur un titre." Troplong, vol. 3, Hypoth. no. 716. Favard, Inscrip. Hypoth. sec. 7, no. 7. We have seen that where reference is had to the original inscription, a very slight enumeration of dates, folios, &c. were held to be sufficient. Even under the French law, strict as are the formalities prescribed, the presentation of the authentic act, even on original inscription, is accidental, and not substantive. Boileux, in his commentary on article 2148, C. N., thus expresses himself: "Le defaut de réprésentation du tit e serait il une cause de nullité? Il faut juger du merite d'une inscription, par ce qui se trouve relaté sur les registres du conservateur: or, on ne fait pas mention de cette représentation sur les registres; l'inscription ne peut dès lors être attaqué pour cette cause. Le représentation du titre constitutif, n'est donc pas tellement de rigueur, qu'elle ne puisse être executee pur équipollence." Cass. 19 juin, 1833, sec. 33, p. 461, 18 juin, 1823, sec. 2, 3, 1, 64.

Now, what takes place in original inscription? The record presents the name of the notary, the date of the act, the names of the mortgager and mortgages, a description of the property mortgaged, the amount secured, and the period at which the payment is to be made. In all the subsequent mortgages these same particulars are given. The act creates the new mortgage, describes the property, and then goes on to declare that it is subject to certain mortgages, &c. Is not this a re-inscription? The requirement of the authentic act for the first inscription is, doubtless, induced by reasoning analogous to that cited from Troplong. Are not the requirements of the article 3333, in spirit complied with, when the re-inscription is affected by the presentation of an authentic act, by one in adverse interest, containing, though in recital, all the elements required in the original mortgage, and all the recorder ever spread upon his pages?

Lee and Durant, for the appellant Bringier. The re-inscription by Shepherd is to be construed, not in accordance with his desires, but according to the legal nature and effect of mortgages. It is true, he desires to secure his own eighty two bonds only, and is indifferent to, or even anxious to sacrifice, the interest of those who are, with him, the joint holders of the series to which his bonds belong; but to effect his purpose, he is compelled to set forth at length the facts and circumstances of the original mortgage; he cites the act by which defendants granted the mortgage, and describes the book and page of the registration thereof in the mortgage office. Now, the original act of mortgage was a unit; there was not a distinct act in favor of Shepherd, another in favor of Phelps, Doge & Co., another in favor of Bringier, &c., but an act in favor of all the holders of the second series of bonds, which act was, in itself, one and indivisible. That it was so, is seen by art. 3249 of the Civil Code, which says: "The mortgage is a legal right on the property bound for the discharge of the obligation. It is in its nature indivisible," &c. Shepherd must be considered as having re-inscribed the whole mortgage, or nothing.

The re-inscription of a mortgage, after the lapse of ten years, produces no effect. Art. 3333 of the Civil Code, says: "The registry preserves the evidence of mortgages and privileges during ten years, reckoning from the day of their date: their effect ceases, even against the contracting parties, if the inscriptions have not been renewed before the expiration of this time, in the manner in which they were first made."

The mortgage to secure the first series of bonds was prescribed, and the attempt to renew it, after the expiration of ten years, was a nullity, and should

not have been permitted by the recorder of mortgages.

The case of Roche's Heirs v. Groysilliere involves the point now under consideration, whether a mortgage is prescribed by the lapse of ten years after inscription without renewal thereof, and whether it is prescribed by the lapse of ten years without inscription. The court say: "As more than ten years elapsed between the promulgation of the Louisiana Code and the intervention of the heirs of Walker in this suit, without the inscription of their mortgage being renewed, we conclude that, the effect of their mortgage has ceased, and that the plea of the third possessor (prescription) is well founded in law.

In the case of Minor v. Alexander, 6 Robinson, 171, this question was more fully, though not more judiciously, discussed than in the case just quoted, and in the former the court reconciles entirely all apparent conflict between articles 3316 and 3333. The court say: "It is evident that the intention of the lawmaker was, that a mortgage, whether inscribed or not, should cease to have its legal effect after ten years, unless renewed before the expiration of the time; and that the want of registry should prejudice the contracting parties, as well as third persons, if not made before the expiration of ten years from the date of the mortgage with regard to the parties themselves, or of its first inscription with respect to third persons. From these different provisions of our law, it seems to us that it may be fairly inferred that, although the mortgage need not be originally recorded to have effect between the contracting parties, still, it is required that, in order to continue after ten years to have the effect it had, as to them only, whilst it was not registered, the mortgage should be inscribed as directed in article 3333; and that this second or new inscription may be considered as a renewal of the mortgage between the parties, and against third This interpretation, in our opinion, gives full effect to the two provisions of the law, apparently contradictory, and is subject to less inconvenience in the application than if they were construed in their literal sense. Here, the vendor's mortgage was not re-inscribed until about twelve or thirteen years after the date of the act, and we must conclude that its effect had ceased, even between the contracting parties, at the time of the second registry." The principles of this effective and conclusive decision are revived and re-affirmed in Lejeune v. Hebert, 6 Robinson, 421.

F. B. Conrad, for the appellant, McCawley.

Hoffman, contrà. There is no error in the judgment appealed from. It has been contended that art. 3333 is in effect the same as art. 2154 of the French That in the French text the language used, with the addition of a few words, is that used in the French Code, and that the interpretation must be

If the rule laid down in art. 3333, contains no evidence of a different intention, the exception incorporated in it is conclusive proof thereof. It is said that the sole motive for limiting the effect of registering a mortgage to ten years, was to dispense with a search by the register beyond that period. Now the exception to the rule which our law contains entirely defeats that object, inasmuch as it requires a search beyond that period in a numerous class of mortgages. In France as with us, mortgages in favor of minors, &c. have effect against all without being inscribed, but it is made the duty of tutors and others to cause such inscription to be made. In France it is the duty of the same class of persons to cause a re-inscription of all such mortgages; and in case of neglect they are held responsible in the same manner as for a neglect to inscribe. Sirey, 8, 2, 81. It cannot be pretended that such responsibility exists under our law. Having caused the inscription to be made the responsibility of keeping it there rests with the register alone.

The peculiar provision of our legislation, which gives effect to mortgages without inscription, as against those who in bad faith seek to take advantage of the want of it, is that upon which the appellants rest all their hopes. Equally pe-

SHEPHERD

SHEPHERD ORLEANS OTTON PRESS COMPANY.

culiar are the provisions in relation to the force and effect of mortgages in cases of failure. Also in the formalities required for inscribing. Under the Code of 1808, a mortgage gave precedence over ordinary creditors without registry. Such was the law in France before the Code, and until settled otherwise by the Court of Cassation was, by some commentators, deemed to be law after it. See Sirey 7, 2, 954, and Delvincourt, vol. 2, page 648. Our jurists were also well aware that the mortgage produced certain effects, as between the parties to the contract, without being recorded; such as the right to an order of seizure and sale, the right to be paid out of the property mortgaged, thereby depriving the debtor of the right of pointing out property. It is therefore evident that in fixing a period for the prescription of mortgages, terms were purposely used which extended its application to the effect of the contract as between the parties. This is in conformity with the construction given by the late Supreme Court in 13 La. 245, 14 La. 102, 6 Rob. 166, 419.

Let us now examine the provision peculiar to the Code, that notice of the

existence of a mortgage is equivalent to registry.

Article 3297 will be found verbatim the same with that of the French Code: " Among creditors the mortgage has force only from the time of recording it in the manner hereinafter directed." Then follows the exceptions in favor of minors, &c. At the beginning of the next section we find what is called the limitation of that rule. Arts. 3314, 3315. It is contended that all the appellants come within the exception to the rule. Arts. 3316, 3320 and 3329 contain similar provisions, and a just rule of interpretation requires that they be taken in connexion with the two former.

The court is called upon to decide upon the rights of mortgage creditors in a case where all the parties have duly registered their mortgages, and in which some of them omitted to re-inscribe within the period fixed by law. The appellants, by the registry of their mortgages, affected all the world with notice of their existence, and thus precluded all questions that otherwise might have arisen, under the state of things contemplated by arts. 3214, 3215. The case argued by the opposite counsel is one in which the registry of the mortgage had been omitted, and the rights claimed by subsequent mortgagees are contested on the ground that, at the time of becoming such, they were aware of the existence of the prior mortgage. The record calls for no decision upon such a The important distinction between the two cases, consists in state of facts. the fact that the mortgages in question were duly inscribed, and that being the case, the only question for decision is, what alteration, if any, took place, as to the rights of the parties, by the failure of some of them to renew such registry within ten years. To meet this view of the case, the appellants are bound to show that they are in the same condition they would have been in, had they omitted to inscribe their mortgages. To prove this, they must show that the registry of a mortgage produces no legal effects. The legal effects resulting from registry, is to visit with notice as effectually as if all the world had witnessed the contract. C. C. art. 2264. The inscription gave rights to the mortgagee, which he had not without it. It placed all others under restrictions which did not exist without it. If then the registry produced certain effects and operated a change in the condition of the mortgagees, can it be maintained that the failure to reinscribe, wiped away all the legal consequences which attached to the registry? I answer, no. Many instances may be put where the legal consequences of a step taken by a creditor cannot be got rid of.

The claim of a mortgage creditor who has taken no note is not prescribed under ten years. But should he take a note from his debtor his claim will be limited to five years from its maturity. Could he, by destroying the note, after the period, take from creditors the legal effects resulting from his act?

We conclude then that the appellants by inscribing their mortgages shut out all questions that might otherwise have arisen under articles 3214, 3215. by doing so they brought themselves within the very letter of art. 3333, according to their own interpretation of it, and that the legal consequences resulting from the failure to reinscribe, must have effect.

Preston, on the same side. No point has been more fully decided in every possible form by the Supreme Court, than that a mortgage inscribed more than 10 years, without re-inscription, ceases to exist between the parties and third persons. Roche's Heirs v. Groysillière, 13 La. 245. Gravier v. Hodge, 14 La. 103. Dupuy vs. Dashiel, 6 Robinson, 166, 419. 11 La. 66. There

ORLEANS

COMPANY.

would be no confidence in judicial decision, nor security for property, nor cer-

tainty in transactions, if the question were still open.

Not only have the actions of men, but legislative action has been governed by the uniform judicial decision upon art. 3333 of the Code. In 1842 the le- Cottos Press gislature, by express law, exempted the property of banks from the effect of that article, which they conceived about to extinguish the mortgages in favor of those banks; and, in 1843, authorized any person interested to cause to be cancelled mortgages more than ten years old. The only possible reason was, that they were extinct by the operation of law. Otherwise, the legislature would not have authorized any one to injure a mortgagee by cancelling his existing mortgage, not only for his own benefit but as to all other persons. of 1842, p. 232. Acts of 1843, p. 51.

Registry alone gives effect to a mortgage. Civil Code, arts. 3317, 3318, 3290, 8 Mart. N. S. 570. 9 La. 354. As to the date, see art. 3319. To obtain a registry, the creditor or his agent must present an anthentic copy of the act to be recorded to the register of mortgages. Civil Code, article 3330. It has effect against third persons only from the day it is thus registered. Civil Code, arts. 3317, 3318, 3319. And to have effect after ten years, it must be reinscribed in the same manner. Art. 3333. The registry of an act of mortgage containing the recital of the mortgages in an annexed certificate, is not a registry of those mortgages. It has never been so understood by the community, nor by recorders of mortgages, who never give a correspondent certificate. Such a principle would produce unutterable confusion in the mortgage offices. If such a recital in the certificate, or act of sale, or mortgage, were regarded as a sufficient registry, or notice of the mortgages, to the subsequent vendee or mortgagee, article 3333 of the Code would be in opperative, because in all sales, mortgages, or donations, the notary is bound by article 3328 to obtain a certificate of all existing mortgages. Article 3333 can have no meaning if such notice supersedes it.

A mortgage is not a debt, but a security for a debt. It is not an obligation, but an accessary to an obligation. It is an encumbrance upon property until a debt is paid. It is the will of the legislature that, that incumbrance should exist, as to third persons, only by being recorded in the mortgage office. It is the will of the legislature that it should cease to exist, at the end of ten years after the inscription. What ceases to exist? The accessary to a debt—the security for that debt—the incumbrance upon property. Suppose the property in other hands than those of the mortgagor, would it be pretended that his knowledge that the debt was not paid would keep alive the accessary obligation. Articles 3314, 3315 are not inconsistent with 3333, as interpreted by us. They relate to inscription, not re-inscription. They are limited to the parties, their heirs and witnesses. They protect the negligent from those who seek to take advantage of their knowledge of that negligence; not those, who in their fair

busivess, oppose an extinguished mortgage.

The mortgage is prescribed. Article 3374, nos. 4, and 6, and art. 3333 of the Civil Code establish the only prescription in cases of mortgages. Prescription is a peremptory exception founded in law. Code of Practice, art. 345. Every party interested is entitled to plead it. Civil Code, art. 3429. Good faith is not required to support prescription. Ibid. art. 3515. It results from the mere silence or inaction of the obligee. Civil Code, art. 3494. It releases property from every real right. Art. 3495. The third possessor may plead that the mortgage has not been registered. Civil Code, art. 3366.

As to a mortgage not prescribed, the court can give full effect to articles 3214,

3215. They do not relate to mortgages which have been prescribed.
T. A. Clarke, Benjamin and Micou, on the same side.
Josephs, Bradford, Roselius, Burthe, C. M. Jones and Grymes, for different appellees.

The judgment of the court was pronounced by

Rost, J.* The object of this controversy is to ascertain the order in which the mortgage creditors of the Orleans Cotton Press Company are to be paid, out of the proceeds of the sale of the establishment where the Company carried on its operations. The following are the mortgages to be classed; 1st. A mort-

[&]quot;SLIDELL, J., did not sit in this case, being related to one of the parties.

SHEPHERD

v.

ORLEANS
COTTON PRESS
COMPANY.

gage to secure the payment of four hundred bonds of \$500 each, and one hundred and twenty bonds of \$400 each, all bearing date the 15th of March, 1834. This mortgage was inscribed on the 26th of March, 1834, and no re-inscription of it took place till the 21st of April, 1845. 2d. A mortgage given to secure the payment of one hundred and twenty bonds of \$500 each, bearing date the 15th of January, 1836, and recorded on the 30th of the same month. An attempt was made by one of the bond-holders, on the 13th of January, 1846, to re-inscribe that mortgage, so far as his interest went. 3d. A mortgage in favor of Leeds & Co., inscribed on the 29th of July, 1845. 4th. A mortgage given to secure the payment of eighty bonds of the Company, for \$500 each, inscribed on the 14th of December, 1841. This mortgage has been reduced by payments to \$13 500, besides interest. 5th. A judgment obtained by Rezin D. Shepherd against the Orleans Cotton Press Company, inscribed on the 3d of February, 1846.

The judge of the court below, following the jurisprudence established by the late Supreme Court, and considering, that the mortgage given in 1834 lost its rank and ceased to have effect even against third persons having notice, on the 29th of March, 1844, for want of re-inscription—that the re-inscription made on the 21st of April, 1845, had, from that day, and from that day only, the effect of a new mortgage-that, although against all persons not coming under the denomination of third persons, the mortgage may exist whether recorded or not, the inscribed mortgage ceases to have effect against all persons, if more than ten years have been suffered to elapse without re-inscription-that the attempt at re-inscribing the mortgage of 1836 was not in a legal form, and could produce no effect, ordered the proceeds of the sales to be distributed as follows: 1st. To pay and satisfy the costs of the suit in which the property was seized and sold, including the costs of this suit. 2d. To discharge the mortgage of Leeds & Co. 3d. To discharge the mortgage recorded on 14th of December. 1841, by satisfying the bonds yet unpaid, which it was intended to secure, and the interest due thereon. 4th. To discharge the mortgage re-inscribed on the 21st of April, 1845, by satisfying the bonds yet unpaid, which it was intended to secure, with interest due thereon. 5th. To pay and satisfy the principal, interest, and cests of the suit of R. D. Shepherd against the Orleans Cotton Press Company. The court further ordered the erasure upon the books of the recorder, of all the other mortgages mentioned in his certificate. Three of the creditors have appealed from this judgment, and upon the appeal several others have asked that it be amended.

For a proper understanding of the points made by the numerous counsel, it is necessary to premise that, in countries where the civil and common law prevail, the registry laws are at this day administered upon two distint and essentially different principles. In the first, so far as all but the parties are concerned, the inscription is in fact the mortgage. It must be renewed at certain fixed periods, and the non-re-inscription may be opposed by all third persons having an adverse interest, although they may be charged with notice. The right of preference which subsequent mortgage creditors, with or without notice, are compelled by law to to give the inscribed mortgage, provided it is re-inscribed according to law, appears to be viewed there in the light of an obligation contracted on condition that an event shall happen within a limited time. C. C. art. 2033. The case of Turner v. Parker. 10 Rob. 154.

The delay is in all cases fatal, and if it is suffered to expire without re-inscription, the mortgage loses its rank, and a subsequent re-inscription gives it effect only from the time it is made. A litigation between the mortgage creditors does not dispense from re-inscription; even the sale of the preperty effected under the mortgages, not does dispense from it, when the purchaser fails to pay the Cotton Press price. The inscription must continue until the proceeds of the property mortgaged are reduced to possession. 2 Troplong, Priv. et Hyp. nos. 558, 569, 570. 3 Troplong, nos. 716, 716 bis, 770, 724, 725. Merlin, Rep. de Jurisp., verbis Inacription and Hypothèque. Such is the principle of the registry law of France, and of the other nations of Europe who have imitated her Codes.

In England and in the other states of the Union, the rule, on the contrary, is that inscription need not be renewed, that the want of the registry required by the statute is not in all cases fatal; and that extra-judicial notice, when brought home to the party who alleges the want of registry, is equipollent to it. Story's Equity, pp. 397, 385, 399.

We are called upon to determine upon which of these two principles the registry laws of Louisiana have been framed, and should be administered. The appellees contend that, by the introduction in the Louisiana Code of art. 3333, which is the same as art. 2154 of the Napoléon Code, enlarged so as to extend the effect of non-re-inscription to the parties themselves, we have adopted the rule of the French law in a manner too clear to be misunderstood; that whatever may be the intendment of arts. 3314 and 3315 of the Civil Code, the question involved in this controversy is not one of unregistered mortgages, and that, whenever the inscription has been made, the provisions of art. 3333 cannot be evaded. They further allege that art. 3328 makes it the duty of every notary, who passes an act of sale, mortgage or donation of an immovable, to obtain from the office of mortgages a certificate declaring the privileges or mortgages inscribed on the object of the contract and to mention them in the act, and that, as it is also made the duty of notaries to see to the first inscription of those acts, the presumption is that that incumbrances upon immovable property are always inscribed and known to the persons dealing with the owner: that consequently, if all persons having such a notice are deprived of the rights intended to be conferred by art. 3333, that article is in all cases in operation.

The appellants, on the other hand, insist that, under arts. 3314 and 3315 of our Code, which are not found in the French Code, the contending parties here cannot be called third persons, because they did not become creditors before the existence of the previous mortgages, and did not deal with the debtor in ignorance of those mortgages, since they had them reiterated to them in the acts under which they claim; that, if inscription was required as to them, those two articles would become inoperative, and the diligent creditor, who inscribes his mortgage, would find himself placed in a worse condition than if he had not inscribed it.

The most universal and effectual way of discovering the true meaning of laws, when their provisions appear conflicting, is by considering their reason and spirit, and the motives which induced the legislature to enact them. Civil Code. art. 18. Under the laws of Louisians, at the time of the change of government. both immovables and moveables were subject to a great number of mortgages, and no publicity was required to be given to them. It was soon perceived that such a state of things was ill adapted to the necessities of a growing and commercial country, and the inconvenience and occasional hardship resulting from it, soon raised against the whole system of mortgages an opposition which has controlled all our subsequent legislation in relation to them. As early as the

SHEPHERD ORLEANS COMPANY.

SHEPHERD

ORLEANS
COTTON PRESS
COMPANY.

adoption of the Code of 1808, it succeded in abolishing mortgages on movembles. and in establishing a recording office in the city of New Orleans, where all conventional and judicial mortgages were to be inscribed, before they could have effect against third persons; but it was unable, at that time to subject legal mort. gages to that formality. They continued to have effect without inscription, and the framers of the Code adopted, on the subject of good faith and of notice, dispositions similar to those of arts. 3314 and 3315 of the present Civil Code. See Code of 1808, p. 458, art. 37; p. 470, art. 78; p. 472, art. 80; p. 464, arts. 52, 53, 54. In 1810 recording offices were established in every parish in the territory. 3 Martin's Digest, verbo Mortgage. The opposition continued to gain strength, and, in 1813, an act was passed making it necessary to record all mortgages and liens, under a penalty which is in these words: "And all sure. ties, sales, contracts, judgments, sentences or decrees, and all liens of any nature whatever, having the effect of legal mortgage, which shall not be recorded agreeably to the provisions of these acts, shall be utterly null and void to all intents and purposes, except between the parties thereto." The 3rd section of that act provided that, the want of the formality of recording should in no wise be prejudicial to the interests of minors, absent heirs and persons insane. These were the only exceptions.

The spirit that dictated that act presided over the formation of the Code of 1825. Many of the legal mortgages were abolished by it, and art. 3333 was evidently a blow aimed at those that were suffered to remain. It has been considered by the legislature ever since as suffering no exception. In 1842, the property banks were exempted by law from its operation, under the belief that it was about to extinguish the right of preference of the mortgages held by those institutions. In 1843, any persons having an interest were authorized, by another law, to cause to be cancelled on the books of the recorder all mortgages the inscription of which had continued more than ten years. Acts of 1842, p. 232, Acts of 1843, p. 61.

After these repeated manifestations of the mens legislatoris, and the numerous adjudications of our courts giving it effect, the question must be considered as settled. Nothing has been shown in argument that would justify this court in disturbing at this late day a known rule of property. A similar state of things in France, at the beginning of the revolution, produced there, also, a violent opposition to occult mortgages. That opposition resulted in the adoption of the principle of publicity, and of the specific legislation which we have borrowed from them.

Questions about uninscribed mortgages under arts. 3314 and 3315 will be determined as they come before us; but it may here be observed that those articles were taken from dispositions of the Code of 1808, and that the new dispositions introduced along with them, have the effect of rendering them, to a very great extent, inoperative.

Registry laws, provided they are known and certain, can work no injury. The view which has been heretofore taken of ours, and which we feel constrained to adopt, has, in a high degree, the merit of certainty in its application, and is consonant with the general rule of the civil law, that legal delays are fatal in all cases, unless expressly declared to be otherwise. It is based upon the consideration that, whatever may be the effect of the notice generally, when the act has been inscribed they do not extend to a waiver of the laws which regulate the mode and limit the life of the inscription. The inscription

is exclusively in the power of the party having an interest to make it. If he SHEPHERD does not reinscribe, he cannot complain of losses sustained through his own neglect. The construction contended for by the appellants would make, in all Cotton cases, of the effect of instription, a matter en pais, and therefore uncertain, and would give rise to endless litigation.

We do not understand art. 3333 as providing for the prescription of mortgages, but, on the contrary, as recognizing the right of re-inscription, after the expiration of ten years, as exercised by the first mortgagees in this case.

The French side of that article clearly expresses the intention of the legislature. It is the effect of the inscription that ceases, not the effect of the mortgage. If the prescription of the mortgage had been intended, it would have been so expressed. Prescription never attaches by implication.

The cases in the 13th and 14th vols. of the Louisiana Reports should be understood as having reference to the inscription, although, it must be admitted, that the language used by the court would authorize a different interpretation. Roche's Heirs vs. Groysillière, 13th La. 245. Gravier's Executors vs. Hodge, 14 La. 103.

The inscription produces some effects between the contracting parties. Art. 3329 provides that, if a person who has given a mortgage on his property, takes advantage of the neglect to register the mortgage, and engages the same property afterwards to another person, without informing him of the first mortgage, he shall be considered guilty of fraud, and shall be subject to the damages which the law authorizes in such cases. After the inscription, he is not liable in damages for giving a second mortgage. At the expiration of ten years, if no re-inscription takes place, his liability revives, and in that manner, the effect of the first inscription ceases, even against the contracting parties.

The court below did not err in considering the re-inscription attempted to be made on the 13th of January, 1846, for part of the mortgage securing the second series of bonds, as void. Whatever be the form of the reinscription, the description of the property mortgaged is one of its essential requisites, and was entirely omitted on that occasion. The reference to previous mortgages does not cure that defect. The object of the re-inscription is to dispense from searching, for the evidence of mortgages, more than ten years back.

That part of the judgment appealed from which orders the amount of a judgment obtained by R. D. Shepherd against the defendants, in suit No. 24478 of the District Court, to be paid by preference, is erroneous. That judgment was obtained upon bonds of the second series, and, as the effect of the mortgage securing the payment of those bonds did not cease between the parties to it, by the omission to re-inscribe after ten years, all the bonds of that series should be paid concurrently.

It is therefore ordered that the judgment of the District Court be amended, so that, after satisfying the four previous mortgages, the balance remaining be distributed pro rata between R. D. Shepherd and all the other holders of the bonds of the defendants, bearing date the 15th of January, 1836. It is further ordered, that the judgment thus amended be affirmed, the appellee R. D. Shepherd paying one half of the costs of the appeal, the other half to be paid by the appellants.

THE CITY BANK OF NEW ORLEANS v. Houston et al.

Where one holding a mortgage on property offered for sale by order of a District Court of the United States, sitting in bankraptcy under the stat. of 19 August, 1841, never proved his claim in bankraptcy, and, though notified of the sale, from a wish to avoid recognizing the power of the court to sell mortgaged property, took no part in the proceedings, he will not be estopped from disputing the title of the purchaser. His conduct could not mislead or deceive any one.

A mortgagee not made a party to proceedings by which a judgment was obtained ordering the recorder of mortgages to erase the mortgage held by him, will not be bound by them.

The jurisdiction conferred on the courts of the United States in matters of bankraptcy, by the stat. of 19 August, 1841, is restricted to the unencumbered assets of the bankrapt, except where parties voluntarily apply to the court for relief, or remedies are sought to be enforced against them which are authorized by special provisions of that act. The object of that statute being the discharge of debtors from their debts, it affects only such rights of property as stand in the way of that object. The 11th sect. provides that the assignee may, under the authority of the court, redeem and discharge any mortgage or pledge, deposit or lien upon any property, real or personal, whether payable in presention at a future day, and tender a due performance of the conditions thereof. The assignee may thus remove the encumbrance by satisfying the creditor, he may sell the property cum onere, or he may leave the creditor to exercise his rights at his option; but no power is given over such mortgage, pledge, deposit or lien, except to satisfy it, and thereby release the property. Sec. 2.

A PPEAL from the Commercial Court of New Orleans, Watts, J. On the 30th June, 1837, Thomas Banks executed a mortgage in favor of the City Bank, for the sum of \$55,000, giving his bond at twelve months for that amount, with privilege of renewal on payment of the stipulated instalments. The property covered by the mortgage consisted of ten lots of ground in the city of New Orleans, in the square bounded by Magazine, Gravier, Natchez and Tchoupitoulas streets, the description of which is contained in the mortgage, the whole forming the property known as Banks' Arcade. This mortgage was duly inscribed in the office of the recorder of mortgages. At the institution of this suit, there remained due to the City Bank on the above mortgage, the sum of \$44,000, with interest, at eight per cent per annum, from the 30th June, 1842; and the object of the suit is to recover this amount by the sale of the mortgaged premises in the hands of the defendants, who are the present owners of the property, by purchase from the assignee of T. Banks, in bankruptcy.

On the 30th July, 1842, Thomas Banks filed his petition, praying to be decreed a bankrupt, in the District Court of the United States for the Eastern District of Louisiana. His schedule embraced the property subject to the mortgage of the plaintiffs, and the plaintiffs were named as creditors, by mortgage and pledge of stock, to the amount of \$63,250. On the 5th September, 1842, the decree of bankruptcy was passed in due form, and F. B. Conrad, Esq. was appointed assignee, and gave bond accordingly. On the 23d December, 1842, the assignee presented his petition, praying for an order of sale of the estate of the bankrupt. An order was passed for the publication of the application, and the hearing was fixed for the 6th January, 1843.

In pursuance of certain rules adopted by the United States District Court, notice was also directed to be given to certain mortgage creditors, and, among others, to the City Bank. The tenor of this notice is as follows:

CITY BANK

"The assignee of said estate having filed in the court a petition as above described, it is ordered by the court, that a hearing of the said petition be had on thursday, the 5th January, 1843, at 10 o'clock, A. M., when, as one of the mortgage creditors of said estate, you are notified to appear, and show cause why the said assignee should not be authorized to erase and cancel all the mortgages, judgments and liens recorded in favor of certain creditors of said estate, so that he may convey a clear and unencumbered title to any purchaser thereof, reserving to such creditors all their rights in law to the proceeds of the sale of the said property upon the final distribution thereof, and why the said property should not be sold in the manner and form, and upon the terms suggested by the assignee, as particularly set forth in the schedule annexed to his petition, and filed in court." And by the return of the marshal, it appears that a copy was served upon the City Bank by its cashier, on the 29th December. No proceeding was had on the 5th January. On the 6th January, 1843, an order was granted, authorising the assignee to sell the property of the bankrupt, on terms therein fixed; and, after reciting that certain mortgagees, the City Bank among others, had been served with notice, and made no opposition, the assignee was authorized "to cause to be erased and cancelled from the records of the office of mortgages, the mortgages recorded in favor of the said creditors, reserving to them all the rights in law to the proceeds of the sale upon the distribution thereof." Neither the rule, nor the order of the court specified the mortgages to be raised. On the 24th February, 1843, a, further order was granted, at the instance of the assignee, and without notice or rule to show cause, suggesting that, in pursuance of the orders of the court, he had caused to be sold the property known as Bank's Arcade; that the New Orleans Canal and Banking Company, which held the first and oldest mortgage upon said property, had given to the said assignee a written consent that the same should be sold, and its mortgages be raised; that the application to sell, and to raise the mortgages, had been notified to the New Orleans and Carrollton Railroad Company, owners of the second mortgage, and to the City Bank, owners of the third mortgage, and that no objection had been made by them. It was thereupon ordered, that the recorder of mortgages should erase from his records the mortgages upon said property in favor of said banks. This order was accompanied with a description of the property, and a statement of the mortgages referred to, by date, amount, &c.

On the 6th March, 1843, the assignee presented his petition to the Parish Court for the parish of Orleans, reciting the aforesaid orders of the United States District Court sitting in bankruptcy, and the sale made by the assignee in pursuance of said orders; that said assignee had presented to the recorder of mortgages duly authenticated copies of said orders and proceedings, and had demanded the erasure of said mortgages, and a clear certificate, but that the recorder had refused to comply with said demand "alleging that the judgment of the District Court of the United States was invalid, and of no legal force or effect." The assignee prayed that the recorder might be cited to show cause, within three days, why a writ of mandamus should not issue, commanding him to cancel said mortgages, and grant the certificate as demanded. Service of this petition was accepted by counsel for the recorder, but no written answer was filed; and, on the 10th March, 1843, the mandamus was granted. On the 21st March, 1843, an appeal was taken by the recorder; and the judgment of the Parish Court was affirmed, on the 29th May. On the 23d June, 1843, the New Orleans Canal and

CITT BANK

Banking Company filed a petition in the United States District Court, reciting that they held the first mortgage upon the Banks' Arcade property, to the amount of \$102,000, besides interest; that the property had been sold by the assignee, who was in possession of the proceeds in cash and notes, the amount of which was less than their mortgage debt; that they were willing to receive the proceeds on account; and praying that the assignee be cited to show cause why the same should not be paid. To this petition an answer was filed by the assignee, declaring that he was willing to make the payment on the order of the court, and after deducting expenses of the sale. An order of publication of this petition was passed, and the hearing fixed for the 6th July, on which day a decree was rendered in conformity with the prayer. On the 5th January, 1844, on motion of the assignee, notice was ordered to be given by publications, that, on the 18th instant, the several reports filed by the assignee would be referred to the commissioners in bankruptcy; and calling upon creditors who had not proved their debts, to do so before that date. On the 8th April, 1844, a notice was issued addressed to the creditors who had proved their debts, and the return of serservice endorsed shows that it was notified to twenty-three creditors, but the name of the plaintiffs is not on the list. The object of this notice was to call upon said parties to show cause, on the 18th of April, why the report of commissioners should not be approved. The report in question includes, among those who had not proved their debts under the commission, the plaintiffs, as creditors, by loans on mortgage and on pledge of stock, for the sum of \$63,250. The proceeds of the Arcade, amounting to \$123,650, were awarded or confirmed to the Canal Bank, as the first mortgagee. An order was also made for the publication of the rule, and all persons interested were called upon by the publications to show cause why the report so filed should not be homologated and approved. On the 18th April, 1844, the report was approved and homologated,

The adjudication of the property, by the assignee, to the defendants, took place on the 15th February, 1843, after publications in the newspapers, and posting of hand-bills. The acts of sale were passed on the 7th June, 1843, the delay being caused by the proceedings to raise the mortgages, and the defendants have admitted, of record, that they refused to receive acts of sale, or to comply with the adjudication, until a clear certificate could be produced. The mortgages were cancelled by the recorder after the decree of the Supreme Court was pronounced, although no writ of mandamus was issued or served upon him, nor was the decree of the Supreme Court filed in the Parish Court.

The plaintiffs did not appear, and were not represented in any of these proceedings, either in the United States District Court, the Parish, or the Supreme Court. No notice or citation was served, except that referred to above; nor did the plaintiffs ever make or file any proof of debt, in conformity with the provisions of the bankrupt act, in the court sitting in bankruptcy. Thomas Banks received his discharge in bankruptcy, in December, 1843. The plaintiffs pray that the mortgaged premises in the hands of the defendants may be subjected to their claim, and seized and sold to satisfy it.

Several exceptions were filed, among them, one to the jurisdiction, on the ground that exclusive jurisdiction in all matters of bankruptcy was vested in the federal coarts. The others set up the validity of the proceedings under which the defendants had purchased. The exceptions were overruled, with leave to plead the same matters in defence. The defendants then filed separate answers, which present, in different forms, the same defence. The sub

Houston.

stance of the defence in all of them is, that defendants had acquired the property in good faith, at a public adjudication, in pursuance of a decree of a competent court, rendered after due proceedings, and with a clear certificate of the recorder of mortgages; that they had severally paid the amount bid by them for the lots; that, by reason of the bankruptcy and discharge of Thomas Banks, and of the proceedings touching the sale, and raising of mortgages in the Court of Bankruptcy, and in the Parish and Supreme Courts, by all of which the rights of the plaintiff were bound and concluded, the mortgage had been extinguished and legally cancelled; and, that the property was free of any lien or charge for the same. The defendants also plead, that the City Bank was "conusant" of all these proceedings, and was therefore bound by the knowledge and notice of the same. The assignee in bankruptcy, the Canal Bank, and the recorder of mortgages, were cited in warranty. The recorder only answered, relying upon the decree of the Supreme Court; and no further steps were taken against the warrantors.

During the trial of the cause, and after the evidence had closed, the plaintiffs filed a supplemental petition, in the nature of a replication to the rights set up by defendants under the proceedings in bankruptcy, to the effect, that the rights of mortgagees were specially reserved and exempted from the operation of the bankrupt law, by the proviso of the second section of the act; to the filing of which the defendants excepted, on the ground that it was filed too late, and after the trial had commenced.

The transcripts of the judicial proceceedings above referred to, the procesverbal, and acts of sale to the defendants were introduced. Witnesses were sworn, to prove the degree of publicity given to the sale; that the sale by lots produced more than would have been produced by a sale in block; and that the president and cashier, and attorney of the City Bank knew, before the sale, that one was intended. Peters proved, that after the adjudication, and before passing the acts, an application was made by Hullin to the City Bank, to release its mortgage, on the ground that the proceeds of sale were insufficient to pay the Canal Bank, holding the first mortgage, but that this proposition was not acceded to. He also stated, that the Bank took no part in any of the proceedings touching the sale, or the cancelling of the mortgages.

Judgment was rendered for the defendants, and the plaintiffs have appealed. Lockett and Micou, for the appellants. The question to be decided is, whether the mortgage granted by Thomas Banks to the plaintiff has been legally cancelled, so as to exempt the property, in the hands of the defendants, from its operation. The grounds on which the defendants rely, to protect the property from the mortgage, may be classed as follows, viz.: 1. The certificate of the recorder, that there were no mortgages. 2. The sale made by the assignee. 3. The orders of the United States District Court, requiring the recorder to cancel the mortgage. 4. The mandamus directed to the recorder by the Parish Court, affirmed by the Supreme Court. 5. The neglect of the bank to oppose these orders, and an alleged acquiescence resulting from such neglect. We will notice, in their order, these several grounds.

I. The recorder caused destroy a mortgage by a certificate. His certificate

is only prima facie evidence. After the mortgage has been recorded, it cannot be caucelled, except in accordance with law. Dreux v. Ducourneau, 5 Mart. 627

II. The assignee received the property subject to the mortgage, and could only convey it to the purchasers subject to the same incumbrance. Bankrupt Act, secs. 3, 15. Ex parte Remlin, Jus. Baldwin. Norton's Assignee v. Boyd, 3 Howard, 440. Succ. Field, 3 Rob. 5. Savery's Assignee v. Best, 3 Howard, 118. Egerton v. Creditors, 2 Rob. 201. Foley v. Dufour, 17 La. 526. Bertoli v. Citizens' Bank, 1 Ann. Rep 119.

CITY BANK HOUSTON.

III. The United States District Court was wholly without jurisdiction to order the release of mortgages, or to compel the appearance of mortgagees. Bankrupt Act, secs. 6, 8. Pck v. Jenness, Parker, J., Law Rep., Dec. 1845. City Bank v. Christy, Baldwin, J., Penn. Law Rep. Hubbard v. Hamilton, 7 Metcalf, 346. Ex parte Cook, 5 Law Rep. The mortgage of the City Bank is protected by the provisions of its charter, and the exemption of the second section of the bankrupt act. Charter, act of 1831. Bertoli v. Citizens' Bank. 1 Ann. Rep. 119. The judgment of a court, without jurisdiction ratione materia, is absolutely null. Thompson v. Tolmie, 2 Peters, 169. Voorhies v. Bank of United States, 10 Peters, 449. Spencer v. Barbour, 5 Hill, 570. Beale's Heirs v. Walden, 11 Rob. 67.

IV. The recorder alone was cited. The rights of the bank could not be destroyed in a suit to which it was not a party. Bank of Alabama v. Hozey, 2 Rob. 152. Cox v. Rees, 16 La. 110. Vignié v. Blache, 5 Ibid. 108. Hellum v. Maurin, 8 Ibid, 113. French v. Prieur, 6 Rob. 302. State v. Leblanc,

 5 La. Gasquet v. Dimitry, 6 Ibid, 283.
 V. Citation is the only basis of judicial proceedings; mere notice of their existence will not bind third parties. Wall v. Wilson, 2 La. 172. McMicken v. Smith, 5 Mart. N. S. 429. The bank had no notice, except of the sale : to this it had no objection, and had no interest in opposing it, because by law the sale did not impair the mortgage. Acquiescence could only be presumed from conduct not susceptible of any other interpretation. The conduct must be such as to mislead the parties interested, and such that ratification necessarily results. Riva's Heirs v. Bernard, 13 La. 175. Story's Eq. Jurisp. § 307. and cases, Drewry on Injunctions, 38 Law Lib. 45. Greig v. Bartlett, 20 Pickering, 186. Cook v. West, 3 Rob. 331. So far from consenting, the bank positively refused to release its mortgage. Its position was well known. The purchasers were perfectly informed of the existence of its mortgage. The value of the property was necessarily affected by the claim, and the defendants had the benefit of the reduced prices resulting from a sale under a clouded title. They speculated the reduced prices resulting from a sale under a clouded title. upon the chances of destroying the bank mortgage, without its consent; and, even if they fail in this speculation, their bargain in the property will indemnify them for the loss. It results, that the mortgage of the bank has never been legally disturbed or impaired, but remains in full force. The judgment of the Commercial Court should therefore be reversed, and a decree rendered, condemning the property to be sold, to satisfy the mortgage.

R. H. Wilde, on the same side. The plaintiffs, at the time of Banks' bank-ruptcy, 290, 294, 298, 306, 111, 304. 2 Black. Com. 467. Cullen on Bankruptcy, 145, 185. Plaintiffs have not proved the debt against the bankrupt's estate, do not claim under the bankruptcy, but adversely to it, and are in no wise subject to the jurisdiction of the District Court of the United States, exercissee the 5th, 3d and 10th section of the bankrupt act. Briggs v. Stephens, Law Rep. Oct. 1844, p. 281. Dutton v. Freeman, 5 Ibid. 452. Ex parte Comstock, 5 Ibid. 165. Over a creditor who does not prove, the jurisdiction, as we contend, is not summary, but formal. Two kinds of jurisdiction created by the act, one

Distinction between formal and summary jurisdiction of courts, well established. 2 Chitty's Gen. Prac. 312, 314. This distinction clearly pointed out by Judge Baldwin in regard to our bankrupt act, in Kerlin's case. The United States courts have no jurisdiction but what is expressly given to them. Taylor v. Cooke, 2 McLean's Rep. 516. Steamboat Orleans v. Phanix, 11 Peters, 184. The English High Court of Chancery, sitting as a bankrupt court, cannot call before it a second mortgagee who has not proved his debt. Ex parie Jackson, 5 Vesey, jun. 357. Ex parte Bignold, 1 Deacon, 503. 1 Deacon, 383. 1 Glyn

and Jameson, 4, and 260.

by the 6th, one by the 8th section.

That the United States District Court, sitting as a bankrupt court, and exercising summary jurisdiction in matters of bankruptcy, had no lawful power, jurisdiction or authority to order the erasure of the plaintiffs' mortgage, is a mere logical deduction from the foregoing premises.

On the rule taken against the recorder of mortgages, in the Parish Court, and in the appeal thereon, plaintiffs were not made a party, and are in no wise bound thereby. In a rule against the recorder of mortgages, the mortgagee must be a party. Florance v. Mercier, 2 La. 487. Waters et al. v. Mercier, 4 Ibid. 17. Gasquet v. Dimitry. 6 Ibid. 453. Cox v. Rees, 16 Ibid. 110, 111. Foley v. Dufour, 17 Ibid. 526. Barthe v. Bernard, 1 Rob. 397. Bank of Alabama v. Hozey, 2 Ibid. 150, 152. Le Goaster v. Barthe, 2 Ibid. 390. Ex parte proceedings not binding on those not parties. 1 Rob. 116, 17 La. 14. 5 Ibid. 122.

The Bank, by the express provision of its charter, is exempted, in regard to mortgages, from the operation of the State insolvent laws, and the saving of the proviso to the act of Congress, being a saving of the State lien in its full integrity, they are, as to such lien, and its remedies, exempted by the said proviso from the operation of the bankrupt act likewise. For the charter of the City Bank, granting the same privileges, &c., with the Bank of Louisiana, and the Consolidated Association, see Acts of 1831, p. 38, sec. 18. For charter of Bunk of Louisiana, see Moreau's Dig. vol. 1, p. 35, secs. 35, 34, 33, 31. For charter of Consolidated Association, see 2 Moreau, p. 404, secs. 25, 24, 22. Analogous to mortgages with a pact de non alienando. Williams v. Bank of Louisiana, 17 La. 378, 379. Egerton et al. v. Their Creditors, 2 Rob. 203. The privileges of the bank net affected by a syndic's or probate sale. Bertoli v. Citizens' Bank, 1 Ann. Rep. 119.

F. B. Conrad, for the defendants. The pretensions of the plaintiff are founded mainly upon an alleged want of jurisdiction in the District Court of the United States, as a court of bankruptcy, over property encumbered with liens and mortgages; and it is contended, that the sale by the marshal, and the judgment of the court ordering the cancelling of the mortgages, and the cancelling thereof by the recorder of mortgages, did not operate an erasure of the mortgage of the plaintiffs.

Whatever may have been once thought of such pretensions, the question as to the jurisdiction of the bankrupt court must now be considered as definitely settled by the highest judicial authorities, both of this State and of the United States. Immense interests have been acquired; property of incalculable extent and value is held upon the faith of those authorities; and public policy, and a sound administration of justice require, that the question should no longer be considered an open one.

The defendants, therefore, hold that, the District Court of the United States had fall authority and jurisdiction in the premises, and was competent to decree the sale of the property and the cancelling of the mortgages. Walker v. Best, 3 Howard's Reports, 111. Ex parte The City Bank of New Orleans v. Christy's Assignee, 3 Ibid, 292. Norton's Assignee v. Boyd et al., 3 Ibid, 434. Opinion of Judge Story, in the matter of Jonathan H. Cheney. 5 Law Reporter, 19. "A creditor of a bankrupt, who holds collateral security for his debt, may, in the discretion of the District Court, be permitted to take the same at its value, to be ascertained under the direction of the court, or the District Court may order a sale thereof." In the matter of B. B. Grant and others, 5 Law Reporter, 303. Clarke, assignee, v. Rosenda et al., 5 Robinson, 27. Conrad, assignee, v. Prieur, recorder, &c., 5 Ibid, 49. Lewis v. Fisk et al., 6 Ibid, 159.

L. Pierce, on the same side. The conduct of the bank has deprived it of the right to contest the sales under which defendants claim. The evidence on this subject is as follows: Samuel J. Peters says, "that he is, and has been for many years, president of the City Bank." Being asked whether, as president of that bank, he knows whether any particular course was resolved upon by that institution with regard to the debt due by Thomas Banks to that institution, and if so, for what reasons, and on what account it was adopted, and how continued? he says that, "at the time of the failure of Thomas Banks, he owed the City Bank about \$44,000; that that debt was secured by mortgage on the Arcade property: there were other mortgages before that of the City Bank on the property, those of the Canal Bank, and that of the Carrollton Bank. The City Bank never proved its claim on Banks' estate in bankruptcy, by advice of counsel, and pursued the same course in all similar instances; the bank was advised by counsel that the mode of selling the property was of doubtful legality. Subsequent to the sale of that property, some difficulty having

CITY BARK E. HOUSTON. CITY BANK HOUSTON.

arisen about raising the mortgages, and giving a title to the Arcade, the City Bank was applied to by Mr. Hullin, with a proposition that the bank should authorise the erasure of the mortgages, on the ground that the property had been sold, and had not produced more than enough to pay the Canal Bank. That proposition was referred to the counsel of the bank; the bank was advised not to accede to it; the bank did not accede to it. The City Bank never opposed in any bankrupt case when it was in possession of a mortgage, as witness thinks, this being the settled course of the bank, under advice of their counsel: not wishing, in any case, to recognize the power of the bankrupt court to sell the property mortgaged."

Palfrey, the eashier, testifies that, he "was fully aware that the property was

to be sold; saw the advertisements of the sale in the newspapers; the president, S. J. Peters, attended to the business of the real estate of the bank."

The law on this subject is laid down in the case of Marsh v. Smith, 5 Robinson, p. 523 and 524, where the court say:

"The principle invoked by the defendants' counsel is one well settled, that if a man stands by and is silent while his own property is sold, and suffers another to become the purchaser, he is estopped from disputing a title thus acquired. The rule of law is well expressed by Lord Denman, in the case of Pickard v. Sears, (6 Adol. & Ellis, 469,) to wit, that where one by his words or conduct wilfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief so as to alter his own previous position, the former is concluded from averring against the latter a different

state of things as existing at the same time.

"'There are cases,' says Judge Story, in his Treatise on Equity, 'in which a man may innocently be silent; but in other cases, a man is bound to speak out; and his very silence becomes as expressive as if he had openly consented to what was said or done, and had become a party to the transaction. Thus, if a man, having a title to an estate, which is offered for sale, and knowing his title, stands by and encourages the sale, or does not forbid it, and thereby another person is induced to purchase the estate, under the supposition that the title is good, the former, so standing by and being silent, will be bound by the sale, and neither he nor his privies will be at liberty to dispute the validity of the purchase.' 1 Story on Equity, 375, § 385. 3 Robinson, 332. 1 Johns. Chanc. Rep. 354. We cannot but conclude that, the present case comes within the principle thus laid down, and especially the great principle of equity, that where one of two innocent persons must suffer, he shall suffer who, by his own acts, occasioned the confidence and the loss."

To the same effect also is the case of Miles Beach v. John McDonogh, 5

Robinson, 252, et seq.
C. M. Randall, Roselius and C. M. Conrad, on the same side.

The judgment of the court was pronounced by

EUSTIS, C. J. This is an hypothecary action, in which the creditor asks for a decree subjecting certain property in the possession of the defendants to the payment of his debt. The defendants plead in substance that they purchased the property at a judicial sale, made of a bankrupt's estate, under a decree of the bankrupt court, with a clear certificate of the recorder of mortgages that the proceedings in bankruptcy were regular, and that by reason thereof and the discharge of the bankrupt, and by the decrees of the bankrupt court, the mortgage was extinguished and lawfully cancelled, and the property released from any charge or incumbrance resulting therefrom. That they were bond fide purchasers and paid the purchase money; and that the City Bank was cognisant of the sale and of all the proceedings in bankruptcy, and is bound by notice and knowledge of the same. There was judgment for the defendants, and the plaintiffs have appealed.

The transcripts of the different proceedings and the other documents have been so methodically set forth in the printed statement furnished in the brief of the counsel for the plaintiffs, that it would be useless to give any

further analysis of them. We proceed to give our decision on the different CITY BARK questions of law which this interesting case presents.

Houston.

I. We do not consider that there is anything in the conduct of the officers of the bank, as it is before us in evidence, which would bind the bank by the sale of the mortgaged property. They acted on their view of the law consistently throughout-misled no one, deceived no one. The different opinions among professional men in relation to the powers of the bankrupt court are matters of notoriety, and prevented any one from acting otherwise than with caution and deliberation in the purchase of mortgaged property at bankrupt sales. It is impossible for us to overlook a fact which thus excludes the plaintiffs from the operation of the salutary and equitable rule invoked by the counsel for the defendants.

II. The late Parish Court for the parish and city of New Orleans, at the instance of the assignee of the bankrupt, rendered a judgment against the recorder of mortgages, by which the latter was ordered to cancel the mortgage which is the subject of the present suit, and to grant a certificate of no mortgage. On an appeal the judgment was affirmed. The plaintiffs were not parties to those proceedings and are not bound by them, and the mortgage in question ex isting on the property at the time of the sale and afterwards, unless released by the decree of the bankrupt court, or by the sale itself, so far as the defendants are concerned, must be considered, for all the purposes of this enquiry, as sub-

III. The power and jurisdiction of the bankrupt court in this respect must be next considered. This is a case in which the bankrupt court, at the instance of the assignee, without the consent of the mortagage creditor, ordered mortgaged property to be sold, and the mortgage to be cancelled in the manner authorized by our laws in a concurso, considering the assignee as vested with the same authority as is exercised by syndics in the settlement and liquidation of insolvent estates under the cessio bonorum.

The argument presents two antagonist systems as the true theory of the bankrupt act of 1841, and we have to decide between them. One gives to the bankrupt court an unlimited and absolute control over all mortgages, liens, privileges and encumbrances on all the property surrendered by the bankrupt; the other confines its jurisdiction to the unencumbered assets belonging to the bankrupt, except in cases in which parties may voluntarily apply to the court for relief, or remedies may be sought to be enforced against them which are authorized by special provisions of the bankrupt act.

The different opinions entertained by enlightened and learned men on this subject attest its difficulty; and we are relieved by their researches from the labor, and, in some degree, the responsibility, of determining the question as res novaby having it in our power to adopt one of the conflicting theories, under the convictions which the full discussion of the whole subject has produced on our minds.

Without drawing into question the constitutional power of Congress, under the anthority to establish an uniform system of bankruptcy throughout the United States, to vest the jurisdiction in the bankrupt court, which is contended for by the counsel for the defendants, it is not a little singular that, for these absolute powers contained in such a jurisdiction over the property of third persons, the

[&]quot;The statement of the case made in this report, is condensed from that referred to as prepared by MM. Lockett and Micou, counsel for plaintiffs.

CITE BANK 9. HOUSTON. exercise of which depends upon the will of any one who chooses to apply fur the benefit of the act, there is no express warrant in the act itself, nor are these powers necessary to carry it into effect.

The object of the bankrupt law was to discharge debtors from their debts. An artificial state of things was supposed to require the great remedy of none tabulæ. This was the purpose of the act; and there was neither reason nor policy in touching any other rights of property than those which stood in the way of this object. The proviso contained in the second section, if it mean anything, must mean this. It says "that nothing contained in this act shall be construed to destroy, annull, or impair any lawful rights of married women or minors, or any liens, mortgages or other securities on property, real or personal, which may be valid by the laws of the States respectively, and which are not inconsistent with the provisions of the second and fifth sections of this act." So far from the act providing for the protection of these rights under its operation, they are expressly excluded from its benefit. All who prove their debts under the act must share alike, with the exception of the United States, those subrogated to their rights, and certain operatives for their wages not exceeding \$25.

The provise of the second section is scarcely more explicit and positive than that which exempts fiduciary debts from the operation of the bankruptcy. Mr. Justice McLean, in the case of *Chapman* v. Forsyth, 2 Howard 208, in speaking of that class of debts says: "But as the discharge operates only on debts, contracts, etc., which are provable under the act, it is said that consent cannot include fiduciary debts."

"Such debts without the assent of the creditor, are clearly not within the act. But if his debt shall be found on the schedule, and he not only proves it, but receives his proportionate share of the dividend, he is estopped from saying that it was not within the law. He is a privileged creditor, and is not bound by the bankrupt law; but he may waive his privilege. As a creditor he has a right to come into the bankrupt court, and claim his dividend. He does not establish his claim as a fiduciary one, but as a debt proveable within the statute; and, having done this, he can never controvert the discharge." Vide also, Morse v. City of Lowell, 7 Metcalt, 155. If the mortgage creditor prove his debt under the act, he can only receive a dividend with the other creditors. This, of itself, excludes the conclusion that, the mortgaged property must be sold in the bankrupt proceedings.

Section 11 is coincident with, and justifies this construction. It provides that the assignee shall have full authority, under the court in bankruptcy, to redeem and discharge any mortgage, or other pledge, or deposit, or lien upon any property, real or personal, whether payable in presenti or at a future day, and to tender a due performance of the conditions thereof. By this means the encumbrances being removed, the property belongs to the creditors, and is to be divided rateably among them; but no power is given over the mortgage, pledge or lien, except to satisfy it, and thereby release the property. This is all that can be done by the court in bankruptcy.

If this be not the true construction of the bankrupt act, it certainly recommends itself by its extreme simplicity, by its accordance with the general tenor of the act and its evident purpose and intendment, and its conformity with every one of its provisions, and its opposition to none. It gives the debtor all the relief he is entitled to ask; it discharges him from his debts personally, but

CITY BANK E. HOUSTON,

leaves the rights of his creditors on property affected by his debts, unimpaired. It leaves the State tribunals in the full exercise of their jurisdiction, except so far as that jurisdiction is divested by the constitutional power of the bankrupt court—with full and complete authority to carry into effect an uniform system of bankruptcy, and prevents that accumulation of power in the bankrupt court, which is to be exercised without appeal, and which we cannot believe the act confers.

Some weight is attempted to be given to the contrary construction of the act, from the mode of proceeding under our system of insolvency; but it has no affinity with the bankrupt act. The system of bankruptcy must be uniform throughout the United States. The enquiry is, as to the jurisdiction conferred by the act on the bankrupt court; the powers of assignees and of the bankrupt court, must be determined by its provisions.

We find them adequate for their object, consistent, and carrying out well recognised and constitutional powers. If the assignee finds that the property of the debtor is encumbered, he is authorized to remove the encumbrance by satisfying the creditor; he can sell it cum onere, or he can leave the creditor to exercise his right against it at his option; but we find nothing which authorizes the bankrupt court, under this act, to annul any mortgage, lien or security, reserved, as we consider, under the provise of the second section of the act.

It is also worthy of remark that, it is surprising that in so elaborately prepared a statute as the bankrupt act, no single provision is made for the mode of exercise of this jurisdiction over pledges, liens and mortgages, for which the necessity was evident. Nor can this omission be considered as an oversight, for the act bears in every part the proof of great care and foresight. In the 11th section the assignee is not even authorized to compound or compromise any debts or securities due or belonging to the bankrupt, except under the authorization of the court, after ten days public notice in a newspaper. The rules of court for proceedings in bankruptcy, prepared under the direction of the Supreme Court of the United States, contained no provision on this important subject.

Such being the view we have taken of the act itself, it now remains to examine the authorities cited. The principal cases on which the appellees have based their argument, in favor of the powers of the bankrupt court under which the mortgages in this case were released, are those of Ex parte Christy (3 Howard's Reports 293,) and Norton's assignee v. Boyd, (3 Howard, 427.) Those cases were decided in 1845, and were preceded by two cases decided by the late Supreme Court of this State. Clarke v. Rosenda, (5 Robinson, 27) and Conrad, assignee, v. Prieur, recorder of martgages, (1b. 49,) which it is material to notice. The cases decided in the Supreme Court of the United States were both from the Louisiana district, and it is apparent, from the argument of counsel and the opinion of the court, that the decisions of our own court were not without influence in leading the learned judges of the Supreme Court of the United States to the conclusions to which a majority of them arrived.

The Louisiana decisions maintain the extraordinary powers asserted by the bankrupt court to their full extent. But they were made by a bare majority of the court. Judge Martin took no part in the causes, and, on both occasions, Judge Bullard gave a formal and emphatic discent to the opinions of the court, and supported his views by a thorough and eleborate examination of the sub-

HOUSTON.

CITY BASK ject, which we consider unanswerable as a sound exposition of the legal intendment and construction of the bankrupt act.

We think these decisions are founded on two capital errors. One is in taking it for granted that the bankrupt act is in its administration identical with our Louisiana insolvent system, and that all the powers given by our laws to our courts for the liquidation of insolvent estates are given by the bankrupt act to the bankrupt court, which is no less than assuming the very point in dispute. This assumption is founded on a supposed necessity, which authorizes the recognition of implied powers. It is obvious that no such necessity exists, and a very slight examination of the subject will satisfy any one that the supposition is chimerical.

Another error consists in considering the mortgage under our laws, as different from mortgages as they exist in other parts of the Union. But under the bankrupt act, the proceedings in the bankrupt court are, according to the rules and principles of equity; and equity considers mortgages, as our laws consider them, simply as the security for a debt or obligation, 3 Blackstone Com. 435. The distinction between the two is without a difference, so far as relates to the action of a court of equity upon them. And in relation to the supposed necessity of releasing the mortgages in order to facilitate the liquidation of the bankrupt's estate, we have only to refer to the operation of the bankrupt act in States other than Louisiana, in which the absolute control of the bankrupt court over mortgages has never been asserted; nor is any such necessity supposed to exist under the English system of bankruptey.

The opinion of the Supreme Court of the United States in Christy's case, was delivered on an application for a prohibition to the District Court of Louisiana, and it was held that the court had no authority to issue writs of prohibition except in the cases provided for by the statute, that is, where the district courts were proceeding as courts of admiralty and maritime jurisdiction. The applition being in a case in bankruptcy, was disallowed.

The doctrinal portion of this opinion supports the jurisdiction of the bankrupt court to the extent contended for by the counsel for the appellees, and it seems to be affirmed in the subsequent case of Norton's assignce v. Boyd et al. The opinions in these cases do not come before us in such a form as to command an acquiescence, and to demand from us a sacrifice of conscience and of our sense of duty to authority.

Being entirely aloof from those feelings which controversy rarely fails to engender, even with those who are the most anxious to avoid its effects, we have not stated in detail the objections to which we think the opinion of that high tribunal is obpoxious. There is one, however, which it will not, we hope, be considered out of place, if we submit.

The Supreme Court has never decided that the jurisdiction of the bankrupt court was exclusive of the State courts. The point was reserved in Norton's case, and the general exercise of the jurisdiction of the State courts on liens and mortgages, we think, renders its lawfulness unquestionable. In order to enable the bankrupt court to liquidate an estate, according to the doctrine in Christy's case, to class and settle the rank of the privileges and mortgages, to ascertain and give their relative position to the different liens existing under our laws, the jurisdiction must be exclusive, the power must be absolute. A conflicting authority is irreconcileable with a speedy settlement, and leads to litigation and delay, which, it is admitted on all hands, the bankrupt act repudiates throughout. The only mode by which estates can be settled within a reasona- CITY BANK ble time, under that act, is by leaving it to operate upon the unencumbered assets of the bankrupt, and enabling those who have rights of property to exercise them in the ordinary tribunals, as their interest or inclination may prompt them. The necessity of making the jurisdiction exclusive, in order to enable the system to work out its own ends, appears to us so obvious, that we cannot consider that a matter of this importance would be omitted, or even left in doubt, by the distinguised authors of this remarkable law. We cannot belive it was left to be implied, and that such a delegation of power, exclusive and without appeal, over the property of citizens, should be assumed or vested otherwise than openly, expressly, and in a formal manner.

So much has been before the public on this question that anything further on our part would be merely an exhibition of what has been previously said, and it only remains for us to state our thorough conviction of the correctness of the views taken of it in the cases cited by Judge Bullard, in his dissenting opinions, and which we adopt as an expression of our own.

In witholding our assent to the opinion given in Christy's case, we are far from considering that we, in any one single point, derogate from the respect which we owe and feel for the memory of the illustrious judge who delivered it, or for that august tribunal from which it emanated. We are acting under the stern responsibility of duty, and under the consolation that, if our views are sound, they will be sustained, and if erroneous they will be corrected by the superior wisdom of those who will be called upon to decide this case in the last

There is a fastidious and irrational delicacy, which shrinks from the examination of every thing which bears the semblance of authority; but following the example of that court itself, and the lights which it holds out to those who are in pursuit of truth, we have considered this important subject with great care and solicitude, and cannot refuse to the party litigant the benefit of our conscientious and deliberate convictions.

In the case of the Louisville Railroad Company v. Letson (2 Howard, 554), Mr. Justice Wayne, in delivering the opinion of the court, says:

"We remark too, that the cases of Strawbridge and Curtis and the Bank and Deveaux, have never been satisfactory to the bar, and that they were not, especially the last, entirely satisfactory to the court that made them. They have been followed always most reluctantly, and with dissatisfaction. By no one was the correctness of them more questioned, than by the late chief justice who gave them. It is within the knowledge of several of us, that he repeatedly expressed regret that those decisions had been made, adding, whenever the subject was mentioned, that if the point of jurisdiction was an original one, the conclusion would be different. We think we may safely assert that, a majority of the members of this court have, at all times, partaken of the same regret, and that whenever a case has occurred on the circuit, involving the application of the case of the Bank and Deveaux, it was yielded to, because the decision had been made, and not because it was thought to be right. We have already said that the case of the Bank of Vicksburg and Slocomb (14 Peters), was most reluctantly given on mere authority. We are now called upon, upon the authority of those cases alone, to go further in this case than has yet been done. It has led to a review of the principles of all the cases. We cannot follow further; and, upon our maturest deliberation, we do not

CITT BANK D. HOUSTON.

think that the cases relied upon for a doctrine contrary to that which this court will here announce, are sustained by a sound and comprehensive course of professional reasoning. Fortunately a departure from them involves no change in a rule of property. Our conclusion, too, if it shall not have universal acquiescence, will be admitted by all to be coincident with the policy of the constitution and the condition of our country."

The act under consideration had but a short existence, but the exigencies of the future may require similar remedies to meet them; and it is, in a political point of view, extremely important to ascertain the extent of power vested in a bankrupt court, by the terms and provisions of this act, which may serve as a guide to be followed, or an example to be avoided, in future legislation.

Under the conclusions to which we have arrived, it is unnecessary to examine the other objections taken by the plaintiffs to the force and effect of the bank-rupt proceedings, being of opinion that, so far as they affect the plaintiffs' mortgage, the court was without jurisdiction. The plaintiffs are entitled to judgment. It is therefore erdered and decreed that the judgment of the Commercial Court be avoided and reversed.

SLIDELL, J., dissenting. In dissenting from the opinion upon the question of jurisdiction adopted by all the other members of this court, it is due to cander and to the respect which I entertain for their judgment, to say, that my dissent is not dictated so much by weight of argument, as by the force of authority, and a consideration of the evils that would arise from overthrowing the doctrine established by the Supreme Court of the United States, and twice recognized by the former Supreme Court of this State. Were this question res nova, or even were the bankrupt law unrepealed, the inclination of my mind would be to concur on the main question with the opinion just pronounced by the chief justice, though I might differ as to some of the minor questions incidentally discussed.

I do not wish to be understood as recognizing unqualifiedly the rule of stare decisis. Indeed, the rule itself is not inflexible, nor absolute. Those who respect law as a science would not hold themselves bound in all cases by decisions, whether pronounced by themselves or others, which mature reflexion should demonstrate to be opposed to sound reason. To do so would be to prostrate the science itself, by excluding it from the career of progress and improvement which is open to every other, and forbidding it to accomodate itself to those changes of manners and institutions, some amalgamation with which is indispensable to its utility and even to its existence. To perpetuate error might, in some cases, be as unpardonable as to originate it: and hence the history of every jurisprudence exhibits decisions overthrown, and rules limited or abandoned. As was said by a learned author and very eminent judge: "The revision of a decision very often resolves itself into a mere question of expediency, depending upon the consideration of the importance of certainty in the rule and the extent of property to be affected by a change in it." Kent. vol. 1, p. 477.

The question of the jurisdiction of the District Court of the United States, under the bankrupt law, over the rights of a mortgagee who has not voluntarily submitted himself to its authority, is the only question determined by the majority of the court, and therefore the only one upon which I shall remark. Between the Supreme Court of the United States and the highest State tribunals there has long been established a system of reciprocal deference. While the Supreme Court of the United States has always professed the highest re-

HOUSTON.

spect for the decisions of State courts upon local laws; on the other hand it has GITT BAKK been usual for the State tribunals to receive the construction given by the Supreme Court of the United States to the laws of the United States as their true construction. This rule, as may be gathered from a long series of decisions, and as is obvious to every mind, is founded upon the principle that, the judicial department of every government is the appropriate organ for construing the legislative acts of that government. If exceptions to this rule be made by State tribunals, it seems to me they should be limited to extreme cases, where either the error was too manifest to admit of doubt, or where the recognition of a principle established by the federal tribunal would necessarily involve, in the conscientious opinion of the State tribunal, the prostration of some vital constitational right or function of State power, or a manifest usurpation of power by the general government.

It is admitted by the majority of the court that, the doctrinal opinion of the Supreme Court of the United States, in Ex parte Christy, 3 Howard, supports the jurisdiction of the United States District Court to the extent contended for by the counsel for the appellees, and is affirmed by that court in Nugent's Case, 3 Howard. This admission is undeniably just. I have examined, with great care, the masterly brief presented in this cause by the counsel for the appellants. One of those learned counsel argued before the Supreme Court of the United States the cases of Christy and of Nugent. On the question of jurisdiction the identical points seem to me to have been raised, and the identical authorities to have been cited in Christy's case, which are now submitted to us. Those points and authorities were elaborately examined and replied to, if not answered, by Judge Story; on every essential point the opinion was adverse.

It is urged, however, that the circumstances under which the opinion was pronounced, were such as to withhold from it the force of authority. It is true that the case was one of an application for a prohibition; that the Supreme Court of the United States declared itself without jurisdiction to issue the writ, and that the decision of that point only was indispensable. Under ordinary circumstances, what was said by the court on the question of jurisdiction now presented to us, might be regarded as obster dictum. But we cannot close our eyes to the remarkable fact that, the discussion of the jurisdiction of the District Court of the United States, of its organization and powers under the bankrupt law, and of the scope and meaning of that statute, occupies thirteen pages of the printed opinion, while the power of the Supreme Court to issue the writ of prohibition is disposed of in as many lines. For a course so novel in judicial exposition, it would be disrespectful to that high tribunal to suppose they had no adequate reason. That reason must at once suggest itself to every mind. The true interpretation of the bankrupt law was a subject of great moment; great conflict of opinions had arisen in the courts of the States, and in the inferior courts of the United States. Under the judicial organization of the District Court under the statute of 1841, there was no appeal from that court to the Supreme Court, and yet even the extrajudicial opinion of the Supreme Court, in this state of conflicting decisions, was eagerly desired by the bench and bar throughout the United States. Under such circumstances that opinion was elaborately given, after solemn argument, and its expositions cannot be treated as obiter dicta.

Subsequently, in Nugent's case, the same learned counsel renewed the discussion. The chief justice, who then acted as the organ of the court, apparently CITT BANK 0. HOUSTON.

ex diligentia, and to give additional force, if necessary, to the opinion in Christy's case, recited in full the opinion of the circuit judge. That opinion contains, among others, the views of the circuit judge upon a point of legislative expediency. "I agree fully in the opinion," says Judge McKinley, "that upon the ground of expediency, the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive; but I do not understand the bankrupt law to render it so." But he also says: "I wish it, however, to be distinctly understood, that I am fully of opinion that the District Court of the United States is vested with jurisdiction over mortgaged property belonging to the bankrupt, and that, when a proper case is shown, it has power to foreclose a mortgage, and to do all other acts nocessary to bring about a final distribution and settlement of the bankrupt estate." After inserting this opinion at length, the chief justice proceeds: "We have inserted the whole of this decree, because we think the court were not only right in dismissing the bill, but, with a single exception, we concur also in the principles and reasoning on which the learned judge founded his decision. The exception to which we allude is, that part of the decree in which he expresses his opinion that, upon the ground of expediency, the jurisdiction of the District Court of the United States over all the property of the bankrupt, mortgaged or otherwise, should be exclusive, so as to take away from the State courts any jurisdiction in such cases. Upon that subject it is not our province to decide, and we have no desire to express an opinion upon it. But, in every other respect, the decree conforms to the opinion delivered by this court at the presont term, upon the motion for a prohibition in the case Ex parte the City Bank of New Orleans, in the matter of Wm. Christy, assignee of Daniel T. Walden, a Bankrupt, v. The City Bank of New Orleans. In that case, the opinion of this court in relation to the jurisdiction of the District Court in matters of bankruptcy, has been fully expressed, and need not be repeated here; and, according to the principles therein stated, the decree of the Circuit Court in this case must be affirmed."

The substance of these decisions, I understand to be, that the District Court of the United States has jurisdiction over mortgages, and when, in its discretion, that jurisdiction is exercised, it may, by summary proceedings, bring the mortgagees before it, decree a sale, settle the rank of creditors, and distribute the proceeds; protecting, however, in such distribution the rights of the mortgagees, as they would be protected in the State Courts, and distributing the residue among the ordinary creditors; that this jurisdiction is not exclusive, and, that if not exercised by the United States Court, a mortgagee, who has not come into the bankrupt court, may proceed in the State court to the foreclosure of his mortgage and sale of the mortgaged property. It will be observed that this doctrine protects the two classes of titles, those acquired by sales under State process, and those made under decrees of the bankrupt court.

Now, when we recollect that the bankrupt law went into effect in February, 1842; that the rules of the District Court of the United States upon the subject matter of mortgages, were adopted in October, 1842; that, in April, 1843, the Circuit Judge for Louisiana recognized their legality, and the jurisdiction of the District Court over mortgaged property and mortgagees; that the Supreme Court of the United States and the former Supreme Court of Louisiana, have each twice recognized the same doctrine; that property of great value has been sold and under numerous decrees of the District Court; that the bankrupt law

has been repealed, and the great mass of bankrupt estates administered; it CITT BANK seems to me too late for a court in Louisiana to entertain the question of jurisdiction.

By reason of the repeal of the bankrupt law, we are sitting here to adjudicate upon the past. Were that law unrepealed, and the opinion expressed by authority so high manifestly erroneous, it might be said that the importance of avoiding future error should outweigh the danger of unsettling established landmarks, and disturbing important rights, which parties, under the sanction of the highest judicial authority, supposed they had acquired. But such is not the The doors of the bankrupt court have long since been closed to new applicants, and the administration of the great mass of estates under their charge has been consummated. The future is not before us. It is true that the decision now rendered, if affirmed, might, as suggested by the court, be a beacon to the future legislator; but it appears to me that the conflict of decisions, which has already occurred, would be an ample warning to that department of the government, should they ever think proper again to exercise that branch of their constitutional power.

From having had considerable opportunity of observing the course of procedure in the District Court of the United States for this State, it is to my personal knowledge not only that mortgaged property of great value was sold under its decrees, but that, in very many cases, mortgagees who were cited, unless they held an early rank, made no appearance, and did no acts which could be construed into a personal ratification of the sales made, or even affect them with bad faith. The door which will be thrown open by this decision to vexatious litigation, will be a very wide one. The bankrupt law itself is considered by many as having been pregnant with evil; and if it be, at this late day, declared that the District Court was without jurisdiction over mortgaged property and mortgagees, an additional and fruitful source of evil will be opened.

For the grave reasons above stated I feel bound, on this question of jurisdiction, to submit my own doubts to the force of authority, and stand upon what has been solemnly decided.

In these brief remarks I have confined myself solely to the question of jurisdiction, because that is the only question really involved in the opinion of the majority of the court. I have considered that it would be superfluous, at present, to say any thing on the questions of citation and nullity, and the very important question of subrogation, and other equities in favor of these purchasers, or other parties interested.

THE PONTCHARTRAIN RAILROAD COMPANY v. HEIRNE et al.

In an action against the owners for the value of certain services alleged to have been rendered to a steamer, evidence is admissible, under the general issue, to show that, at the time of rendering the services, the steamer was chartered to a third person. The defence set up is not an exception.

The owners of a steamer, chartered to, and in the possession of, a third person, will not be liable for services rendered to the vessel, while so chartered, to the knowledge of the party by whom the services were rendered.

The 9th sec. of the stat. of 20 January, 1830, incorporating the Pontchartrain Railroad

PONTCHAR-TRAIN RAILROAD COMPANY. Company, while it grants to that company a privilege on vessels or other property liable for the cost of warehouseing, wharfage and transportation, imposes no personal liability on the owner for services rendered to a steamer while charted to a third person.

Where the business of an incorporated company is of such a nature as to require it to be conducted through servants or agents, notice to one of its officers relative to a matter in which he acted within the scope of his employment and in the usual course of the company's business, will bind the company.

A PPEAL from the Commercial Court of New Orleans, Watts, J.

A Stewart, for the plaintiffs. The privilege granted to the plaintiffs included a personal action against the owners of the steamer. Civ. Code, arts. 3149, 3150, 3151. Persil, Regime Hyp. ch. 1, sec. 4. 1 Sumner. 75. The defendants could not prove the chartering of the steamer under the plea of the general issue. Code Pract. arts. 327, 331. 8 Mart. 207. 3 Mart. N. S. 667. 5 Ibid. N. S. 39. 2 Ibid. 358. 6 Ibid. 311, 388, 398. 3 La. 350. 6 Ibid. 457, 745. 5 Robinson, 487. 9 Ibid. 263. 3 Black. Com. 305-9. Stephens on Pleading, 75. Kauffman's Mackeldy, vol. 1, sec. 204. Febrero, C. J. lib. 3, ch. 1, § 14, nos. 174, 176. Merlin, Rep. verbo Exception, Orme v. Tounsend, 4 Mason, 543. There is no bill of exceptions to the opinion of the judge rejecting the charter-party. It cannot, therefore, be noticed by this court, the defendants not having excepted to the opinion of the court rejecting it. Code Prac. arts. 483, 487, 489, 896, 897, 899, 900. 1 La. 323. 13 Ibid. 95.

Mott, for the appellants. General owners are not liable for supplies, repairs, &c., furnished to a ship or vessel while under a charter party. Abbott on Shipping, last Boston ed. p. 41. Reeve v. Davis, 1 Adolphus & Ellis, 312. 28 Eng. Com. Law Rep. 95. Baker v. Buckle, 7 J. B. Moore, 349. 17 Eng. Com. Law Rep. 78. 16 East. 173.

The judgment of the court was pronounced by

SLIDELL, J.* This suit is brought for the recovery of certain charges for transportation and labor, for which it is alleged that the defendants are liable in solldo, as owners of the steamer Monmouth, at the time of the rendition of the services to that vessel, then employed in carrying passengers and property for hire, on lake Pontchartrain; and that the obligation of defendants for said freight and labor, was duly contracted by their authorized agent. The defendants pleaded a general denial. At the trial of the cause the defendants offered in evidence a charter party, and also parol evidence to show that, at the time of the rendition of the services by plaintiffs, the boat was chartered to one Hoffman. To the admission of this evidence the plaintiffs excepted, upon the ground that the facts thus offered to be proved should have been specially pleaded, and could not be shown under the general issue. The testimony was received, subject to the exception.

We think the evidence was admissible under the general issue. Such evidence, under such a plea, would be admitted in courts which follow the common law system of practice. See Stephens on Pleading, p. 162. We are not disposed to be more rigorous, except in those cases where we are required to be so by positive provisions of our Code of Practice, or by those rules, as to some particular subjects of defence, which a long course of decisions of the Supreme Court may have recognized. Our Code of Practice gives great latitude to the plea of the general denial. By article 327, it is declared that, "the defendant,

^{*} Eusris, C. J., did not sit on the trial of this case, having been of counsel in the lower court.

[†] The introduction of the charter-party having been objected to by the plaintiffs, an entry on the minutes of the court states, "that the court is to decide upon the objections on the final decision of the suit, reserving to either party the right to except." In the ressons for its judgment, the court say: "This piece of evidence is rejected, because the defence was not specially pleaded."

though not bound to answer specially to all the allegations of the plaintiff, except when called upon to avow or to deny his signature, must, nevertheless, if he intend to resist the action by means of some exception, plead the same expressly and positively in his answer, in all the cases hereafter prescribed, otherwise he shall not be permitted to avail himself of such exception afterwards." The expression here used, "exception," rendered in the French text, "moyens de defense qu'on appelle exceptions," has a well ascertained technical meaning. These exceptions are classed by the Code under the heads of dilatory, declinatory and peremptory. It is too plain to need remark that the particular subject matter of defence under consideration cannot be classed under either of the two first heads, nor upon a reasonable construction of the provisions of the Code can it be classed under the head of peremptory exceptions. These last are of two kinds. Those "relating to forms, and which tend to have the cause dismissed owing to some nullities in the proceedings," and " peremptory exceptions founded on law," which, are "those which, without going into the merits of the cause, show that the plaintiff cannot maintain his action, either because it is prescribed, or because the cause of action has been destroyed or extinguished." The defence in the present case obviously cannot be classed under the former description, nor is it comprehended in the latter, because its tendency is to show, not that the action has been prescribed, nor that its cause has been destroyed or extinguished, but that no cause of action against these defendants ever existed.

Our next consideration is the nature and effect of this evidence, upon the question of the alleged liability of the defendants. It is shown that, under the terms of this charter party, and also in the mode of its execution, the defendants parted with the possession and with the entire control and direction of the steamer, all which were held and exercised by Hoffman during the period of the rendition of the services for which the plaintiffs seek to make the defendants liable; and there is no proof of any direct promise or undertaking by the defendants to the plaintiffs. Now, in such a case, the well ascertained doctrine in England and in the United States is that, the owners are not liable. The doctrine goes even to parol, as well as written charter parties, and was extended by Lord Denman, in Reeve v. Davis, 1 Adolphus & Ellis, 312, to a case where the defendants were the registered owners of the vessel, and where the plaintiff, who had supplied goods and labor for the ship on the orders of the captain and charterer, was unacquainted with the contract of charter party. The English and American authorities which are numerous, may be found in the references in Abbott on Shipping, edit. of 1846.

But the learned judge of the Commercial Court, after considering these authorities, was of opinion, that they were not applicable to the present case, by reason of the peculiar provisions of our Civil Code; that for supplies, repairs, &c., our laws give a privilege upon the vessel, and hence, said he, a fortiori, a personal action on the property; that the credit is given to the vessel and to the owners of the property thus put afloat; that a charter party is a secret contract, the terms and conditions of which are not known to third persons.

Conceding, for the purpose of argument, that by the special clause of this company's charter, it would stand on as favorable a footing as to privilege as one who had furnished supplies to the steamer, still we cannot concur with the deduction made by the court below from these premises. There is no inconsistency between the existence of a privilege on one's property, and an exemption

PONTCHAR-TRAIN RAILROAD COMPANY. V. HEIRNE. from personal liability. If A lends his horse to B, the keeper of an inn where B puts up, has a privilege on the horse (C. C. art. 3201), but no claim against the lender personally. The purchaser of land subject to a mortgage, which he has not assumed, takes it encumbered with that burden, but is not personally answerable. Moreover, the distinction between the privilege and the indebtedness is amply established by our Code, which abounds in cases showing that the privilege may be extinguished, and yet the indebtedness remain. Arts. 3213, 2769, &c. The clause of the charter which the plaintiffs invoke, perhaps gives the same privilege which is accorded to the captain for freight; but his privilege is lost, even against the consignee, in fifteen days, while the personal action lasts for a year. The company's charter cannot be strained beyond its terms, in derogation of the general commercial law. It grants a privilege against the vessel, but imposes no personal liability upon her general owner.

This view of the case might suffice. But it is proper to add, not only that there was no direct undertaking by the defendants towards the plaintiffs, but that the facts of this case harmenize with the principle upon which the English and American doctrine rests. The credit really appears to have been given to Hoffman, the charterer and employer of the steamer. The secretary of the company states that he had early information from Hoffman of the vessel being chartered; and Hoffman, after the expiration of the charter party and after having ceased to be captain, gave the secretary a due bill for the amount, signed by himself individually. Bills incurred after the expiration of the charter party were, according to the usual course of the company's business, promptly presented to the defendants' officers, and promptly paid by them, while the previous bill-of charges now contested, lay over for many months, without any call upon them.

It is said that the knowledge of the charter party by the secretary of the company, and the conversations in the course of these transactions which passed between him and *Hoffman*, cannot affect the corporation. This proposition we cannot recognize. The official capacity of the secretary, who was one of the principal witnesses in the cause, is not disputed, and the matters in which he acted appear to have been within the scope of his employment and in the usual course of the company's business, which was of such a nature as necessarily to be conducted through servants and agents, and impossible to be carried on in its details by the direct action of its board of directors.

It is decreed that the judgment of the court below be reversed, and that there be judgment in favor of the defendants, with costs in both courts.

CONREY V. BRANDEGEE.

Where the conduct of the principal is calculated to interrupt the friendly relations existing between him and his agent, the latter may terminate his agency, under a full reservation of all his tights. Per Curiam: Honeste vivere is part of the law of principal and agent.

Plaintiff. in consideration of being employed as a factor to sell the crop of his principal for a commission, became surety for the latter in a bond executed in certain judicial proceedings. The friendly relations of the parties having been interrupted through the fault of defendant, plaintiff notified the latter of his desire to terminate his agency, and to have another surety substituted in his place, informing him that unless such substitution was made before a

certain time, he would charge a commission on the amount of the bond on which he was bound as surety. In an action to recover the commission claimed, no other surety having been substituted: Held, that plaintiff had no right to insist upon being released from his BRANDEGEE. suretyship, and that, whatever claim he may have resulting from the agreement as to the sale of the crop, defendant was not bound to compensate him for not releasing him.

CONBEY

PPEAL from the Commercial Court of New Orleans, Watts, J. Benjamin and Micou, for the appellant. Roselius, for the defendant, The judgment of the court was pronounced by

EUSTIS, C. J. This suit was instituted for the recovery of the sum of \$750, being a commission of two and a half per centum on the amount of two bonds, which the plaintiff signed as the surety of the defendant. They were given in a suit pending in the Circuit Court of the United States for this district, and the plaintiff alleges were entered into by him at the special instance and request of the defendant, in consideration of a reasonable compensation by him to be paid for said service, which the plaintiff avers to be 24 per cent on the amount, and which the defendant agreed and is bound to pay him. The defendant charges, on the other hand, that the signing of the bonds was a mere act of friendship, for which no compensation was ever to be required, and that it was so well understood at the time. There was judgment for the defendant, and the plaintiff has appealed.

We are satisfied that it was understood between these parties that no commission was to be charged by plaintiff for signing the bonds, but that he was to be compensated by having the sale of the defendant's sugar crop. He was the factor of the defendant, and transacted his business in the city. Their business relations were terminated by a communication from the plaintiff to the defendant to that effect, which also contained a request that some other name should be substituted for his on the bonds in the United States court. The plaintiff also notified the defendant that, unless he was released from his bonds within a certain time, he would charge him the commission of 21 per cent, for signing the bonds.

It was considered by the judge of the Commercial Court, before whom this cause was tried, and it has been maintained in argument, that their business relations were brought to a close at the instance of the plaintiff himself, and that he must take the consequences of their termination. But the evidence satisfies us that their termination must be considered as resulting from their mutual consent, but that the cause was the conduct of the defendant in his relations with the plaintiff. Honeste vivere is part of the law of principal and agent, and, after the demeanor of the defendant in the office of the plaintiff, there was nothing in the condition of the defendant's business under the gestion of the plaintiff, which prevented him from closing his agency, under the full reservation of his rights.*

^{*}The evidence in relation to this conduct, is as follows; Moise, a book keeper employed by Conrey, testified: "That he met Brandegee at the post-office, who saluted him with the expression, "I'm going to kick," or "tell Peter I'm going to kick," and witness reported the expression to Conrey. Afterwards Brandegee came to the office, and used some similar expressions to Conrey, to which Conrey immediately replied in an emphatic and decided manner, but with politeness, that Brandegee might get some body else to attend to his business. Brandegee seemed immediately to recede, and things went on as if that expression had not been heard, and the parties continued to transact business for some days after. Their ceasing to do business together, was caused by Brandegee's failing to furnish for Conrey's office [which was rented from him,] such a stove as he had promised to supply, and refusing to pay for one furnished by Conrey. It appeared that both parties were willing that their doing business together as principal and factor should cease."

CONREY U. BRANDEGER. Pothier considers that the revocation of a mandate may be presumed, "lorsqu'i est survenu de grandes inimitiés entre le mandant et le mandataire." Brunneman is cited by him in support of this opinion. Contrat de Mandat, § 120, But had the plaintiff a right to insist on being released from his suretyship? For if the defendant was bound to release him, he ought to compensate him, exeque et bono, for holding him to it after the formal notice, and against his consent. In the progress of the suit in chancery in which the bonds were given it might become necessary, for the furtherance of justice, to remove the disability under which the surety might labor, and the court would, in such a case, authorize the substitution of another in his stead; but, as we are at present advised, this is the only case in which a solvent surety would be discharged from a judicial suretyship, unless perhaps by depositing the whole amount of the bonds, under article 3034 of the Code. This it would be unreasonable to insist upon.

When a debt is due, equity will relieve the surety, and compel the principal debtor to pay the debt and release the surety. But until the debt is due, or the debtor has made default, and where there are no allegations of danger of less to the surety by the insolvency or condition of the principal debtor, courts have always refused to compel the debtor to exonerate the surety by depositing the money. Such has been the uniform decision of courts of equity.

The Court of Sessions of Scotland approved an interlocutory decree of Lord Jeffrey, who held, in a case similar to this, that it was contrary to the bona fides of a contract of suretyship, to maintain such a demand on the part of a surety for instant and total relief. Erskine's Institute of the law of Scotland, 721, note. Vide also, case of Calvert v. Gordon, 3 Manning and Ryland, R. 124.

The plaintiff required from the defendant to release him from his suretyship. The learned judge who tried this cause considered it was not in the power of the party to comply with this demand. He was clearly right, except by a means which the surety had no right to insist upon. The Spanish law authorized the release of the surety in certain cases. Partida 5, tit. 12. law 14. Our Code does not seem to contemplate a release of the suretyship, but provides expressly for indemnifying the surety in certain cases: 1st. when there exists a law suit against him for payment; 2d, when the debtor is insolvent, or has become a bankrupt; 3d, when the debtor was bound to discharge him within a certain time; 4th, when the debt has become due by the expiration of the term; 5th, after the lapse of ten years when the principal obligation is of a nature to last a longer time, unless it is not to expire before a determinate period, as a curatorship, &c. The plaintiff has not made out a case in which he would be entitled to ask even an indemnity from the defendant against his suretyship, which, by its conditions, was to endure until terminated by the action of the court.

The defendant, not being bound to release the plaintiff from his bonds on his notice and requisition, the latter can have no claim for compensation for continuing his suretyship. The contract must be considered as entire, and resting upon its original consideration. It was understood that no commission was to be charged, and we can allow none. What claims the plaintiff may have against the defendant, growing out of the understanding concerning the sale of the sugar crop of the defendant, it is unnecessary to consider, as they are not before us.

The interruption of the friendly relations between these parties, cannot affect in any manner their obligations touching the suretyship. Gregorio Lopez in-

CONRET E. BRANDEGRE.

clines to the opinion that the creditor had his remedy for relief. "Quando intervenit inimicitia capitalis, culpà debitoris, et satis æqua videtur ista opinio." Partida, 5. tit. 12, law 14, Gloss. Henrys, in his treatise Des Cautions, § 391, says: "La caution se peut encore faire décharger, si entre elle et le debiteur il est intervenu quelqu' inimitié capitale;" and he cites in support of his opinion, Ranchin in quæst 117, Gruy Pape and Charondas.

Modern authorities, however, as well as our Code, have not considered this as one of the reasons for which a surety can apply to a court for relief; nor does our Code enumerate it, as a circumstance from which the revocation of a mandate may be presumed. But the mutual relations between principal and factor impose on parties, in order to give them effect, a reasonable degree of decency in their intercourse with each other; these relations imply a series of acts, and a communication between the agent and his principal on the business entrusted to him. Suretyship is one act, and implies no necessary communication between the parties after it is once entered into.

Judgment affirmed.

ROBERT v. DE ST. ROMES

Where a slave sold as "pleinement garantie des vices et maladies prévus par la loi, a l'exception qu'elle est un peu oppressée," proves to have been so affected with asthma, anterior to the sale, that it must be supposed the buyer would not have purchased her, had he known of the disease, the sale will be rescinded. The statement in the act of sale that the slave was un peu oppressée, was not a clear announcement of the disease with which she was affected. A vendor is bound to explain himself clearly; and any obscure or ambiguous expression must be construed against him. C. C. 2449.

A PPEAL from the District Court of the First District, Buchanan, J. Rousseau and Robert, for the plaintiff, cited Civ. Code, arts. 1841, § 1, 4, 2523. Pothier, Vente, Nos. 211, 231, 234, 235. Dict. de Medicine, verbis Asthma, Oppression.

Roselius, for the appellant. The language of the act of sale was sufficient to put the purchaser on his guard, which is all that is required. It is not necessary, in order to modify the extent of the warranty, to state the exact nature of the disease in technical language.

The judgment of the court was pronounced by

SLIDELL, J. It is clearly established by the testimony that the slave sold to the plaintiff has the asthma, and that the disease existed anterior to the sale; that this disease is aggravated by the labours of the kitchen; and that its nature is such as to render the use of the slave inconvenient and imperfect, to the extent of the intendment of art. 2496 of our Civil Code.

The only matter then to be considered in this cause is, the effect of the language used in the act of sale upon the rights of the parties. The slave was sold "comme cuisinière, blanchisseuse et bonne domestique de maison;" and the act further declared, "laquelle esclave est pleinement garantie des vices et maladies prévus par la loi, à l'exception qu'elle est un peu oppressée." Was this such a designation of the disease existing at the time of the sale as to exonerate the vendor? This disease, according to the evidence, is intermittent, and, between the attacks, its symptoms are not apparent. It is considered as not curable. Oppression is its dominant symptom. But oppression may proceed

from other causes, and oppression and asthma are not convertible terms. The DE ST. ROMES. seller is bound to explain himself clearly respecting the extent of his obligations; any obscure or ambiguous clause is construed against him. Civil Code. art. 2449. This was not a clear announcement of the disease with which the slave was affected, and which rendered her incompetent to the satisfactory performance of such household duties as she was expressly represented to he qualified for. We believe that the plaintiff would not have purchased if he had known the existence of the disease, and we cannot infer such knowledge from the vague expressions used. Judgment affirmed.

GARDERE v. GARVEY et al.

Where by the release of one of two debtors in solido, and the deduction of his part of the debt, made in the court below for the purpose of introducing him as a witness, the amount in dispute is reduced below the sum necessary to give jurisdiction to the Supreme Court, no appeal will lie. Const. art. 63.

Where the amount in dispute is insufficient to give jurisdiction to the Supreme Court, the appeal will be dismissed, though the objection be not made hy either party.

PPEAL from the Parish Court of New Orleans, Maurian. J. J. Seghers, for the appellant. Castera, for the defendant.

The judgment of the court was pronounced by

King, J. The plaintiff instituted this action to recover the value of materials furnished to the defendant Garvey, an undertaker, for the construction of a house for Marie Beaulieu, the other defendant, alleging that Beaulieu had made several payments in anticipation to the undertaker, which payments, as regarded the plaintiff, were to be considered as not having been made. He prayed for a judgment against both the defendants, with the privilege established in favor of the furnishers of materials by art. 2744 and 2745 of the Civil Code. During the progress of the trial, the plaintiff offered Garvey as a witness, and, with a view, as is alleged, of removing objections to his competency, discontinued the suit as to him, and gave him the following discharge in writing:

"I hereby grant to M. Lawrence Garvey a full release of my claim against him for five hundred and fifty two dollars and twenty cents, reserving all my rights against Marie Beaulieu, the other defendant.

"F. GARDERE."

The judge below considered that Beaulieu was discharged by this release, and rendered a judgment in her favor, from which the plaintiff has appealed. He contends that the defendants were bound in solido, and that, having reserved his rights against Beaulieu, he can still prosecute his demand against her, after deducting the part of Garvey, to whom the release was granted. Civil Code, art. 2199.

Under the view we have taken of the case, It is unnecessary to inquire whether or not the obligation of Marie Beaulieu was in solido. not bound in solido, it is conceded that the release operates her discharge; and, assuming the obligation to be in solido, which is the hypothesis deemed by the plaintiff most favorable to himself, and on which he has brought up the case, the position is equally fatal to the appeal. The cause having been discontinued as to Garrey, and a release given to him in full, a deduction of his part of the debt

GARDERE

followed as an admitted legal consequence. There then remained an action pending for \$276 10. This was the only "matter in dispute" after the release, and the sum is below the jurisdiction of this court. Cons. art. 63. The point has not been made at bar; but the uniform rule has been to decline the revision of cases the jurisdiction of which is not conferred by the constitution, even when the objection is not made by the parties themselves.

If we were at liberty to pronounce upon the merits of the cause, we would affirm the judgment of the court below. The plaintiffs' claim grew out of, and depended on a contract entered into between Garvey and herself. When Garvey was discharged from the contract there remained no obligation to enforce against Beaulieu. The discharge destroyed the foundation on which the claim against her rested.

Appeal dismissed.

BENOIST et al. v. REYBURN.

To entitle a party to a continuance to obtain the return to a commission, where the commission was not applied for within the time prescribed by a rule of court, the party must show due diligence, and circumstances justifying an exception to the rule in his favor.

Where the holder of a bill of exchange, drawn on merchandize, at ten days sight, and accompanied by a bill of lading, does not present it for acceptance according to its tenor, although the drawers were willing to accept upon delivery of the bill of lading, but demands immediate payment, and, on their refusal, transfers the merchandize represented by the bill to another house, the drawer will be discharged.

The plaintiffs in an action on a bill of exchange will not be allowed to establish a special agreement with the drawer, inconsistent with the allegations of their own petition.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. C. M. Randall, for the appellants, cited Code Pract. arts. 464, 468. Mc Carty v. McCarty, 19 La. 296. Bell v. Williams, 13 La. 447.

A. Walker, for the defendant.

The judgment of the court was pronounced by

SLIDELL, J. When this cause was called for trial in the court below, the plaintiffs applied for a continuance, on the ground that they had not yet obtained the return of a commission taken out by them. The defendant objected to any delay upon the ground that, the commission had not been applied for within ten days after issue joined, as required by a rule of the court. The affidavit declares that the application for the commission was made by the plaintiffs' attorney, as soon he became aware that an answer had been filed; but exhibits no showing that, by any circumstances beyond his control, he had been prevented from sooner inspecting the record, and ascertaining that the answer had been filed. A party invoking the discretionary power of the court to grant a continuance, and set aside, for his benefit, a general rule, must exhibit a case of due diligence, and circumstances equitably justifying an exception. The affidavit, moreover, states the absence of the client, and ignorance by the attorney of the names of the witnesses by whose testimony the special defence set up by the defendant could be resisted. Upon an application to the court within ten days, supported by proper affidavit, the court, even under the rule in question. might, in its discretion, have accorded a delay suitable to the circumstances of the case, We think the application for a continuance was properly refused.

BENOIST V. REYBURN. The testimony adduced by the defendant establishes that, the bill of exchange sued upon was accompanied by a bill of lading; that the holder did not present the bill for acceptance, at ten days after sight, according to its tenor, but demanded immediate payment; and, upon refusal, although the drawees were willing to accept upon delivery of the bill of lading, at once transferred the merchandize represented by the bill of lading, and upon which the draft was drawn, to another house. Judgment was therefore properly rendered in favor of the defendant, the drawer of the bill. See Lanfear v. Blossman, 1 Annual Reports, 148.

The application for a new trial was properly refused, for the same reuson which justified the refusal of a continuance, to wit, a want of due diligence; and the further reason, that the facts exhibited by the plaintiffs' affidavit would tend to establish a special agreement by the drawer of a bill inconsistent with the plaintiffs' petition; and, therefore, if the testimony had been obtained in due season, it would have been inadmissible.

Judgment affirmed.

O'REILLY v. McLEOD.

A motion to dismiss on the ground of informalities in the mode of bringing up an appeal, must be made within three days after the record is filed.

A PPEAL from the District Court for Lafourche Interior, Nicholls, J. Cole, for the plaintiff. Beatty, for the appellant,

The judgment of the court was pronounced by

SLIPELL, J. The transcript in this case was filed on the 26th January, 1846. On the 26th January, 1847, a motion is made to dismiss, on the ground of informality in the order of appeal and the appeal bond. It comes too late. It should have been made within three days after the record was filed. Murray v. Bacon, 7 Mart. N. S. 271. Moreover, the case was set for trial in January term, 1846, continued for want of time, and again, on a subsequent day, continued indefinitely. See O'Donnell v. Lobdell, 2 La. 300. See also Gilmore v. Brenham, 1 La. 414.

Succession of Segond.

Evidence taken under a commission cannot be excluded on the ground of its not having taken in conformity with arts. 425, 426, 427, 428 of the Code of Practice, and of the witness' being interested, where the counsel of the opposite party was present at the taking of the deposition, and cross-examined the witness, who, in the course of his cross-examination, swore that he was disinterested.

A PPEAL from the Court of Probates of Ascension, Duffel, J. Isley, for the appellants. D. Seghers, contra.

The judgment of the court was pronounced by

Rost, J. Léonine Rémy claims from the succession of Theodore Segond \$1,500, alleged in her petition to have been placed by her in the hands of the deceased for safe keeping. She also claims legal interest from the opening of

the succession. The answer of the curator is a general denial; and the agent of the tutor of the minor heirs of *Theodore Segond*, who resides in the kingdom of France, has joined in the defence.

SUCCESSION OF SEGOND,

This controversy came beforethe late Supreme Court, (6 Robinson 111,) on the appeal of the curator, and the case was remanded for further evidence of the amount of the claim, on the ground that only one witness swore to the acknowledgment of the debt by Segond to Rémy, and that the remainining evidence did not disclose circumstances corroborating his testimony, as required by art. 2257 of the Civil Code.

On the second trial, Rémy, in addition to all the evidence adduced on the first, introduced another witness who deposed that, he occupied a part of an old house in Dauphine street, of which Rémy was the owner, and which was in a state of decay; that she applied to the witness to repair it, and he advised her to build a new one; she then told him that as soon as she could see Mr. Segond, she would let him know. A few days after, the witness went with her to Mr. Segond, who directed him to draw a sketch of the house intended to be built, and to give him the estimate of the cost of the building. When the sketch was finished, he presented it to Mr. Segond, in Rémy's presence. The value put upon the building was about \$2,400. Mr. Segond then observed, in his conversation with Rémy, that although he had funds belonging to her to the amount of two thousand three or four hundred dollars, he could not dispose of of that amount at the time; that he could not give her more than six hundred dollars, because the balance of her money was lent by him on interest, and that the contract must be made in the following manner; six hundred dollars in two instalments according to the progress of the work, and the balance payable in two years, in her notes to the witness, bearing interest and secured by mortgage. The witness accepted those conditions, and proceeded to build the house. The two instalments of \$300 each, were paid to him by Mr. Segond, in the presence of Rémy, and he gave a receipt for the same in her name. The last payment took place about fifteen days before the death of Segond; at the time it was made, the witness heard Segond say to Rémy: "I am going up the coast; on my return I will make a final settlement of all your affairs." A few days after. the witness was informed of the death of Segond. This witness also states that, when the house was finished, he made with Rémy a settlement by notarial act, a copy of which is also introduced in evidence; and that he negociated, without warranty, the note he received in payment, and has therefore no interest in the event of this suit.

The curator excepted to the introduction of the testimony of this witness on the ground that, the commission under which it was taken was not executed in conformity with arts. 425, 426, 427, and 428 of the Code of Practice, and also on the ground of interest. The curator was present by his counsel at the taking of the deposition, and cross-examined the witness at great length. In the course of that cross-examination the witness positively swore that, he was disinterested. Under these circumstances, the judge did not err in admitting the evidence.

It is unnecessary to examine the other bills of exception, as the evidence to which they refer has either no material bearing on the cause, or was directed to be admitted by the late Supreme Court.

We are satisfied that the claim of Rémy is now sufficiently proved, and that there is no error in the judgment appealed from.

Judgment affirmed.

LACOUR v. DELAMARRE et al.

Where there is no evidence that the husband has authorized his wife to sue, and there is no appearance on his part, personally or by attorney, the suit must be dismissed. Her own statement that she was authorized, made in her petition, is insufficient.

A PPEAL from the District Court of Pointe Coupée, Deblieux, J.

Lacoste, for the plaintiff, cited 6 Rob. 60. 5 Rob. 96. 4 Mart. N. S. 99. Code Pract. art. 897.

Cooley, for the appellant. Plaintiff was not authorized by her husband to sue. Gorman v. Bergans, 1 Rob. 468. Same case, 2 Rob. 282.

The judgment of the court was pronounced by

EUSTIS, C. J. In this case the plaintiff, a married woman, alleged to be separated of property from her husband, took out an order of seizure on a mortgage against the defendants, from which one of them, Louise Mourain, has appealed. It is objected that, there is no proof of any authorization on the part of the husband to institute these proceedings. The only evidence of any authorization, is her own statement to that effect in her petition.

We have held, that where the husband and wife appear in the same suit as plaintiffs or defendants, or the husband appears in court as authorizing his wife, the authority on the part of the husband to the wife's appearance necessarily follows; but in this case there is no appearance on the part of the husband, in person or by attorney. We consider the rule well settled, and the authorities cited by the counsel for the appellant are conclusive.

The judgment appealed from is, therefore, reversed, and the plaintiff's petition dismissed, with costs in both courts.

MEDLEY et al. v. Voris et al.

The omission of a seal in the copy of a citation in the record of appeal will not be considered as establishing that the citation was issued without a seal, it being a common practice with clerks not to copy the seal, in making a copy of the citation.

Where a citation signed by the clerk, purports to have been issued from a District Court sitting in a particular parish, and calls upon the defendant to file his answer in the clerk's office of that court, at a certain place, it is a sufficient description of the place where the clerk's office is held. C. P. 179.

Where notice of protest of a note, payable in a particular parish, is shown to have been mailed, addressed to the inderser at a post office in another parish, in which he resided, it is for him to prove that there was another office nearer to his residence.

An error in allowing interest from the 1st instead of the 4th of the month, on a sum of seven handred dollars, is too insignificant to justify the reversal of a judgment.

PPEAL from the District Court of Terrebonne, Randall, J.

Beatty, for the plaintiffs. Stevens, for the appellant. The judgment of

the court was pronounced by

SLIDELL, J. The defendant, R. R. Barrow, is appellant from a judgment rendered against him on a promissory note, of which he was endorser. After a judgment by default, he filed an exception and answer. The exception presents a general objection to the citation as informal. In his brief, the counse-

MEDLEY v. Voris.

presents two alleged points of informality. First: That the citation was not under the seal of the court. As he has not thought proper to produce and offer in evidence the citation served upon him, neither this court, nor the court below, has been enabled to judge if the defect existed; and, in the absence of such proof, we will presume the clerk did his duty. As to the copy of citation in the transcript of appeal, to which we are referred, it exhibits no seal or copy of a seal; but we do not consider this circumstance as establishing that the citations issued were unsealed, for it has been common for clerks in copying citations in the transcript to neglect to copy or notice the seal. Second: That the place where the clerk's office was held, was not described in the citation. The copy of the citation in the record bears the title of the District Court of the Fifth Judicial District, sitting in and for the parish of Terrebonne, is signed by the clerk, and calls upon the defendant to file his answer in the office of the clerk of said court, at Houma. This designation appears to us a sufficient compliance with the 179th article of the Code of Practice.

The note was dated at Houma, was made payable at a bank in another parish, and the notice was addressed to the appellant at Houma. This being a post town in the parish of Terrebonne, and the appellant being a resident of that parish, the notice must be considered as properly mailed at the place of protest, and properly thus addressed. If there was a post office in Terrebonne parish, or elsewhere, nearer than that of Houma to the appellant's residence, the prima facie showing made by plaintiff, threw upon the appellant the burden of proving such proximity. Yeatman v. Erwin, 5 La. p. 266.

The appellant has also objected that the original protest and certificate of notice were offered in evidence, and that it does not appear that either the protest or certificate was recorded. We are at a loss to see how, under the fair intendment of the statute, an original can be considered evidence inferior to a copy of a recorded original.

The appellant complains that interest was given on the sum of \$700, from the 1st March, 1846, instead of the 4th March, 1846. The difference is too insignificant to justify us in reversing this judgment, and inflicting on the plaintiffs the costs of an appeal, by which the appellant has gained a delay of some months.

Judgment affirmed.

SEMPLE, Administrator, v. BARROW.

A PPEAL from the District Court of Terrebonne, Randall, J.

Beatty, for the plaintiff. Stevens, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The note sued upon is drawn by the defendant to the order of Baker, whose administrator the plaintiff is. The note was annexed to the petition, forms part of the record, and its execution was not denied. The objection under these circumstances, that the note is not stated in the clerk's note of evidence to have been formally offered in evidence, is frivolous. A similar objection as to the formality of citation, is raised as in the case of Medley v. Voris just decided, and which was there considered. There is also a like mistake of three days in allowing interest, which, as we there stated, we deem too trifling to justify a reversal.

Judgment offirmed.

MOURAIN v. DELAMARRE.

The debts of the partnership must be paid, before any partner can have a right to require a particular piece of partnership property to be divided in kind.

A PPEAL from the District Court of Pointe Coupée, Farrar, J.

Cooley, for the plaintiff. Provosty and L. Janin, for the appellant. The judgment of the court was pronounced by

Eustis, C. J. This suit is instituted for the partition of certain lands and moveables belonging to the parties, and the principal object of it appears to have been to have a tract of land situated in the parish of Point Coupée divided in kind. The defendant in his answer alleges that, a special partnership as planters existed between him and the plaintiff, and that this tract of land was partnership property, and, in a reconventional demand, he prays for a liquidation of the affairs of the partnership, that the debts be paid, and for this purpose that the partnership property be sold. He alleges that he is a creditor of the partnership, and he prays judgment for the amount due him, and for one half against the plaintiff personally.

The District Court decided that the tract of land in Pointe Coupée should be divided in kind, that the other property should be sold, and that the accounts between the parties should be referred to an auditor. We think the evidence establishes the tract of land in Pointe Coupée to be partnership property, and that the court erred in ordering it to be divided in kind. The debts of the partnership must be first paid, before either party can have any such right as the plaintiff insists upon.

It is obvious that the suit, as it now stands, is for the settlement and liquidation of the partnership affairs, and we have so recently given our views of the law in relation to suits of this kind that we deem it unnecessary to repeat them, and recommend to the serious attention of the parties the rules we have laid down in the case *Gridley* v. *Conner*, ante p. 87.

It is therefore ordered that, so much of the judgment appealed from as orders the division of the Pointe Coupée tract in kind be reversed, and that said tract be sold to satisfy the debts of the partnership; that the case be remanded for further proceedings; and that the appellee pay the costs of this appeal.

HEADEN v. OUBRE et al.

Where a debtor, whose property has been sold under a fi. fa., receives from the sheriffthe surplus of the proceeds of the sale remaining after payment of the judgment creditor, it amounts to a ratification of the sale, and will preclude the debtor from disturbing it on account of any informalities in the execution of the writ.

A PPEAL from the District Court of Pointe Coupée, Deblieux, J.

Ratliff and Cowgill, for the appellant. Provosty and Cooley, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. A slave belonging to the plaintiff was seized and sold under an execution, and he now claims the slave as still his property, upon the ground of

HEADEN E. OUBRE.

various alleged informalities in the writ and its execution. After the sale, and application of a portion of the price by the officer who made the sale to the payment of the judgment creditor, there remained a balance in the officer's hands. The plaintiff applied to the officer for the balance, and received a portion of it; and the only reason why the residue was not received by the plaintiff was, a subsequent dispute as to the amount, which the officer tendered to him, and which the plaintiff refused to receive, alleging that he was entitled to more. These facts appear by the plaintiff's own statement, in answer to interrogatories. They amount in law to a ratification of the sale. See Thomas v. Scott, 3 Robinson, 256.

Judgment affirmed.

SLIDELL v. RIGHTOR et al.

A PPEAL from the District Court of Ascension, Nicholls, J. It appearing by affidavit of the counsel for the appellant, that the record of this case could not be completed, in consequence of the destruction of a part of the original papers by a fire, which consumed the building in which the records of the District Court were kept, the case was remanded for a new trial.

Beatty and Grymes, for the appellant. Ilsley, for the defendants.

HOPKINS et al. v. VAN WICKLE.

Defendant sold a tract of land on a credit, retaining a mortgage to secure the price. There was, at the time of the sale, a legal mortgage on the land, which was not mentioned in the act of sale. The land was subsequently sold under a f. fa., at the suit of a creditor of the first purchaser, and was re-sold by the purchaser at the sheriff's sale to the plaintiffs, who, as part of the price, paid defendant the balance due on the original purchase. In an action by plaintiffs against defendant, for damages, alleging their inability to sell the land in consequence of the legal mortgage, and charging him with fraud in concaling its existence from the first vendee, on an exception that plaintiffs shewed no cause of action: Held that, plaintiffs not being parties to the act of sale from defendant, the omission to mention the legal mortgage, caused them, of itself, no immediate damage, and that it is only those acts or omissions which, immediately and of themselves, cause damage to another, for which a party is responsible under arts. 2294, 2295, of the Civil Code.

Where a purchaser has paid the price, he has no recourse against his vendor until finally evicted, when he may call him in warranty. C. C. 2538.

A purchaser can acquire no greater right than his vendor possessed.

A PPEAL from the District Court of Point Coupée, Farrar, J.

Provosty, for the appellants, cited Civil Code, arts. 2294, 2295, 2477, 2480, 2523, Troplong, Vente, nos. 437, 469, 497. Duranton, vol. 16, no. 264.

Merlin, verbo Créancier. Wilkins v. Bassett, 5 Rob. 492. Smith v. Wilson, 11 Rob. 522. Wilkins v. Bassett, 12 Rob. 29.

Cooley, for the defendant. There is no privity of contract between the parties to this action. A purchaser, who has paid the price, has no right to have it restored before eviction, nor to security against eviction. Civ. Code, art. 2538. 17 La. 25.

The judgment of the court was pronounced by

HOPKINS

O.

VAN WICKLE.

Rost, J. In 1836, the defendant sold to one Flécheux, a tract of land for a price payable in four instalments, and retained a mortgage on the land to secure the payment of the price. In 1838, A. Ledoux & Co. and one Morris, judgment creditors of Flécheux, had the land sold under two executions, and it was adjudicated to one Hamilton Hopkins, who paid about eighty dollars, that sum being the surplus over the mortgage of the defendant. Hamilton Hopkins sold one-half of his land to his brother, Henry Hopkins, and afterwards, in 1841, they both sold to the plaintiffs. At the time the defendant sold to Flécheux, there was against him a legal mortgage on the land, which is not mentioned in the sale. The plaintiffs, alleging their inability to sell the land on account of this legal mortgage, which has not yet been erased, instituted this action, in 1844, charging the defendant with fraud in concealing it from Flécheux, and claiming from him five thousand dollars damages.

The defendant excepted to the petition, on the ground that the allegations therein contained did not make out a cause of action against him. The court below having sustained the exceptions and dismissed the petition, the plaintiffs appealed.

It is not pretended that the damages claimed are due in consequence of any breach of contract; but the plaintiffs contend that arts. 2294 and 2295 of the Civil Code, provide that every act of man that causes damage to another, obliges him, by whose fault it happened, to repair it, and that every man is responsible not only for the damage caused by his fraud, but also by his imprudence or negligence; and that as they have sustained, by the omission of the defendant to declare the existence of the legal mortgage, the damage alleged in their petition, he is bound to indemnify them.

The commentary of Toullier, upon which they rely in support of their position, is conclusive against them. "Those articles comprehend, says that author, all acts of man whatever, which cause, immediately and by themselves, damage to another." 11 Toull. no. 117. The omission to mention the legal mortgage in the sale to Flécheux, in 1836, did not, immediately and by itself, cause damage to the plaintiffs, who were not parties to the act, and acquired no interest in the land till 1841. The immediate cause of the damage, if any there be, was their own neglect, in failing to ascertain that the land was free from encumbrance before they purchased it.

It is said that there is no wrong without a remedy; but in this case no wrong has been shown. The mortgage complained of was inscribed in the proper office, and that inscription affected the plaintiffs and Flécheux with notice: no mention was made of it in the sale, because Flécheux, who is presumed to have been aware of its existence, dispensed the notary from producing the recorder's certificate. There was neither concealment nor fraud on the part of the defendant; and one of the grounds upon which the plaintiffs expect to recover is, that they are not in danger of eviction.

At the time of the purchase by the plaintiffs, a large portion of the price was still due by Flécheux to the defendant, which they assumed to pay, and have accordingly paid. If Flécheux himself had remained in possession and made the payment, he would not, under the allegations of the plaintiffs, be entitled to the restitution of the price, or even to security against eviction. Civil Code, art. 2538. 47 La. p. 25. As long as the purchaser, who has paid the price, is not finally evicted, the only right which the law gives him, is that of calling his vendor in warranty, when the case occurs. Troplong, de la Vente, no. 614.

The plaintiffs, who hold nothing more than the right and title of Flicheux HOPKINS under a sheriff's sale anterior to their purchase, can have no greater rights than VAN WICKLE. the law gives him. The plaintiffs' petition was properly dismissed.

Judgment affirmed.

LEIRUNE v. HEBERT.

Where, in an action for the price of land, defendant resists payment on the ground of the existence of a servitude which had been fraudulently concealed from him, alleging it to have been created by public act, passed before a certain notary at a particular date, he [may offer in evidence, as proof of the servitude, an act under private signature, of the same date and recorded in the office of the same notary. The evidence will not be excluded for such an inaccuracy in the description of it.

A PPEAL from the District Court of West Baton Rouge, Burk, J. Greves, for the plaintiff. W. E. Edwards, for the appellant. The judgment of the court was pronounced by

E wstis, C. J. The defendant resists the payment of a portion of the price of a tract of land, on the ground of the establishment of a servitude on the land sold previous to the sale to him, which had been fraudulently concealed by the plaintiff. It is charged in the answer as being given for a public road, by public act passed before Judge Favrot, on the 5th of September, 1840. It appears that the instrument upon which the defendant relies for the proof of the creation of the servitude was an act under private signature, and bore the date mentioned in the answer, and was recorded in the office of Judge Favrot, who was the judge of the parish of West Baton Rouge, where the land was situated, and the parties reside, on the 2d of September, 1842. It would be carrying technicality to an extreme, to exclude a piece of evidence on such an inaccuracy as this in the designation of it. True the act was not an authentic act, but the date is identical, and it was recorded in the office mentioned. We think the judge erred, and that the bills of exception, except the first as to the amendment of the answer, which is not material, are well taken.

The judgment of the District Court is, therefore, revered, and the case remanded for a new trial, with directions to the judge to receive in evidence, on due proof being made of its execution, the private act, dated the 5th September, 1840, mentioned in the bill of exceptions, and to receive the testimony of Vincent Kirkland, and Jean Baptiste Labauve, for the purpose for which it was offered by the counsel for the defendant; and that the plaintiff and appellee pay the costs of this appeal.

AILLET v. HENRY.

In proceedings via executiva, it is not necessary to serve the defendant with a copy of the petition; and the Code of Practice, art. 734, expressly dispenses with any citation. The notice required by arts. 735, 736, is not a citation, but is in the nature of a notice of judgment; and no law requires it to be served in the french language, even when that is the mother tongue of the party to be notified.

AILLET B HENRY. Where a judgment, the execution of which has been enjoined, bears interest, such additional interest only can be allowed, on dissolving the injunction, as will make the rate allowed equal to the highest conventional interest.

A PPEAL from the District Court of West Baton Rouge, Burk, J.

Greves, for the plaintiff, contended that the service on the plaintiff should have been in french, that being his mother tongue, citing Code Pract. arts. 179, 625, 626.

Labauve, for the appellant, cited 15 La. 431.

The judgment of the court was pronounced by

King, J. The defendant in this suit being a creditor of Aillet, the plaintiff, by a special mortgage, importing a confession of judgment, obtained an order for the seizure and sale of the hypothecated property. The plaintiff enjoined the proceeding, on the ground that his mother tongue is the french, and that the petition, notice of the order of seizure, and notice of seizure, were served on her in the english language only. Proof having been made of the facts alleged by the plaintiff, the injunction was perpetuated by the judge below, and the defendant has appealed.

We think that the judgment appealed from is erroneous. In ordinary actions in which citations are necessary, the defendant may, if the french be his maternal tongue, require to be served with a citation and a copy of the petition, in that language. Code of Practice, arts. 172, 179. But it has been repeatedly held that, in executory process it is not necessary to serve the defendant with a copy of the petition; and the Code of Practice (art. 734) expressly dispenses with citation in that proceeding. 15 La. 434. 9 Rob. 12.

The notice required by the 735th and 736th articles of the Code of Practice is not a citation, but is in the nature of a notice of judgment. 7 Mart. N. S. 514. 1 Rob. 297. No law requires that it should be served in the french language, when that is the mother tongue of the defendant.

The defendant prays for interest and damages on the dissolution of the injunction, to both of which she is entitled. The judgment enjoined, however, bears seven per cent interest, and but one per cent in addition can be awarded, eight per cent being the highest rate now allowed by law.

It is therefore ordered that the judgment of the District Court be avoided and reversed. It is further ordered that the injunction issued in this case be dissolved, and that the defendant, Henry, have judgment for, and recover from the plaintiff, Ursin Aillet and Mathurin Lejeune, his surety in the injuction bond, in solido, five per cent damages on the amount of the judgment enjoined, and one per cent additional interest on the amount of said judgment, from the date of the injunction to the dissolution of the same; the plaintiff paying the costs of both courts.

O'REILLY v. McLEOD.

One who has made useful and necessary repairs to the road and levées on the lands of an absent proprietor, under an adjudication by the inspectors of roads and levées, is entitled to recover from the owner of the land the value of such improvements, with interest from judicial demand, on the principle ihat no man shall be permitted to enrich himself at the expanse of another.

A PPEAL from the District Court for Lafourche Interior, Nicholls, J. Cole, for the plaintiff. Beatty, for the appellant. The judgment of the court was pronounced by

O'REILLY

Rest J. The defendant is the owner of a tract of land having forty arpents front on bayou Lafourche, part of which front is wood land. In the fall of 1844, the inspectors of roads and levées of the district in which it is situated, having satisfactorily ascertained that it was not in the power of the defendant to make to the road and levées upon said land the repairs they required, before the annual rise of the Mississippi river, advertized those repairs to be made, in conformity with the 20th section of the act concerning reads and levées, approved in 1829, and they were adjudicated to the plaintiff, for the sum of \$395.

The work was executed in due time, It is proved that it was well worth the price paid for it; that it was done according to the directions of the inspectors, who accepted it when finished, and gave the plaintiff a certificate, that he had fulfilled the obligations imposed upon him by the contract, as near as could be done on land either newly cleared or not cleared at all, and the surface of which had been much cut up by repeated overflows. Several witnesses corroborated this certificate, and proved besides that the road was as good and as well drained as could be expected, and that the levée was strong and well made, and stood the high water without accidents of any kind. The defendant having refused to pay the amount of the adjudication, these proceedings were instituted against the land, in conformity with the provisions of the act already cited. He intervened, by way of opposition, and his counsel have taxed their ingenuity to the utmost, and assumed every ground of defence of which such a case is susceptible. The court below gave judgment in favor of the plaintiff, and the defendant appealed.

Under the state of facts disclosed by the evidence, we conceive the main question involved in this controversy to be, whether the defendant can be permitted to enrich himself at the expense of the laborer, who effectually protected his land from inundation, and himself from the enormous damages for which he might have been liable to his neighbors, if the repairs had not been made, and their lands had been inundated in consequence of his neglect.

That question has long since been settled. It came before the Supreme Court of this State in the case of the *Police Jury* v. *Hampton*, 5 Mart. N. S. p. 389. The court there went into a long and elaborate examination of the law applicable to it, and concluded their able opinion as follows:

"The failure of the police jury to give notice, cannot defeat this action. It is founded on the great principle of equity, that no man shall profit by the labor of another, without compensation; and neither error, nor bad faith on the part of the negotiorum gestor, will prevent him from recovering the amount to which he has benefitted another, if the work done was useful and necessary." L. 6. 83, Dig. (3. 5).



We shall not weaken the arguments used on that occasion, by attempting to state them. We deem it sufficient to refer to them, and to say that we consider them as establishing conclusively, the rights of the plaintiff in this suit. He is further entitled to interest from judicial demand, and the defendant by his appearance and contestation on the merits, has waived any informalities that might have existed in the proceeding in rem.

Judgment affirmed.

JEWELL et al. v. PORCHE.

Whatever name may have been inserted in the certificate of the board of commissioners of the United States, confirming a spanish grant, the confirmation must inure to the benefit of the real owner.

A survey made by a parish surveyor under an order of court, and proved by the officer who made it, will be presumed to be correct, until the contrary is shown.

A patent granted by the United States for land in Louisiana, which had been patented by the spanish sovereign before the change of government, is, as to those claiming under the spanish patent, an absolute nullity.

A PPEAL from the District Court of Pointe Coupée, Farrar, J. Cooley, for the appellants. Ilsley, for the defendants.

The judgment of the court was pronounced by

Rost, J. The plaintiffs claim a tract of land in possession of defendant, and described in their petition as section no 63, in township 5, west of the Mississippi, range 10 east, containing 77 superficial acres, under purchase and a patent from the United States. The defendant resists their claim on the ground that, she is the just owner and possessor of the land by descent from her father, George Olivot, and in virtue of a spanish patent, issued in his favor in 1791, and duly confirmed by the board of commissioners of the United States, after the change of government. She further avers that her father and herself have been in actual possession of the land ever since the date of the patent; that there are no vacant lands adjoining above or below it; and that the sale made to the plaintiff by the United States, was the sale of the property of another, and, as such, null and void, as well as the patent issued thereon. The parties made proof of their respective titles, and the court having given judgment in favor of the defendant, the plaintiffs appealed, and ask a reversal of the judgment on two grounds:

1st. That it is not satisfactorily proved that the lines of the spanish patent include the locus in quo.

2nd. That the confirmation of that patent by the board of commissioners was to George Olivet and not to George Olivet.

With the evidence in the record of possession during fifty years and more by Olivot and his descendants, the last ground cannot be considered as serious. Whatever be the name inserted in the certificate, the confirmation must inure to the benefit of the real owner. 3 La. p. 107. 5 Mart. p. 663. 11 Mart. 212. The members of the board of commissioners made sad work in spelling french and spanish names, and this appellation of Olivet for Olivot is one of their most successful efforts in that way.

The other ground taken by the appellants rests exclusively upon fact. The evidence satisfied the court below that the land in controversy was covered by the spanish patent, and after a careful perusal of it, we have come to the same conclusion. The survey made the by United States surveyor was not legal evidence; but the judge does not appear to have taken it into consideration, and we are satisfied that there is, without it, in the record, abundant evidence to maintain the judgment.

The counsel for the plaintiffs has pressed upon the court the great danger to be apprehended from giving full faith to surveys made by parish surveyors, in

JEWELL U. PORCHE.

cases like this.* The presumption of law is in favor of the correctness of those surveys, when they are proved by the officer who made them; but that presumtion will of course yield to contrary proof, when such proof is made. No attempt has been made by the plaintiffs to falsify the survey. The plat returned represents the locus in quo as included by the calls of the spanish patent; the surveyor swears to its correctness; and states in his evidence that he followed the lines and found the marks of the spanish surveyor. Two old and respectable inhabitants of the neighborhood corroborate this testimony; and the description of the boundaries of the land in the patent itself, shows that, at its date, the lands adjoining above and below had already been granted. This evidence, unimpeached as it stands, appears to us as complete as human testimony can make it.

We do not perceive the dangers apprehended by counsel. Surveyors are the experts of land suits, and we view their plans as the reports of experts are viewed. They cannot make the survey without calling upon the parties for their titles; the parties, when called upon, may, if they think proper, attend the survey, and, when it is returned into court, make opposition to it, and falsify it by any competent evidence. The errors of surveyors cannot prejudice diligent suitors; if they are not diligent, it is not in the power of courts of justice to take better care of them than they choose to take of themselves.

We are satisfied that the that the sovereign had parted with his right to the land in controversy, before the change of government.

That the title of the defendant was placed by the treaty of cession, beyond the reach of the constitutional powers of Congress; and that the patent issued by the United States in favor of the plaintiffs, is, so far as the rights of the defendant are involved, an absolute nullity. See the case of Lavergne's Heirs, 17 La. p. 230. 2 Howard, p. 318.

Judgment affirmed.

THE POLICE JURY OF WEST BATON ROUGE v. HEBERT.

In an action by a police jury against a sheriff to recover the amount of taxes on suits placed in his hands for collection, plaintiffs are not bound to show the amount actually collected by him, as the measure of his liability. On proof by plaintiffs that, the lists of suits on which taxes were due were delivered to him as required by law, it is for him to account for the amount, and to show that, though due diligence has been used by him, he has been unable to collect.

A PPEAL from the District Court of West Baton Rouge, Burk, J.

H. W. Sherbourne, for plaintiffs, cited Bull. and Curry's Digest, p. 776,
s. 1. Ibid. 515, ss. 3, 4. Police Jury v. Bullitt, 8 Mart. N. S. 323. Police
Jury v. Fluker, 1. Rob. 389. 1 Pothier, Oblig. 666. Civil Code, art. 3508.

Deblieux and Labauve, for the appellant.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs seek to make the defendant, a former sheriff of the parish, liable for the amount of taxes on certain suits. The lists of suits exhibited commence with dates as early as the year 1832, and run to September, 1843. The only witness examined was the clerk of the District Court, who went imto office in June, 1835; and who states that while he remained in office

^{*}The survey was made under an order of the District Court, in this case.

HEBERT.

POLICE JURY he regularly delivered every year to the sheriff the list of taxable suits. The testimony of this witness does not cover all the cases, the taxes for which are sued for; and it appears by the allegations of the petition that the sheriff went out of office in January, 1843. For the period antecedent to the appointment of the witness as clerk, there is no evidence that the lists of taxable suits were duly delivered to the sheriff. For the taxes accruing after he ceased to be sheriff, he could not be liable. Under the evidence it is left uncertain whether the list for the year 1842 was placed in his hands; for by the statute the list of each year was directed to be delivered to the sheriff, in the month of January of the succeeding year. See act of 24th March, 1823. We are also uninformed as to the amounts claimed in the District Court suits, instituted after the passage of the act of the 8th March, 1841. Sess. acts. p. 71.

> In this loose state of the evidence we are unable to test the accuracy of the amount at which the court below fixed the liability of the defendant, and therefore remand the cause. In doing so we think proper to state that, we cannot concur in the argument of defendant's counsel, that the burden is on the plaintiffs to show what amount the sheriff actually collected, as the standard of his liability. Upon proof by the plaintiffs that the lists as prescribed by law have been duly delivered to the sheriff, the burden is upon him to account for the amounts thereof, and to show that, notwithstanding the exercise of due diligence, he has been unable to collect.

> It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for further proceedings according to law; the costs of this appeal to be paid by the plaintiffs.

CRAIGHEAD et al. v. HYNES, Tutor, et al.

Under the late judicial system, courts of Probate had jurisdiction, in all suits for partitions in which minors were concerned. Sec. 14 of art. 924 of the Code of Practice, is not confined to the partition of successions.

PPEAL from the Court of Probates for Iberville, Dutton, J. This was an 1 action for the partition of lands and slaves, in which certain minors were interested.

W. E. Edwards and L. Peirce, for the plaintiff.

Labauve, for the appellant. The Court of Probates had no jurisdiction ratione materiæ. Code Pract. art. 924, nos. 14, 15. La. 33. Consent of parties could not give such jurisdiction. Code Pract. art. 92. 11 Robinson 77. The disposition of art. 924, no. 14, refers altogether to property belonging to successions, and not to property held in common otherwise. Nothing here shows that the property in question, belongs to a succession. The Court of Probates was of limited jurisdiction, and could take cognisance of no case not determined by Code Pract. art. 925.

The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal from a judgment of partition of a plantation and slaves, in which minors were interested, rendered by the late Court of Probates of Iberville. By section 14th of article 924 of the Code of Practice, courts of Probate had power "to ordain and regulate all partitions of successions, in which minors, interdicted or absent persons are interested, or even those which are made by the authority of law, between persons of lawful age and residing in the State, when such persons cannot agree upon the partition and the mode of making it."

CRAIGHEAD U. HYNES.

By a subsequent act, jurisdiction in partitions was given to the District courts. Our impression is, that under the latter clause of the above section, courts of Probate had jurisdiction in cases of partitions, in which minors were interested. There is an expression in an opinion given by the late Supreme Court in the case of Gordon et al. v. Dick et al., 15 La. 37, which implies a different construction of this clause; but as it was given as an obiter dictum, and not as deciding the cause, we do not feel ourselves bound to adopt it. Judgment affirmed.*

DRIGGS v. MORGAN.

Where a case has been submitted to amicable compounders by an agreement filed among the records of the court, it will be conclusive evidence of the terms of the submission. Per Curiam: The records and minutes of a court are the highest and best evidence of its proceedings.

An agreement between the parties to a suit to submit the matters in dispute to amicable compounders is a contract, and the parties should be held to the observance of the strictest good faith in all proceedings relating thereto.

A PPEAL from the District Court of Pointe Coupée, Farrar, J.

Ratliff and Cowgill, for the appellant. Cooley, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. The appeal in this case is taken from the judgment of the District Court, setting aside an award of amicable compounders. The case was last before the Supreme Court, in March, 1845, and is reported in 10th Robinson, p. 120. The litigation between these parties had, on two previous occasions, been adjudicated upon, and is reported in 15 Louisiana Rep. 445, and 17th Ibid. 176. The present suit was remanded by the Supreme Court for a

^{*} The District Courts had jurisdiction of all cases. This was the general rule; and cases taken away from their cognisance, formed exceptions to that general rule. It is for the plaintiffs to show that their case came within these exceptions, and was cognizable before the Probate Court. The question is to be tested by the proper interpretation of art. 924, no. 14 of the Code of Practice. The first part of that article declares, that the Probate courts shall have exclusive power "to ordain and regulate all partitions of successions, in which minors, interdicted or absent persons, are interested." This paragraph comprises the partitions of successions, and amounts to an exclusion of all ether kinds of property held otherwise than by inheritance. Inclusio unius, exclusio est alterius.

The second branch of the sentence is in these words: "Or even those which are made by authority of law, between persons of lawful age and residing in the State, when such persons cannot agree upon the partition and the mode of making it."

This article, contemplating all the time the partition of successions, comprises, in the second paragraph, a case that is omitted in the first. The partition of successions is the sole object of the article. The first part provides for cases where minors, &c. are interested; the second, where persons are of full age. The whole article includes all partitions of successions and nothing more; and the construction given to the law, by the late Supreme Court, although an obiter dictum, is correct.

When a succession is devolved upon persons of full age, they may agree as to the mode of partition. Civil Code, art. 1245. But if there are minors, &c., or if all the heirs, though of age, do not agree, the partition must be judicial. Civil Code, art. 1246.

though of age, do not agree, the partition must be judicial. Civil Code, art. 1246.

The words of art. 924, no. 14 of the Code of Practice, are taken almost verbatim from art. 1246 of the Civil Code, which relates to the participation of successions.

DRIGGS v. Morgan. new trial, on the ground that the damages awarded by the jury to the plaintiff were excessive. The jury had allowed the plaintiff the sum of \$1,500. In November, 1845, the parties, expressing themselves desirous to put an end to a long and expensive litigation, agreed "to submit all matters and things connected with, or in relation to, the aforesaid suit, known on the docket of the aforesaid court as no.—," to two persons named "as amicable compounders, to settle the same fully and entirely" between the parties, with full power to appoint an umpire. On the disagreement of the amicable compounders, an umpire was appointed, and an award was rendered, "that the said *Henry B. Driggs* do recover of and from the said *Charles Morgan*, by reason of his complaints mentioned in his petition in cause no. 1280, the sum of \$1,500," &c.

On a motion to homologate and make this award the judgment of the court according to its terms, which were in conformity with the submission, several exceptions were taken to matters of form. Considering them untenable, we deem it unnecessary to give our reasons, and proceed at once to the consideration of that on which the district judge decided the case, by setting aside the award.

The exception was, that the compounders had exceeded their powers; a great part of the case having been dismissed, and the award extending to the whole of it. This fact, stated in the exception, is supported by the award itself, which extends to the complaints made in the petition in cause, No. 1280; but of any clause limiting the demand of the plaintiff to any part of his different causes of action, the record and minutes afford no evidence. They are the highest and best evidence of the proceedings, and the danger of violating a rule which gives to them this import, is too obvious to require any comment. The interests of property and of society are identified with its maintenance. Wiltiams v. Hooper, 4 Mart. N. S. 177. As the case stands, so far as the record is concerned, the compounders did not exceed their powers, and the award is strictly within the pleadings.

In the opinion given by the Supreme Court in which it was determined that the cause should be remanded, the court say: "It is first proper to notice that the present action, originally based upon three distinct alleged causes of action, to wit: 1st, the wrongful suing out of the writ of injunction; 2d, the illegal arrest and imprisonment of the present plaintiff; and 3d, the wrongful and illegal suing out of a writ of sequestration, was tried below, and is now limited to the cause of action growing out of the arrest and imprisonment of the plaintiff, at the suit of the defendant, for which said plaintiff, having discontinued his demand for damages claimed for the wrongful suing out of the injunction and sequestration, claims in his petition the sum of \$5,000 as damages." The court decided solely on the damages for the arrest and imprisonment, considering it the only matter before them.

It also appears, by the testimony of the gentleman who was of counsel for the plaintiff in this case that, to use his own language, "he moved the court to enter a ———, for the sum of \$2,500, claimed in the petition for the wrongful issuing of the sequestration, and so much for the wrongful issuing out of the injunction as was then prescribed, to wit, \$1,500. This motion was made by witness in open court before the jury had retired, and was made for the purpose of reducing plaintiff's claim to \$6,000, viz. \$5,000 for false imprisonment, \$1,000 for damages under the injunction." This testimony is corroborated by

a memorandum filed among the papers, which imports that a non-suit was ordered for these amounts, at the instance of the counsel for the plaintiff.

It appears that the Supreme Court itself was misled, as to the extent of the supposed discontinuance of the plaintiff. For in the opinion it is expressly stated that, the demand for damages, in consequence of the injuction, was not before them, but only that for damages for the arrest and imprisonment, whereas the defendant has proved, by his own witness, that the former was reserved to the extent of \$1,000. The probability is that the court acted on the statements of the counsel who argued the case before them; nor is it at all surprising that such a mistake should occur, when we observe the manner in which cases are sometimes presented for consideration; and, in that before us, we have searched in vain even for any record of the verdict on which the cause was remanded; but, as the case is now before us on the award, we shall proceed to determine it, there being no motion to dismiss the appeal, nor any suggestion of diminution of the record.

The case stands according to the record on the general issue, a plea of prescription having been overruled. The award must stand, unless it can be set aside for some lawful cause. The cause assigned by way of exception is, "that the compounders acted on more than was submitted to them. A part of said suit had been dismissed, and yet they considered the whole, and gave their award thereon." The submission was most comprehensive in its intendment. It embraced all matters and things connected with, or in relation to, the aforesaid suit, and the claim for relief rests solely upon the evidence we have stated.

Whatever would have been the decision of the court in a case of surprize or mistake, which evidence of this character might establish, the act of the defendant has presented to us a very different one. He attended the meeting of the compounders before whom the witnessess were examined on the original issues, and himself offered a witness whose testimony covered the very grounds, which he now insists were excluded from the examination of the compounders by the terms of the submission. The witnesses were examined without any objection, and the proceedings closed on the evidence adduced by both parties. We cannot permit a party litigant to defeat an arbitration, under such circumstances. It would be unjust and unreasonable. It is also to be observed that the agreement of reference to the amicable compounders, contains the following stipulation: that, "they shall obtain from the clerk of the District Court the record in the above styled and mentioned suit, to serve as the basis of their investigation in the matter referred to them, and shall take and consider as testimony in the cause all the evidence submitted to the court as contained in said record, but either party is at liberty to introduce further evidence." A large portion of the former testimony related to the damages arising from the sequestration.

The agreement to submit their matters in dispute to arbitrators as amicable compounders was a contract, and, in interpreting it, what better guide can we have than the records of the court, and the mode in which the parties themselves understood and executed it.

The law on this subject is well settled. Canty v. Beal, 17 La. 285. Davis v. Leeds, 7 Ibid. 477. The mode of terminating litigation by amicable compounders ought to be favored, and the parties held to the observance of the strictest good faith in all proceedings having an object in view, in which the public, as well as the parties, have a deep interest.

DRIGOS MORGAN.

It is therefore decreed that the judgment of the District Court be reversed. and that the plaintiff recover from the defendant the sum of \$1,500, with costs in both courts.

BRINEGAR v. GRIFFIN.

In an action for the settlement of a partnership plaintiff cannot proceed by attachment, where, from the nature of the business, it is impossible that he can swear, with certainty, to the amount which will be found due to him on a final settlement. Per Curiam: We do not, however, wish to be considered as deciding that a partner can, in no case of joint-adventure, proceed by attachment. Cases may occur where the business of the adventure is so limited and simple, that a party may be considered as able to swear to a positive and precise

The mere bonding of property attached will not preclude the defendant from moving to dissolve the attachment.

A motion to amend a rule to show cause why an attachment should not be dissolved, by adding a new ground, may be allowed even after the trial of the rule has commenced, where no issue has been joined in the case, and where the additional ground was based on matter apparent on the face of the petition, and its allowance was not calculated to delay the trial of the rule, nor to take the other party by surprise.

Where the business of a particular partnership was transacted almost entirely within this State, and the investigation of an important portion of the partnership accounts can be conducted with greater convenience and at less expense here than elsewhere, the mere fact of the partners being residents of another State will not, where the defendant appears in person, deprive our courts of jurisdiction of a suit to settle the partnership.

PEAL from the District Court of Iberville, Burk, J.

W. E. Edwards and Labauve, for the appellant. The mere fact of the defendant's being a non-resident, made his property liable to attachment. Code Pract., art 240, no. 2. The law attaches no condition to the capacity of the attaching creditor, except that he be a creditor, and that his claim be established as provided by the arts. 242 and 243 of the Code of Practice. The court can make no distinction, where the law makes none. The law contemplates that the creditor may himself be a non-resident, and provides how the claim should be sworn to. Code Pract. art. 244. 10 La. 447. The case of Levy v. Levy, 11 La. 577, relied on to dissolve the attachment, is not similar to this case. the plaintiff, by her own showing, contradicted her oath, and satisfied the court that she did not, and could not, know the amount due by the defendant. In this case, the plaintiff shows that everything is in his own knowledge; he makes his own calculations and liquidation of the special partnership, to base his oath upon. 2 Mart. N. S. 326.

This suit was commenced in the ordinary form, the defendant being present, and cited in person. The attachment is an accessory, and the dissolution of it

cannot arrest the progress of the ordinary suit. Code of Practice, 253, 258. 8 Mart. N. S. 352. 14 La. 128.

Deblieux, for the defendant, contended that the attachment should be dissolved and the petition dismissed: 1 st, Because the writ of attachment is designed merely to supply the place of personal service in actions properly brought before our courts, and not for the purpose of withdrawing, without ne cessity, from foreign tribunals, the legitimate subjects of their jurisdiction. 2d, Because the action being for a settlement of a partnership, plaintiff cannot swear to the amount actually due to him. See 11 La. 577. 3d, Because arts. 253, 258 of the Code of Practice, on which plaintiff's counsel rely to show that, even if the attachment be dissolved, the suit must stand, are evidently not applicable to a case like the present. These are provisions applying to suits which might have been brought in the ordinary way, by mere personal service, before a tri-bunal having jurisdiction, and which could compel an appearance, or supply the want of it by a default. Such is the application of the authority quoted. Williams v. Kimball, 8 Mart. N. S. 352. In the case of Gibson v. Huie, 14 La. 128, there was a suit on a contract made here; and although the plaintiff stated that defendant was a resident of North Carolina, the defendant pretended that he resided in this State; he had answered on the merits, and the cause had been decided without regard to the attachment.

The judgment of the court was pronounced by

SLIDELL, J. This case comes before us on an appeal from a decree dissolving an attachment, and dismissing the suit. One of the grounds for dissolution is that, the suit is for the liquidation and settlement of a partnership, and that in such a case the plaintiff cannot have the auxiliary remedy of attachment, because the affidavit indispensable to the granting of this writ cannot properly be made by a party, who, from the nature of the case, must be ignorant of the precise amount due to him.

For a proper consideration of this subject it is necessary to refer briefly to the affidavit and the petition, in connexion also with the evidence received on the trial of the rule. The affidavit, in stating the indebtedness, declares that, the defendant is really and justly indebted to the plaintiff in the sum of \$2,900, as will be shown in the petition to be filed. The petition states, that in the year 1845, and in Keutucky, where the parties both reside, they entered into a partnership for the purchase of a gang of slaves, to be brought to this State and here sold, for the common account; that they arrived in Louisiana in the fall of that year, and closed the sale of the slaves in the following spring; that the defendant is chargeable with the proceeds of the property so held in common and sold for the common account, which proceeds said defendant received. A statement is then given, item by item, of the price and proceeds, and of the vendee of each slave. Most of the sales are stated to have been on credit, and that notes and drafts of the purchasers were received by the defendant. In one instance, a sale or barter is charged as having been made by defendant, for sugar received and disposed of by him. In some cases, the notes or drafts are only charged as having been received by the defendant; in others, as having been paid to him. The petitioner further declares that, he has himself received the price and proceeds of divers slaves, and certain moveables belonging to the partnership, amounting to the sum of \$14,499 53; and "that, after allowing and charging himself for everything and all sums of money he is accountable for to the said special partnership or speculation, or to the said David Griffin, the said Griffin remains justly indebted to petitioner in a balance of \$2,900; that he has often demanded an amicable settlement and the payment of said balance from the defendant, who has always refused to do anything."

The prayer of the petition is as follows: "That the defendant be cited to appear, and to produce all the claims and domands he may have against the plaintiff, or against the said special partnership or speculation; and that a liquidation and settlement of said speculation may take place; and that, after due proceedings, the defendant be decreed to owe the plaintiff the said balance of \$2,900, with interest from judicial demand, &c." It closes with a prayer for general relief.

This then is a suit for the liquidation and settlement of a partnership, the ascertainment of a balance, and a decree therefor. It is true that the plaintiff professes to have calculated, and to his own satisfaction ascertained, the balance; but it is quite obvious that the partnership affairs involve mutual items of debit and credit, numerous and diversified in their nature, such as the original outlay of capital, the necessary disbursements for the transportation and care

BRISEGAR GRIFFIR. of the partnership property, the ascertainment of collections of the notes and drafts taken, and the enquiry into the faithful gestion of the partnership affairs by the partners respectively. It would seem impossible, under the showing of the petition itself, and especially as it does not allege that any accounts have been rendered, nor any balance of account actually struck by the partners, that the plaintiff should be able to declare with certainty, the amount which, on a final liquidation and settlement of these affairs, will be found due to him. This uncertainty, apparent on the face of the petition, is, if possible, rendered more obvious by a letter of the plaintiff's, which was offered in evidence by the defendant. In this letter, after suggesting the expediency of avoiding litigation by an amicable adjustment of their affairs, the plaintiff remarks: "It seems to me that in a business of the amount that we did last summer, either the one or the other must be indebted to the other. If I to you, I am ready at any time to settle," &c. We do not, however, regard this evidence as necessary to sustain a conclusion which has a sufficient basis in the plaintiff's petition.

In applying the law to the state of facts thus disclosed, it is necessary to bear in mind that the remedy by attachment is one, which, according to the uniform tenor of decisions, has been strictly construed. To justify the remedy, the creditor must be able to state on oath, expressly and positively, the amount of the sum due to him. However conscientiously the plaintiff may have believed that the liquidation and settlement of their affairs would eventuate in a balance in his favor of twenty-nine hundred dollars, the nature of the case forbids us to consider his affidavit as meeting the rigorous intendment of law providing this onerous remedy. Such was the view taken by the court in the case of Levy v. Levy, 11 La. 581. It is true, as contended by the plaintiff's counsel, that the circumstances in that case were stronger in favor of the party moving to dissolve, than those now presented; but the principle on which that case rests, appears to us fully applicable to the matter now before us. We refer to, and adopt what is there said, as a just exposition of the intent of the Code.

We do not, however, wish to be considered as laying down the rule that, in no case of joint adventure can a partner proceed by attachment. Suits may occur in which the business of the adventure may be so limited and simple in its features, as to exhibit a case where the party might be considered as able to swear to a positive and precise balance. When such a case presents itself, we shall deem the point open to consideration. The mere bonding of the property did not debar the defendant from moving to dissolve the attachment. See the case of Myers v. Perry, 1 Ann. Rep. 372.

The motion to dissolve on certain enumerated grounds, was made at an early day after the institution of the suit, and before issue joined. Two days after the first motion, and before it was adjudged, the defendant asked leave to amend, by adding the ground for dissolution which we have considered. The court permitted the amendment. We think this was a proper exercise of the discretion of the court. The ground was based upon matter apparent on the face of the petition; it was not calculated to delay the trial of the rule, and does not appear to have taken the plaintiff by surprise, as he did not move for a continuance of the hearing. Our Code has laid down rules on the subject of amendments of the pleadings, but we are not aware that there are any express provisions of law, which, in matters of this nature, restrict the discretion of the judge, where, in his opinion, the amendment, without creating delay, will tend to the furtherance of justice, by restricting within its proper sphere a harsh remedy.

BRINEGAR E. GRIFFIN.

The defendant, who made a personal appearance, also contends that the suit itself should be dismissed. It is true that the parties both reside out of this State, that the contract in which the suit originates, was made in Kentucky, and that the suit involves the liquidation of a partnership. Residence is not indispensable to the jurisdiction of our courts over parties present, even temporarily, in our State. Upon the general question, whether we will take cognizance of all suits for the liquidation of partnerships brought by non-residents against their partners, also non-residents, we express no opinion. When a case is presented of the liquidation of a commercial, or other partnership, involving extended and complicated transactions, conducted abroad, and the partnership having a domicil out of our State, it will be time enough to consider that question. In the present case, the partnership business was to be consummated in Louisiana. According to the plaintiffs' showing, it was so consummated. In the investigation of a very important portion of the partnership accounts, the proceeds of the property sold, the examination can be conducted with greater convenience and probably less expense, here than elsewhere; and we are not prepared to say that, as to other subjects of evidence and enquiry, the facilities of another forum would preponderate. The plaintiff is clearly, under our laws, entitled to the forum which he has chosen, and we are of opinion that the court below erred in dismissing the suit.

It is therefore decreed that, so much of the decree of the District Court as dissolves the attachment, be affirmed, and that so much of the said decree as dismisses the suit, be reversed; and that this cause be remanded for further proceedings according to law, the costs of this appeal to be paid by the defendant.

DECOUX v. THE BANK OF LOUISIANA.

Where a plantation on which an order of seizure and sale has been levied, is in possession of a leesee, the sheriff is not authorized to appoint a guardian or keeper for its management and preservation, and consequently can make no charge for the services of such a person, if one be appointed by him.

A sheriff is entitled to be reimbursed all expenses incurred by him in the preservation of slaves seized under an order of seizure and sale, including compensation for the services of a keeper employed to take care of them on the plantation on which they were at work. Stat. 10 March, 1845, s. 2.

A PPEAL from the District Court of Pointe Coupée, Farrar, J.

L. Janin, for the appellant, cited Code of Prac. arts. 457, 660. Acts of 1845, p. 53, s. 3. Bul. and Curry's Dig. 441. Cooley, for the defendants.

The judgment of the court was pronounced by

King, J. The Bank of Louisiana obtained an order for the seizure and sale
of a plantation and slaves, situated in the parish of Pointe Coupée, in virtue of
which the property was seized by the plaintiff, in his capacity of sheriff of that
parish. Adams, the person in possession of the property, was appointed, on
the day of the seizure, the guardian for its management and preservation until
the sale. The execution of the writ was suspended by an injunction, in consequence of which the property was not sold until nine months after the seizure,
during which interval it remained in the care of the guardian. The plaintiff,

DECOUX 0. BANK OF LOU-181ANA.

in his bill of costs, charged \$2.50 a day for keeping the property during that time, and took a rule on the bank to show cause why the account presented by him should not be paid. The correctness of all the charges was admitted, except that for the preservation of the property, which was contested on the ground that no such services were rendered by the sheriff, and no expenses were incurred by him for that purpose. The rule was discharged in the court below, as far as related to the claim for keeping the property, and for the residue of the account it was made absolute. The plaintiff has appealed.

When the sheriff, in the execution of a writ of seizure, takes a plantation, it remains sequestered in his custody until the sale, unless it has been leased or rented; and he may appoint a keeper to manage it, for whom he shall be responsible. Code of Pract. art. 657. The 660th art. of the Code of Practice, directs that the sheriff shall not remove from plantations the implements of agriculture, the cattle or slaves employed in cultivating or clearing them; but authorises him to appoint a guardian for their preservation. For keeping personal property or slaves under seizure, sheriffs are entitled by law to a compensation which is left to the discretion of the court, within certain limits as regards slaves in actual custody. Acts of 1845, p. 53. s. 2. Under these several provisions the sheriff is entitled to remuneration for keeping property which comes into his custody under seizure, whether the care of it be assumed by himself personally, or be delegated to a keeper for whom he is responsible.

It appears that the plantation was in the possession of Adams, the keeper, at the date of the seizure, under a lease from the mortgagor. It therefore fell within the exception established in the 657th article of the Code of Practice, and the custody of it was not confided by law to the care of the sheriff, who consequently was not authorised to appoint a guardian for its management, nor to make a charge for such services.

The remainder of the property seized was committed to his custody by law, and he was entitled to be reimbursed all expenses incurred for its preservation, and to compensation for the services rendered by the keeper, who was his agent for that purpose. The lower court rejected the claim as unfounded, and the record does not supply us with the means of ascertaining what would be a fair equivalent for the services rendered. The discretion to be exercised by courts on such occasions, must be based on testimony which enables the judge to fix a compensation commensurate with the services. The evidence in the record would, perhaps, have authorized the district judge, under whose immediate eye the proceedings were had, to make an allowance to the plaintiff, but is not such as enables us to award the compensation, with a prospect of doing justice between the parties. We think that justice requires that the cause should be remanded.

The judgment of the District Court is therefore reversed; and it is further ordered that the cause be remanded to the lower court to be proceeded with according to law, and that the defendants pay the costs of this appeal.

Cooper et al. v. Polk et al.

A bill of exchange requesting the drawees, at a certain time after date, to pay a certain sum to the order of a third person, and "to charge the same to account," signed by the drawers, binds the latter jointly only, and not in solido.

It is no objection to a citation served on a curator ad hoc, appointed to represent an absent de-

COOPER

POLK.

fendant, that it was addressed to the absentee. The citation should be served on the curator, and whether addressed to him, or to the person whom he represents, is immaterial.

Where a party takes no bill of exceptions to an order of the court, refusing an application made by him, but proceeds to trial without any objection in that respect, it is a tacit acquiescence in the order, and will preclude him from contesting its correctness on appeal.

Where a party to an action resides out of the parish in which the court is held, his adversary cannot compel him to bring his commercial books into court. In such case the party might be interrogated and required to annex to his answers copies of his accounts, or a commission might be taken out to take the testimony of witnesses by whom the books could be examined and sworn copies made from them; or it might be required that the books should be produced before the commissioners, and the authenticity of the books and the correctness of the copies thus ascertained. It would be the duty of the party, under the order of the court, to give every facility for such an examination of his books.

A PPEAL from the District Court of Lafourche Interior, Randall, J. Hall, for the plaintiffs. Beatty, for the appellant.

The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon an account containing several items. For a portion of them it is quite clear that the appellant, William Polk, is not answerable, being debts of T. G. Polk alone. We shall confine our attention to the items which are based upon three bills of exchange drawn by T. G. Polk and Wm. Polk, upon the plaintiffs, and which they contend they accepted for the accommodation of the drawers. These bills of exchange are not obligations in solido; on their face the liability is joint. 5 La. 122.* Wm. Polk being sued alone, contended, by an exception, that T. G. Polk should have been made a party defendant. T. G. Polk was not a resident of Louisiana, and was not present in the State. If it be conceded that, in such a case, he was a necessary party, it is evident that there was no other way in which he could be made even a formal party, except by the appointment of a curator ad hoc to represent him. The plaintiffs could not be deprived of all remedy against Wm. Polk, because his co-obligor was an absentee.

After the exception was sustained, and a curator thereupon appointed to represent T. G. Polk, the appellant then excepted that T. G. Polk was not properly cited, because the citation was addressed to him, and not to the curator ad hoc. The objection seems to us unsound. It was immaterial whether the address was to the curator, or to the person whom the curator represented. It was properly served on the curator, for a service upon T. G. Polk was an impossibility.

At the time of filing his answer, the defendant, Wm. Polk, applied to the court for an order upon the plaintiffs, to produce in open court their commercial books. This order the court refused, but no bill of exceptions was taken, and the defendant subsequently proceeded to the trial of the cause without any objection in this respect. After this tacit acquiescence in the refusal of the order, it cannot be considered here. There is, however, a broader ground upon which the point may be determined. When a party to a cause lives out of the parish where the court is held, we cannot recognize the right of his adversary to com-

THOS. G. POLK. WM. POLK.

^{*}The first of the bills of exchange was in these words:

[&]quot;Exchange for \$1500. LaGrange, July 11th, 1842. Five months after date of this first of exchange, (second unpaid), pay to the order of D. B. Frierson & Co., fifteen hundred dollars, value received, and charge the same to account.

COOPER O. POLK.

pel him to bring all his commercial books from his domicil, to the seat of justice where the litigation is pending. It is true that the language of the Code of Practice (arts. 149, 473) is general; but if the interpretation we are asked to give be sound, then a merchant in New York or London might be compelled by his debtor to bring his books to Louisiana. Such a hardship imposed upon litigants, wauld make the relations of a factor with a planter, or of a merchant generally with his correspondents, very onerous, and is not to be sanctioned. The right given by law to a litigant, to draw testimony from the books of his adversary, must receive a reasonable construction, and may be fully enjoyed without a resort to means which would operate so seriously to the detriment of commerce. The defendant might, in the interrogatories propounded by him to one of the plaintiffs, have required him to annex to his answers copies of the accounts; or: if unwilling to rely upon the conscience of his adversary, the court might have been called upon to issue a commission; under it witnesses might have examined the plaintiffs books, and made sworn copies from them. The books themselves might have been required to be produced before the commissioner; the authenticity of the books and the correctness of the copies might have been fully ascertained; and it would undoubtedly have been the duty of the plaintiffs, under the order of the court, to give the fullest facilities to such examination.

We do not consider it necessary to decide upon the exception, raised to the admissibility of certain testimony taken under commission, by reason of alleged defects of form. The joint liability upon the accommodation acceptances is established, independently of that testimony.

The claim by the defendant, that the proceeds of certain shipments made by T. G. Polk, should be first credited upon Wm. Polk's share of the joint liability upon the accommodation acceptances, is clearly untenable.

Judgment affirmed.

GILBERT et al. v. MERIAM.

Where, in an action against the surety of a tutor, plaintiffs rely on a judgment obtained by them against their tutor, defendant may establish the nullity of the judgment so obtained.

Where an action has been discontinued, it cannot be revived by a rule to show cause, and, if such revival be allowed, any judgment subsequently rendered, will be null.

The action of a minor against his tutor is prescribed by four years, from the time of his majority. C. C. 356-

The condition of a surety cannot be more oneruus than that of the principal. The surety may avail himself of every defence which his principal could have used, and may plead any prescription by which the creditor's demand has been extinguished. C. C. 3006, 3029,

A PPEAL from the District Court of Iberville, Nicholls, J.

Labauve, for the plaintiffs. This is an action upon a tutor's bond, against the defendant as surety. The only serious defence is the plea of prescription, established by art. 356 of Civil Code. The prescription relied on, is inapplicable to this demand, which is against the surety on the bond, and not against the tutor for a rendition of accounts. 6 La. 161. 1 Mart. N. S, 334. Toullier, 2d vol nos. 1275—6. Whether the tutor is yet liable and bound to account, is not the question; but the question is, whether he has accounted and paid over all moneys in compliance with the bond.

The tutor, as such, took possession of lands, slaves and moveables belonging to his wards, the plaintiffs, and though the action for a rendition of accounts may

GILBERT C. MERIAN.

be prescribed, the demand for a restitution of the property cannot be prescribed but after the lapse of thirty years; and as long as the plaintiffs have an action for the restitution of such property, an action lies on the bond against the surety. Napoléon Code, art. 2236. Louisiana Code, art. 3476. Troplong, Traité de la Préscription, vol. 2, nos. 472, 487, 488, 489. The defendant should be decreed to pay one-third of the bond.

creed to pay one-third of the bond.

W. E. Edwards, for the appellant. The judgment of the Probate Court of Ascension is null, and defendant may show that it is so. 15 La. 59. The action against the tutor, and consequently against his surety, is prescribed by four years.

Civ. Code, art. 356. 10 Robinson, 173. 6 La. 161.

The judgment of the court was pronounced by

The plaintiffs allege that their father died leaving a large succession, which was taken possession of and administered by their tutor, Lloyd Gilbert. That by a decree of the Court of Probates of the parish of Ascension, the succession of the deceased was finally settled, and their shares ascertained to be \$21,445 37, which sum was received by their tutor, who has paid no part of it to them. That for the faithful administration of their estates, their tutor gave a bond in the sum of \$26,000, for one-third of which, the defendant, Meriam, became surety, and they pray judgment against Meriam for \$8,666 66, the amount of his alleged liability on the bond. The defendant, in his answer, avers that the plaintiffs have received the full amount of their inheritance, from their ancestor; that the alleged decree of the Court of Probates of the parish of Ascension is null; and he pleads the prescriptions of four, five, ten and twenty years, in bar of the action. The lower court determined that the right of action of two of the plaintiffs, viz. A. G. Gilbert and W. H. Gilbert, was prescribed by the lapse of ten years, rejected their demand, and rendered a judgment in favor of the remaining plaintiff, Butler Gilbert, from which the defendant has appealed.

The evidence establishes clearly, that more than ten years intervened between the dates at which the two eldest of the plaintiffs attained the age of majority and the inception of this suit. The youngest brother, Butler Gilbert, became of full age a little more than six years before the commencement of the suit. The defendant contends that his right of action has been extinguished by the prescription of four years, established by the 356th article of the Civil Code. It is urged by the plaintiffs, that this is not an action against a tutor respecting acts of tutorship, nor to compel him to render an account of his tutorship; but a suit to recover an inheritance, which is alleged to have gone into the hands of the tutor, the amount of which has been determined by a final decree, rendered on a suit to account, to which the prescription of four years does not apply.

The evidence mainly relied on to sustain the plaintiffs' demand, is a judgment of the Probate Court of the parish of Ascension, which purports to settle the succession of Walker Gilbert, deceased. That judgment, it is contended, is null, and that its nullity is apparent upon the face of the record. It was so held to be in the case of Gilbert et al. v. Nephler & Boyle, in which the present plaintiffs were endeavoring to enforce it against third possessors of property derived from Lloyd Gilbert, during the existence of the tutorship. 15 La. 60. The circumstances under which it was determined to be null, are stated in the opinion of the Supreme Court referred to. We concur in the opinion expressed by the late court, upon the identical evidence now before us and under similar pleadings, that the judgment is void; and this surety, against whom it is produced as the evidence of a debt, may avail himself of that nullity in defence. Apart from this judgment, which we must disregard, there is no evidence showing that an account has ever been rendered by the tutor, or that a settlement of the succes-

GILDERT WERIAM. sion of Walter Gilbert has ever taken place; nor is the amount of the plaintiffs' estate, received by the tutor, otherwise established.

The account of sales of the effects of the succession of the deceased has been produced, from which it appears that property to a large amount was sold, the proceeds of which must have been received by the tutor, on whom the administration of the estate chiefly devolved. It is also shown that the estate was largely indebted. No settlement having taken place or account having been rendered, if the tutor were still living, it is clear that the only action that could be instituted against him, would be one to account, and that action is prescribed. Civil Code, art. 356. 10 Rob. 173. 6 La. 162.

The condition of the surety cannot be more onerous than that of his principal; he may avail himself of every defence that his principal could have used, and may plead the prescription by which the creditor's demand has been extinguished. Civil Code, arts. 3006, 3029.

It is therefore ordered that the judgment of the District Court be avoided and reversed, and that there be judgment for the defendant, with cests in both courts.

BERTEAU v. O'BRIEN.

Where in consequence of the death of a child subsequently to that of the father, the surviving wife holds in common with the other children an undivided share in all the property of the father, she may, under art. 338 of Civil Code, cause the whole of it to be adjudicated to ber, on complying with the requirements of that article. That article does not restrict the right to this adjudication to community property only; it makes no distinction as to the title by which property may be held in common between the surviving parent and the minor children.

A PPEAL from the Court of Iberville, Dutton, J. R. W. Nicholls, for plaintiff.

Sigur, Bonford and Labauve, for the appellant.

The judgment of the court was pronounced by

Rost, J. The plaintiff, Estelle Berteau, sues her mother, and seeks to avoid an adjudication, made to the latter by the Court of Probates under art. 338 of the Civil Code. She alleges that her father died in 1831, leaving her and three other minor children, the issue of his marriage with the defendant: That one of the children subsequently died at a date left in blank in the petition, and that the three surviving children and the defendant are his heirs, each for one fourth: That the succession of her father was composed of proper estate and community property: That, on the 16th of January, 1834, an inventory and appraise. ment of the property of the succession were made by order of court, and that all the property was represented therein, and appraised as belonging to the community: That, on the 22d of December of the same year, all the property contained in the inventory was adjudicated to the defendant, at the price of said appraisement, by a decree of the Probate Court, rendered on the advice of a family meeting, in conformity with the provisions of art, 338 of the Civil Code: That this adjudication, so far as it affects the proper estate of her father, is an absolute nullity. She prays for the nullity of the judgment and for the return in kind of the proper estate of her father to his heirs. The

answer contains several peremptory exceptions, which the opinion we have formed renders it unnecessary to notice, and also a general denial. The court below gave judgment in favor of the plaintiff, and the defendant appealed.

BERTEAU O'BRIEN.

The plaintiff alleges in her petition the demise of one of her brothers, since that of her father. The time at which it took place is not shown, but the plaintiff has introduced, in support of the allegation of her petition, the inventory, the proceedings of the family meeting, which preceded the adjudication, and also the decree of adjudication. Those proceedings satisfactorily show that the minor *Dorville* was dead when they took place, and that, in consequence of his death, the defendant then held in common with her children one undivided fourth of that child's part, in all the property left by his father.

This case is not to be distinguished from that of Harty v. Harty, 8 Mart. N. S. p. 518. It is well known to those who participated in the formation of the Louisiana Code, that no change was intended to be made in the provisions of the act of 1809, under which that case was decided. The very words of the act were preserved in art. 338 of the Code. If the legislature had intended to authorize the adjudication of community property only, they would have said so; but as the rule is general, and makes no distinction with regard to the title by which an estate may be held in common by the surviving parent and his minor children, we do not consider ourselves at liberty to make any.

The case of Reeves' Heirs v. Bernard, 13 La. p. 173, is not applicable to this controversy. There the surviving parent had no interest of any kind in the proper estate which formed the subject matter of the adjudication. In this case the defendant was a joint owner of the property adjudicated, and the adjudication made to her of the whole, does not violate the dispositions of art. 338 of the Civil Code, and must therefore have effect.

For the reasons assigned, it is ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

BACH v. THE POLICE JURY OF JEFFERSON.

A PPEAL from the District Court of the First District, Buchanan, J. Durant, for the appellant. Burthe, for the defendants.

The judgment of the court was pronounced by

Eustis, C. J. The matter in dispute between the parties being less than the sum of three hundred dollars, it is ordered that the appeal be dismissed, and that the appellant pay costs.

McKEE v. ELLIS.

An appeal will lie though the judgment be for less than three hundred dollars, where the amount claimed exceeds that sum. Const. art. 63.

A PPEAL from the Parish Court of New Orleans, Maurian, J.

The defendant appealed from a judgment against him for \$300, in an action for an assault and battery, in which the plaintiff claimed \$1000 as damages.

McKEE . V. ELLIS. Robert, for the plaintiff. The appeal should be dismissed. In actions for damages the right to appeal is determined by the amount of the judgment below—not by the sum claimed in the petition. See Howard's Rep. Cooke v. Woodson, 5 Cranch 13. Wise et al. v. Columbian Turnpike Co., 7 Cranch 276. Wilson v. Daniel, 3 Dallas, 401. Gordon v. Ogden, 3 Peters 33. Smith v. Honey, 3 Ibid, 469.

R. Hunt, for the appellant. The 63d article of the constitution of Louisiana says: "The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases where the matter in dispute shall exceed \$300.' To ascertain the matter in dispute, we must recur to the foundation of the original controversy: to the matter in dispute when the action was instituted: to the thing demanded by the plaintiff and refused by the defendant, and for which suit was brought. The descriptive words of the constitution point emphatically to this criterion; and in common understanding, the thing demanded, and not the thing recovered—the sum claimed (as in the present instance \$1,000, damages,) and not that for which a judgment is rendered, constitutes the matter in dispute between the parties.

This construction not only comports with every word in the constitution, but avoids an inconvenience, which would otherwise affect the impartial administration of justice. For if the judgment was considered as the rule to ascertain the value of the matter in dispute, then whenever a judgment was rendered for less than \$300, the defendant could have no relief, though the judgment should be most erroneous and injurious, while the plaintiff would have a right to an appeal and a revision of the cause—his demand (which is alone to govern him) being for more than \$300. It is not to be presumed that the framers of our constitution intended to give any party such an advantage over his antago-

nist. 3 Dallas' Rep. 404.

But we are not without authority for the true meaning of this provision in our constitution.

"The 4th article, sec. 2d, of the former constitution of this State, provided as follows: "The Supreme Court shall have appellate jurisdiction only, which jurisdiction shall extend to all civil cases when the matter in dispute shall exceed

the sum of three hundred dollars."

From the journals of the convention of Louisiana, held in 1844—1845, we learn, that the committee of the convention, to whom was referred the 4th article of the constitution of 1812, concerning the judiciary department of the State, reported the following, among other provisions: "The Supreme Court shall have appellate jurisdiction only, except hereinafter provided, which jurisdiction shall extend to all cases, when the matter in dispute shall exceed \$500." When this provision came up for consideration before the convention, a motion was made by a delegate from East Feliciana (Mr. Ratliff.) to strike out \$500, and to insert \$300, for the avowed purpose of keeping the appellate jurisdiction of the court unchanged, so far as the value of the matter in dispute was involved.

The convention decided by a large majority, in the the proportion of 3 to 2, that the jurisdiction of this court, so far as it depends on the value of the matter in dispute, shall remain co-extensive with the jurisdiction of the Supreme Court under the constitution of 1812. The court cannot fail to observe that the very language of the 2d sec. 4th art. of the constitution of 1812, is copied into and embodied in the 63d article of the constitution of 1845. In adopting that language, the convention adopted it in the sense in which it had been understood, construed and acted on by the legislature, by the courts and by the people of the State. Indeed the convention were urged to adopt it, because it was well understood. A leading member of that body, to whom I have already alluded, (Mr. Eustis) now the Chief Justice of this court, while expounding the views of the Judiciary committee on the subject of the appellate jurisdiction of the court, said: "The committee propose the adoption of the words of the constitution of 1812. They are of opinion that no change ought to be made in them. They have been long since settled by legislative and judicial interpretation."

Let us see then how the provision of the constitution has been understood and expounded—how the words of the constitution have been settled by legislative and judicial interpretation. The legislative interpretation admits of no

doubt. The Code of Practice declares, as follows, article 874: "The Supreme Court has only appellate jurisdiction, which it exercises in all civil cases where the object in dispute exceeds the sum of \$300." Art. 875: "The Supreme Court has jurisdiction, although the judgment appealed from be for less than \$300, if the demand was for more than that sum."

McKer v. Ellis.

Such is the legislative interpretation, confirmed by a long series of judicial interpretations. In Hart v. Lodwick, 8 La. 166, it was held, that inasmuch as plaintiff's demand exceeded \$300, he was entitled to an appeal against all the appellees who had judgment in their favor, even against those whose demands were under \$300. So, in Buckner et al. v. Baker et al., 11 La. 462, it was held that plaintiffs, whose demand exceeded \$300, were entitled to an appeal even against intervenors whose judgments amounted to \$295 only. It was well settled, then, by these as well as by other decisions, that a plaintiff who claimed more than \$300, had a right to appeal from a judgment for a sum less than \$300. Of course, this rule was not construed to include a case in which a plaintiff made a fictitious demand for the mere purpose of obtaining an appeal; as if, in a suit on a promissory note for \$1000, where the piaintiff could only recover that amount with interest, he claimed \$1,000, damages. In every such case, the court promptly dismissed the appeal as an attempted fraud on its juris-But where the value of the thing claimed exceeded \$300; where a bond fide demand was made for a sum exceeding that amount, or where, as in present action, the law prescribed no limitation as to the amount to be recovered, and the plaintiff, who had a right to estimate his damages at any sum, demanded more than \$300, the plaintiff had a right to appeal from a judgment for less than \$300. It was equally well settled by the decisions of the late Supreme Court, that the defendant was entitled to an equal right of appeal from a judgment for less than \$300, when the plaintiff in his original demand claimed more than \$300. In Philips v. Stanley, 1 La. 246, plaintiff sued for \$1,000, damages. The verdict fixed them at one dollar. Defendant appealed. The court held that he was entitled to an appeal. "It is the sum claimed," said the court, "and not that for which judgment is rendered, which confers jurisdiction on the Supreme Court." So, in Lewis v. Clark, 2 La. 437, plaintiff sued for \$800, and damages. The court assessed his damages at \$192 76. Defendant appealed. The court held that he was entitled to an appeal. They said: "It has been repeatedly decided, that it is the sum claimed, and not that recovered, which confers jurisdiction on this court." So, in Gerber v. Marzoni, 3 Rob. 371, defendant appealed from a judgment for less than \$300. The court refused to dismiss the appeal. They said: "The jurisdiction of the Supreme Court is to be tested by the value of what is claimed in the petition. Whatever may be the amount of the judgment given, either party has a right of appeal." It would be easy to cite other decisions to the same effect. But it is sufficient to observe that the entire series of decisions of the Supreme Court, on the right of plaintiff as well as of defendant to appeal from a judgment for less than \$300, where the demand was for more than that sum, is uniform and unbroken, from the adoption of the constitution of 1812 up to the year 1846, without a solitary conflicting decision, without even the dissenting opinion of a single judge.

Surely, then, in adopting the provisions of the constitution of 1812—in refusing to make any change in the words of the provision, because they had long since been settled by judicial and legislative interpretation—the convention expressed as strongly as they could, by words and by action, their determination to adhere to the construction put upon the provision for a period of thirty-three years, and universally acquiesced in by the people of the State; a construction sanctified by time, approved through a series of years, and reaffirmed and republished by the highest judicial tribunal of Louisiana, at the very time the provision was adopted by the convention. Si de interpretatione legis quæratur, in primis inspiciendum est quo jure civitas retro in ejusmodi casibus usa fuisset. ff. 1, 3, 57. If the construction of the words of the constitution, as a question of original interpretation, res integra, admitted of doubt, the deliberate action of the legislature, and the solemu and repeated decisions of the Supreme Court have long since settled the construction too firmly to be shaken, without well founded alarm to the people. "Miserable" says a great judge, "miserable indeed must be the condition of that community, where the law is unsettled, and decisions upon the very point are disregarded when they again come di-

McKee v. Ellis rectly or indirectly into discussion. In such a state of things, good men have nothing to hope, and had men nothing to fear."

In vain was it attempted, in the convention of 1845, to restrict the jurisdiction of this court within narrower limits, and to shut out a large class of suitors

on account of the smallness of the matter in dispute.

To give a novel construction now to the words of the constitution, and thereby to exclude from this court persons, who, under the well settled and uniform construction of the same words in the constitution of 1812, were entitled to an appeal to the Supreme Court, would frustrate the intention of the convention. It would be a fraud upon the constitution. It would be to alter, and not to expound the constitution.

The reasoning by which the appellee seeks to oust this court of jurisdiction

over the present case, is not less startling than the object sought after.

By the judiciary act of 1789, an appeal is allowed from the Circuit Courts to the Supreme Court of the United States in certain cases, where the matter in dispute exceeds \$2,000. The Supreme Court of the United States have determined that their jurisdiction depends on the sum or value of the matter in dispute in that court, and not that which was in dispute in the Circuit Court; and that therefore a plaintiff, who sues for more than \$2,000, may appeal from a judgment for less than \$2,000, but that the defendant would not be entitled to an appeal from such a judgment. As the words of this statute are similar to the words of the constitution of Louisiana, the counsel for the appellee contends that we should reject the construction put upon the words of our own constitution by our own courts, and adopt an interpretation similar to that put upon the statute of the United States, by the courts of the United States; and he refers us to Howard's Reports. 3 Peters' Reports 33. 7 Cranch, 276. 5 Cranch 13. and 3 Dallas, 401.

The case from Howards Report's, is a mere repetition of the point decided in 3d Peters' Rep. 34; and the case in 3d Peters, Gordon and others v. Ogden, is based upon the authority of Wise and Lynn v. The Columbian Turnpike Company, 7 Cranch 276, decided in 1812, and upon the settled practice of the court, which had conformed ever since to that decision. In pronouncing their opinion, the court admitted that the case from 3 Dallas, 401, was directly in point; and that it turned on the principle that, the jurisdiction of the court depended on the sum which was in dispute before the judgment was rendered in the Circuit Court. They added, that although that case was decided by a divided court, and although they thought the jurisdiction of the court depended, by a true construction of the statute on the value of the matter in dispute in the Supreme Court, they "should be much inclined to adhere to the decision in Wilson v. Daniel, (3 Dallas 401,) had not a contrary practice since prevailed." The court then showed that the case from 5 Cranch, 13, was not

It is clear then from the language and reasoning of the Supreme Court of the United States, that if the decision in Wilson v. Daniel had been supported by subsequent decisions, and conformed to in practice, the court would have adhered to it. Thus, the true principle to be extracted from the cases cited by

the appellee proves fatal to his object.

in point; and relied upon the decision in 7 Cranch 276, overruling the decision in Dallas, and upon the practice of the courts from that time up to 1830.

But had there been no such principle in these cases, the notion that we should abandon the construction put by the legislature and courts of Louisiana upon a clause in our own constitution, and adopt the construction given by the courts of the Union to a similar clause in a statute of the United States, when there is no collision between the clauses, is not to be tolerated. It is a principle universally recognised that the judicial department of every government, where such department exists, is the appropriate organ for construing the statutes of that government. The Supreme Court of the United Strees have invariably held that, in cases depending on the statutes or constitution of a State, the settled construction of those statutes or of the constitution by the state courts, must be regarded. The exposition of the law is a part of the law; a fixed and received construction by a State, in its own courts, of its constitution and statutes, makes a part thereof; and the Supreme Court of the United States is bound to conform to such a construction. It would be a perversion of principle, if the judicial exposition of the laws of a State by the state tribunals, should be disregarded. If this be the rule for the construction of the constitution of

McKee v. Ellis.

the State, when it comes immediately and directly for exposition before the Supreme Court of the United States: if that Supreme Court be bound, as it has determined it is bound, where the highest judicial tribunal of a State gives a different construction to a statute, from the exposition formerly adopted by the Supreme Court of the United States, to conform to the construction of the state tribunal, it is not easy to understand, how the fixed, received construction, given by Louisiana herself, to the words of her own constitution, in her own courts, can be disregarded, for the purpose of conforming to another and a contradictory exposition of similar words in a statute of the United States, by the Supreme Court of the United States.

The judgment of the court was pronounced by

SLIDELL, J. This is an action for an assault and battery. The damages are laid in the petition at one theusand dollars. There was judgment against *Ellis* for three hundred dollars, and he has appealed. The appellee asks that the appeal be dismissed for want of jurisdiction in this court.

He rests his motion mainly on decisions of the Supreme Court of the United States. The judiciary act of 1789 gives a writ of error to that court from Circuit courts, in certain cases, where the matter in dispute exceeds the value of two thousand dollars, exclusive of costs. Under this statute, that court has repeatedly held, and it is now the settled interpretation in that tribunal, that, although a greater amount than two thousand dollars be claimed, yet, if there be judgment against the defendant for less than two thousand, the defendant is not entitled to a revision by the Supreme Court of the United States. The language of our constitution, except the expression "exclusive of costs," is substantially the same. Art. 63 declares that, "The Supreme Court, except in cases hereinafter provided, shall have appellate jurisdiction only, which jurisdiction shall extend to all cases when the matter in dispute exceeds three hundred dollars." The appellee asks that we should apply the interpretation adopted in like cases by the Supreme Court of the United States, and consider the matter in dispute as to be tested by the amount of the judgment in the lower court; while the appellant, on the contrary, contends that the amount in dispute must be ascertained by the amount claimed in the petition.

Whatever may be the relative weight of argument on the abstract question of interpretation of these expressions "matter in dispute," found in the act of 1789 and in the constitution of Louisiana, there is another consideration which forbids us to to treat the question in the abstract. The former constitution of this State, which gave place in 1845 to that under which this court was established, contains in the judiciary clause the same expressions, "matter in dispute," as article 63, already cited. During a period of thirty years, it received from the Supreme Court the interpretation which the appellant contends should be given to the existing constitution. It is proper also to remark that, the legislative harmonized with the judicial interpretation. See Code of Pract. art. 875. In copying those words from the constitution of 1812, we must presume that the convention were aware of the construction they had uniformly received, and intended that, in the new constitution, they should have the same meaning.

Motion to dismiss refused.

DUCLAUD V. ROUSSEAU.

DUCLAUD v. ROUSSEAU.

S. intervened in the marriage contract between the defendant and her husband, and made a donation to the former of the right of habitation in a house, with certain rights of use upon a lot of ground, subject to the condition that, in case of a sale of the property by the donor, or of her death, the rights of habitation and use should cease. It was stipulated that, in either of those events, the donee should receive from the donor or her succession, a certain sum as an indemnity. The contract in which the donation was made was registered by the recorder of mortgages. S. subsequently mertgaged the property to plaintiff. The property was seized and sold by the latter, on a confession of judgment by S., and purchased by plaintiff at the sheriff's sale. The certificate of the recorder of mortgages produced at the time of executing the mortgage, showed the property to be free from mortgage, and made no mention of the donation; but the inscription of the marriage contract, and the encumbrance created by it, were notified to the bidders at the time of the sale. In an action by the purchaser to compel the donee to surrender the premises to him: Held, that the inscription of the marriage contract anterior to the execution of the mortgage, was notice to the plaintiff of its existence; and that the execution of the mortgage and the confession of judgment by the donor, do not amount to a sale of the property, and cannot affect the donee's right to the servitude established in her favor.

A mortgage is a species of alienation, but not a sale. It is an alienation of a right on the property—not of the property itself, the title to which, as well as the possession, remains in the owner.

The execution of a mortgage does not imply the debtor's assent to any judicial sale subsequently made to satisfy the debt,

The nature of the evidence upon which a judgment is obtained—whether by the confession of the debtor or otherwise, does not affect the general rule that, in sales under execution, the law neither requires nor presumes the assent of the debtor. Such a sale can never be considered a voluntary one.

Every condition attached to a donation must be so performed, as it is probable that the parties intended it should be performed. C. C. 2032.

In the interpretation of donations, words must be understood according to their usual signification and popular use; and where the intention of the parties is doubtful, the doubt must inure to the benefit of the donee. C. C. 1940, 1942.

A creditor cannot sue to annul a contract, made by the debtor, before his debt accraed. C. C. 1988.

PPEAL from the Parish Court of New Orleans, Maurian, J. Eugenie Savary, the widow of one Joseph Savary, became a party to a marriage contract, executed on the I9 December, 1836, between the defendant and Joseph Rousseau, by which she made to her and her children a donation inter vivos, as follows: "10. Du droit d'habitation et d'usage, pendant sa vie et jusqu'au décès de la future épouse, et aussi pendant la vie des enfants qui pourraient naître du mariage des futurs époux, d'une maison briquetée entre poteaux, d'environ 23 pieds de face, sur 25 pieds de profondeur, que la dite veuve Savary avait fait construire sur partie d'un lot de terre situé rue St. Antoine, entre les rues Amour et Bons Enfants, faubourg Marigny, sur lequel existait déjà des edifices où elle résidait. 20. Du droit de se servir et d'usage en commun avec la dite veuve Savary, pendant tout le tems que durera le droit d'habitation ci-dessus donné, de la cour commune à cette maison et aux édifices où la dite veuve Savary réside, ainsi que de la cuisine qui fait partie des dits édifices le tout suivant certaines conditions mentionnées au dit acte, savoir : 10. Dans le cas de vente par la veuve Savary de la propriété dont fait partie la dite maison, dont le

DUCLAUD U.

droit d'habitation est donné à la future épouse; et, encore, en cas de décès de la dite veuve Savary, le droit d'habitation et d'usage cessera d'exister, et la future épouse devra rendre les lieux dans le mois de l'évènement de l'un ou de l'autre de ces deux cas; mais la dite veuve Savary ou sa succession devra payer à la dite future épouse, pour l'indemniser du dit droit d'habitation et d'usage, la somme de \$1,000, dont la veuve Savary fait donation entre-vifs à la future épouse, ce acceptant dans l'un et dans l'autre des deux cas ci-dessus prévus; laquelle somme sera payée à la future épouse dans le courant du mois qui suivra l'évènement qui donnera lieu à la cessation du dit droit d'habitation et d'usage."

This contract was recorded by the register of mortgages a few days after its date. The donor subsequently executed a mortgage on the same lot of ground, and the certificate produced on the occasion from the register states, the property to be free from any mortgage in the name of Mad. Savary. . The debt secured by the mortgage, not having been paid at maturity, plaintiff obtained a judgment on the confession of the mortgagor, and caused the lot to be sold under execution, and became the purchaser thereof. Notice of the existence of the marriage contract and of the encumbrance resulting from it, was given at the time of this sale. The present action was instituted to compel the defendant to surrender the possession of the property to the plaintiff, the purchaser, at the judicial sale. The court below was of opinion: "1st. That the sale by the sheriff, being made under a writ issued on the mortgage consented to by Mrs. Savary, on the property sold, must be viewed as though it had been made by Mrs. Savary herself: and that consequently the resolutory condition affixed to the marriage contract is fulfilled. 2d. That the plaintiff, as purchaser at the sheriff's sale, acquired nothing but the rights which Mrs. Savary was possessed of, with the charges corresponding thereto. 3d. That the plaintiff, as the mortgage creditor, and therefore, the assignee of Mrs. Savary, could not avail himself of her implied consent to have the property mortgaged sold, without making himself liable to all the obligations, without the performance of which Mrs. Savary could not sell the property. 4th. That Mrs. Savary, according to the marriage contract, could not have sold the property without paying \$1,000 to the defendant. 5th. That the defendant was legally put in default, as to the delivery of the premises, but that no offer to pay her the \$1,000 was proved, nor even alleged by the plaintiff. 6th. That although under these circumstances, judgment could not be rendered in favor of the plaintiff; yet, justice required that that this litigation should be put an end to, by a judgment, condemning the defendant to surrender the property and the plaintiff to pay \$1,000." It accordingly ordered the defendant to surrender the property in dispute to the plaintiff, upon the latter paying to her \$1,000, and costs. From this judgment the plaintiff appealed.

Deslix, for the appellant, contended that the execution of the mortgage, and subsequent sale under a judgment by confession, amounted to a voluntary alienation of the property by the donor, and such as was contemplated by the condition. Code, law 7. de Rebus Alien. Merlin, Répert. Verbo Hypothèque, sec. 1, § 2. Denisart, Collection, verbo Aliénation. Ferrière, Dict. de Pratique, verbo Aliénation. Pothier, Coutume d'Orleans, vol. 2, p. 435. Sirey, vol. 13, part 2, p. 34.

Le Gardeur, for the defendant. The whole controversy between the parties turns upon a correct interpretation of the condition, the accomplishment of which was to operate as a dissolution of the appellee's rights under the donation. With a view to arrive at that correct interpretation, certain questions have been propounded by the court.

DUCLAUD V. ROUSSEAU. I. Did the mortgage given by the widow Savary affect in any manner the

rights of the defendant?

The principles of law which relate to the accomplishment of conditions are: 1st. That, in general, conditions ought to be accomplished in formal specifica. 2d. That they ought to be accomplished in the manner that was probably intended by the parties. 3d. That nothing can be added to or omitted from a condition, to make it more onerous. 4th and lastly. That a condition cannot be extended from one case to another, on account of analogy between those cases-Civil Code, art. 2032. Pothier on Obligations, no. 206. Toullier, vol. 6, ne-586. If these principles be correct, it is plain that the mortgage granted by the widow Savary could not affect the rights of the defendant. What was the widow Savary could not affect the rights of the defendant. condition, the accomplishment of which was to operate as a dissolution of those rights? a sale of the property by Mad. Savary. Now, taking for granted that there exists the greatest possible analogy between a mortgage and a sale, still it cannot be denied that they are different contracts, and governed by different rules, and as a condition cannot be extended from one case to another on account of analogy between them, the inevitable conclusion is that, the condition under consideration was not affected by the mertgage with which Mad. Savary was pleased to encumber the property in favor of Duclaud. But it is contended that by this mortgage she alienated the property, because a mortgage is an alienation. This is true. But an alienation is not a sale. The word alienation is a generical term, which embraces all the different manners in which our rights to property may be disposed of; it is the genus, and each different manner of disposing the species. Thus it is that a donation, a mortgage, a sale, a pledge, are alienations, and yet a donation is not a pledge, a mortgage is not a sale. Now, the parties did not agree that the donation should be dissolved in case the property should be alienated by Mad. Savary, but in case it should be sold by her; thus expressly defining the kind of alienation which was to operate as a dissolution of the contract, and thereby excluding all other kinds from having a like effect. Inclusio unius fit exclusio alterius. Suppose, for a moment that A should give to B a special power to sell certain property; that B should, under that power, mortgage the property; that the mortgage creditor should cause the property to be seized and sold, and it should be adjudicated to C. In an action by A against C for the recovery of the property, would the mortgage granted by B affect the rights of A? Certainly not. Because although a mortgage is an alienation, the power to sell does not include the power to mortgage, a sale and a mortgage being different kinds of alienation. Zachariæ, Droit Civil Français, vol. 3, § 412, p. 126, in fine. Civil Code, art. 2966. Here the parties have agreed upon a sale of the property as the dissolving condition of the contract, and the mortgaging of the property cannot affect their rights, because a mortgage is not a sale. It is, however, contended that the first question propounded by the court, must be solved in the affirmative, because a mortgage implies the debtor's consent to the judicial sale made upon the creditor's demand. To this proposition we cannot assent. The power of the creditor to have the property sold is not given to him by the mortgage, but originates in the pre-existing obligation, the performance of which is secured by the mortgage, which is but an accessory to it. This is clearly explained by the following quotation from Merlin's Répertoire de Jurisprudence, Vo. Hypothèque, sec. 11, § 111, art. 1, no. 1, to wit;

"Quiconque s'est obligé personnellement, est tenu de remplir son engagement

sur tous ses biens mobiliers et immobiliers, présens et à venir.

Les biens du débiteur sont le gage commun de ses créanciers ; et le prix s'en distribue entre eux par contribution, à moins qu'il n'y ait entre les créanciers des

causes légitimes de préférence.

Les causes légitimes de préference, sont les privilèges et les hypothèques.
Ces trois articles présentent la théorie des hypothèques avec une précision et une netteté admirables. Toute obligation personnelle peut se résoudre définitivement en celle de payer une somme déterminée, et le débiteur peut-être contraint à acquitter toutes les sommes dûes, par la vente forcée de ses biens, quelle que soit leur nature, et quelle que soit l'époque à la quelle ils lui adviennent. Le prix de ces biens doit être distribué entre tous les créanciers indistinctement, à moins qu'il n'y ait entre eux des causes légitimes de préférence. Ce sont ces causes légitimes de préférence qui portent le nom de privilèges et d'hypothèques. Les préférences ont lieu dans chacune des distributions successives, lors même que le prix des biens serait plus que

suffisant pour acquitter toutes les dettes; mais elles sont surtout d'une très

grande importance, lorsque le prix des biens n'égale pas le montant des dettes. Cette exposition, tout succincte qu'elle est, nous découvre la nature et les effets généraux de l'hypothèque. L'hypothèque peut être définie l'affectation particulière d'un bien appartenant su débiteur pour la sûreté de l'exécution de ses engagemens. Elle établit un droit accessoire à celui qui résulte d'une obligation principale, en telle sorte qu'il ne peut y avoir d'hypothèque qu'autant qu'il y a une obligation principale à laquelle l'hypothèque trouve à se rattacher. L'hypothèque est un droit dans la chose, jus in re, qui affecte la chose elle-même, et qui consiste principalement à assurer au créancier qui en est investi, la préférence sur d'autres créanciers, dans la distribution du prix de la chose hypothéquée. L'hypothèque ne déplace pas même la possession, du moins le plus souvent ; l'une et l'autre continuent de rester dans la main du débiteur dont le bien est grevé d'hypothèque.

Il est aisé d'apercevoir que l'hypothèque considérée isolément dans les rapports qu'elle établit entre le débiteur et le créancier, n'est d'aucune utilité actuelle pour ce dernier ; en effet, tant que la chose hypothéquée reste sur la tête du débiteur, le créancier hypothécaire peut bien en provoquer la vente pour être payé sur le prix; mais un créancier non hypothécaire a, tout de même, le droit de contraindre son débiteur à l'exécution de ses engagemens, en faisant vendre ses biens, et en s'en faisant délivrer le prix, à concurrence de sa créance. L'hypothèque ne prend de l'efficacité dans la main du créancier hypothècaire, que dans le eas où il suit la chose hypothéquée contre le tiers qui l'a acquise ; et dans celui où, se trouvant en concurrence avec divers créanciers du même débiteur, il réclame la

préférence que lui assigne son titre."

If, as is clearly shown by Merlin, the power to sell, originating in a pre-existing obligation, exists before the mortgage is granted; if the ownership and possession of the mortgaged property continue in the hands of the debtor-the consequence must be that the mortgage granted by Mad. Savary to Duclaud, did not in any manner affect the rights of the defendant. But be this as it may, it But be this as it may, it will not be contested that, in mortgaging the property to Duclaud, Mad. Savary mortgaged that property as it stood in her possession. She did not mortgage an unencumbered property, because the property was encumbered in her hands; non dat qui non habet. Therefore, the rights of Duclaud attached to an encumbered property; it was that property which he caused to be sold, that property which he purchased. The rights of the defendant were clearly then, unaffected by the mortgage and the proceedings under it. It may be true, as is contended by the opposite party, that Mad. Savary, when the hypothecation in favor of Duclaud took place, neglected to disclose the encumbrance with which the property was burthened; but it is equally true that this neglect, although it may give rise to an action against her, can have no effect upon the rights of the defendant, who neither intervened in, nor assented to the act, which, so far as she is concerned, is res inter alios acta.

II. In sales under execution is consent presumed on the part of the debtor?

This question turns exclusively upon the nature and character of sales under execution so far as the debtor is concerned, for if it can be shown by conclusive authority that those sales are considered as being made without the consent and against the wish of the debtor, it is plain that his consent cannot be presumed. Zachariæ, in his Cours de Droit Civil Français, vol. 2, p. 492, § 350, says:

"La vente est volontaire lorsque le propriétaire y procède de son plein gré. La vente est nécessaire, lorsqu'il est obligé d'y consentir par suite d'une nécessité juridique à laquelle il se trouve soumis; c'est ce qui a lieu dans les circonstances

suivantes:

Quand un créancier poursuit contre son débiteur la vente de biens qui appar-

tiennent à ce dernier, &c.

La vente que les créanciers poursuivent contre leur débiteur ou contre le tiers-détenteur d'un immeuble qui leur est hypothéqué, est plus spécialement appelée vente ou expropriation forcée, par opposition aux autres ventes nécessaires qui pré-

sentent plus ou moins d'affinité avec les ventes volontaires.

Pothier, in his "Traité de la Procédure Civile," part IV, chap. II, section v, page 209, vol. 9, (edition of 1835), says: "La saisie réelle est un acte judicaire, par lequel un créancier met sous la main de justice l'héritage, ou autres immeubles de son débiteur, a l'effet d'en poursuivre la vente, pour être payé sur And at page 258, "L'adjudication contient une véritable vente, que la justice, pour le saisi et malgré lui, fait à l'adjudicataire de l'héritage saisi."

DUCLAUD ROUSSEAU. DUCLAUD P

Domat (book 1. title 11, sect. XIII, no. 9), says: "Les créanciers ont droit de faire vendre les biens de leurs débiteurs; et ces sortes de ventes sont forcées, et se font en justice." And at no. 17, of the 11th section of the same book and title: "La rédhibition de la diminution du prix, à cause des défauts de la chose vendue, n'a pas lieu dans les ventes publiques, qui se font en justice. Car dans ces ventes, ce n'est pas le propriétaire qui vend, mais c'est l'autorité de la justice qui tient lieu du vendeur, et qui n'adjuge la chose que telle qu'elle est."

The court's attention is further called to the following quotations from Trop-

long's commentary on Sale, to wit:

"No. 17. Nous terminerons ce que nous avons à dire sur ce point, en rappellant que, quoique le consentement doive être libre, néanmoins on peut pour cause d'utilité publique contraindre une personne à vendre son bien. Des motifs non moins plausibles, autorisent aussi l'expropriation forcée ou saisie immobilière.

"No. 432, L'obligation de garantir l'acheteur de tous troubles et éviction est de droit dans le contrat de vente. Mais la disposition de notre article s'appliquet-elle aux ventes sur saisie? A entendre M. Pigeau, l'adjudicataire aurait contre le saisi et les créanciers une action en garantie. Mais cette opinion et irréfléchie. Ni le saisi, ni les créanciers ns sont les vendeurs. L'un est dépouillé mulgré lui de sa propriété, les autres ne font que solliciter de la justice l'exécution de leur

contrat. A vrai dire, e'est la justice qui vend."

"No. 584. Dans l'ancienne jurisprudence on mettait parmi les vices rédhibitoires, l'incommodité qu'une servitude cachée faisait éprouver à l'acquéreur. Si le Code Civil avait suivi ce système, on devrait décider, sans plus ample examen, que l'acheteur d'un immeuble par voie d'expropriation forcée, n'a pas d'action pour se faire indemniser d'une servitude latente qui vient tout-à-coup dimnuer la valeur de l'objet acheté. Mais le Code a suivi un autre classement. Néanmoins, je pense que les motifs qui ont fait édicter l'art. 1649, doivent étendre sa disposition au cas d'une servitude occulte, dont l'acquéreur sur expropriation forcée se trouve grevé. La raison en est, qu'il n'y a de vendeur dans ces sortes de ventes que la justice.

Our own jurisprudence has adopted the principles of foreign civilians on this subject. Thus in Martin's Reports, vol. 11, page 611, the Supreme Court, in examining into a sheriff's sale, say: "Laws which deprive men of their property, without their consent, should be strictly pursued." Thus again, in the same volume, page 710: "All laws which deprive the citizen of his property, against

his wish, must be strictly pursued."

These authorities show conclusively that, in a sale under execution, the debtor is deprived of his property without his consent, against his wish, and by the sole operation of law. Indeed, this is the very reason why those sales are called, in our jurisprudence, forced sales, and, in the French law, expropriations forces; for if the debtor's consent could be presumed, the sale would not be a forced, but

a voluntary one.

We have, therefore, shown that the mortgage given by Mad. Savary, did not in any manner affect the rights of the defendant; that, after seizure under execution, there is no difference between a judgment on a mortgage debt and a judgment on an ordinary debt; and lastly, that in sales under execution, no consent is presumed on the part of the debtor. What are we to conclude from this? Unquestionably that the forced sale relied upon by the plaintiff, is not the voluntary sale contemplated by the parties to the donation; that the resolutory condition has therefore failed; and that the defendant is clearly entitled to a judgment, quieting her in the enjoyment and possession of the rights vested in her by the donation.

The judgment of the court was pronounced by

Rost, J. The widow of Joseph Savary intervened in the marriage contract between the defendant and her husband, and made a donation to the future wife and her children, of the right of habitation in a house in the city of New Orleans, and of certain rights of use of the town lot on part of which it is built, on condition that, in case of the sale of the property by the donor, or of the death of said donor, those rights of use and habitation should cease to exist, and the donor, or her succession, should, in either case, pay the future wife the sum of \$1,000, as an indemnity, within one month from the death or sale. This contract was

DUCLAUD W. ROUSSEAU.

inscribed in the office of the recorder of mortgages, five days after its date. Subsequently, the widow Savary gave the plaintiff a mortgage on the same town lot, and the certificate of the recorder produced on that occasion shows the property to have been free from mortgage in her name, and makes no mention of the donation. The debt, to secure the payment of which the mortgage was given, not having been paid at maturity, the plaintiff obtained a judgment upon it, on the confession of Mad. Savary, and caused the house and lot in controversy to be seized and sold under execution. The inscription of the marriage contract and the encumbrance it creates upon the property, were notified to the bidders at the time of the adjudication, and are related at large in the sale made by the sheriff.

The plaintiff has instituted this action to compel the defendant to surrender to him the possession of the premises, on the following grounds: 1. That the plaintiff had no notice of the encumbrance, at the time he took the mortgage.

2. That the mortgage was a voluntary alienation of the property, to the amount of the debt.

3. That the giving of the mortgage and the subsequent confession of judgment on the mortgage debt, constitute the sale by the sheriff the voluntary act of Mad. Savary; and that, in consequence of said sale, the rights of use and habitation claimed by the defendant, have ceased to exist.

4. That the right of Mad. Savary to annul the donation, by selling the property, was not personal, and could be exercised for her by any of her creditors, and particularly by a mortgage creditor.

The defendant denies all the allegations of the petition, and alleges that the sale of the property by the sheriff, cannot be viewed as being a sale by the widow Savary, and is not the dissolving condition contemplated by the parties in the act of donation; that should the court be of a different opinion, the plaintiff is bound to pay her the indemnity stipulated in her favor by the contract establishing the servitude complained of.

The court below, being of opinion that the mortgage and subsequent sheriff's sale put an end to the rights of use and habitation of the defendant, and that she was equitably entitled to the indemnity claimed, gave judgment in favor of the plaintiff, on condition that he should pay her the sum of one thousand dollars. From this judgment the plaintiff has appealed, and the defendant asks that it be amended in her favor.

The inscription of the marriage contract being anterior to the date of the mortgage given to the plaintiff, affected him with notice, and his right to recover rests solely upon the question, whether the donation was dissolved by the sheriff's sale. Writers on the civil law assert that, a mortgage is a species of alienation. This is true, but it is not a sale, and the contract in this case is only to be dissolved by a sale. A mortgage is the alienation of a right in the property, not the alienation of the property itself. Perfect ownership becomes imperfect when the property is mortgaged, by the alienation of that real right; but the title and the possession still remain in the owner. Troplong, Hypoth, 2d vol. art. 386. Merlin, Rép. de Jurisp. verbo Hypothèque, sect. 2d, § 3, art, 1. Civil Code, arts. 3246, 3248.

The fact of giving a mortgage, no more implies the debtor's assent to the judicial sale subsequently made to satisfy the debt thus secured, than the fact of contracting an ordinary debt would imply it. The probable intention of Mad. Savary when she gave the mortgage, was to pay the debt at maturity and have the mortgage released. It cannot be presumed that she intended to violate her obligation. The law views the property of debtors as the common pledge of their

DUCLAUD v.
ROUSSRAU.

creditors, and the right to have it sold does not depend upon the nature of their obligations, but is inherent to the obligations themselves, whatever they be. As long as the other creditors of Mad. Savary did not interfere, the only additional right which the mortgage gave the plaintiff, was that of having the mortgaged property seized and sold first, instead of proceeding as the law provides in ordinary seizures under execution.

The fact that the widow Savary honestly confessed the justice of a claim against which she had no defence to make, has no material bearing on this controversy. The nature of the evidence upon which a judgment is obtained does not affect the general rule that, in sales under execution the law neither requires nor presumes the assent of the judgment debtor. See Domat, b. 1st. tit. 2, sect. 13, no. 9. Troplong, De la Vente, nos. 17, 432, 584, 585. Sales under execution are regulations of the use of property falling within the eminent domain of the sovereign. He alone speaks in the writ, commanding the sheriff to seize, take into his custody, advertise and sell the property of debtors; he alone passes to the purchaser the titles of the former owner. In the words of Troplong, it is justice alone which sells. Troplong, Vente, art. 584.

Our courts have uniformly considered that sheriff's sales were made without the consent of the debtor, and have accordingly held that, the laws regulating the manner of making those sales, should be strictly pursued. 11 Mart. 611, 710. But if the positions assumed by the plaintiff's counsel were conceded, an insuperable difficulty would still remain. The counsel has attempted to establish them by analogies and legal inferences, which no one but a lawyer can understand. Is it to be supposed that the illiterate woman who entered into the contract under consideration understood them, and had them in contemplation at the time. Every condition attached to a donation, must be performed in the manner that it is probable the parties intended that it should be. In the interpretation of donations, words must be understood in their usual signification and popular use; and where the intention of the parties is doubtful, the doubt should inure to the benefit of the done. Civil Code, arts. 2032, 1940, 1952.

We are well convinced that the only dissolving conditions contemplated by the parties, were either an ordinary sale effected by the donor personally for a price agreed upon by her, or her death happening during the continuance of her possession; and whatever may be the real or supposed analogy between the sale intended and that which took place, we are not at liberty to extend the condition from one case to the other. Pothier, Oblig. no. 206.

The last ground taken by the plaintiff's counsel is answered by what precedes; and moreover, no creditor can annul a contract made by his debtor, before the time his debt accrued. Civil Code, art. 1988.

For the reasons assigned, it is ordered that the judgment in this case be reversed, and that there be judgment in favor of the defendant, with costs in both courts.

TOWNSEND v. HARRISON.

The privilege granted to an artificer or laborer, on the buildings or other works constructed by him, for the payment of his labor, will exist, as between the parties to the contract, though the work exceed five hundred dollars in value and the contract has not been registered with the recorder of mortgages. The parties to a conuract cannot take advantage of its non-in, scription.

A PPEAL from the District Court of Iberville, Nicholls, J. W. E. Edwards, for the plaintiff.

Labauve, for the appellant. Plaintiff is not entitled to any privilege. Civil Code, arts. 2743, 2746, 3152, 3239. Taylor v. Crain, 16 La. 292.

The judgment of the court was pronounced by

Rost, J. This is a most unjust litigation, on the part of the defendant. The plaintiff claims the stipulated compensation for putting up two sets of kettles and their chimneys, making the sugar-mill and engine walls, putting up the engine and boilers, and doing other work in the sugar-house of the defendant. It is conclusively proved that the work was faithfully done, and that the kettles performed uncommonly well. The compensation claimed for the work is much below the usual price, and the defendant has shown no reason to resist the payment of the sum agreed upon by him. The case was tried before a jury, who returned the following verdict:

"Verdict in favor of plaintiff for the the sum of four hundred and forty-five dollars and sixty-two and a half cents, with legal interest from the institution of this suit, and that the plaintiff be granted a privilege upon the sugar-house and mill belonging to the defendant, Samuel J. Harrison, to secure the payment of the plaintiff's claim and the costs of this suit."

Judgment was rendered in favor of the plaintiff, and the defendant has appealed. The appellee has prayed for the affirmance of the judgment, with damages for a frivolous appeal.

The appellant asks a reversal of the judgment, on the ground that it is unsupported by the law and evidence; and that, as the contract entered into detween the plaintiff and the defendant exceeds five hundred dollars in amount, and has not been recorded, the plaintiff is not entitled to the privilege given him by the judgment; and further, that interest was improperly allowed from the judicial demand.

The first ground has already been answered. In the case of Shepherd v. The Orleans Cotton Press Company, ante page 100, lately determined, we held that, parties to a contract cannot take advantage of the non-inscription of the mortgage which it creates, or which results from it by the operation of law. The same rule applies to privileges like the present. Interest upon the balance claimed was clearly due from the time the defendant was put in default by the judicial demand.

Judgment affirmed.

CAMMACK v. GRIFFIN et al.

In the distribution of the proceeds of a steamer sold under attachment, the creditors of the boat are entitled to a preference over one claiming a privilege as a vendor of the steamer.

Where a vendor takes the notes of the purchaser, payable at a future day, "in payment of the balance of the price," it is a novation of the debt; and the remedy of the vendor will be confined to a personal action against the parties to the notes.

Where the vendors of a steamer intervene in an action by an attaching creditor, claiming to be paid, by preference out of the proceeds of the sale, the amount of notes secured by a deed of trust on the steamer, the production of the notes and deed of trust is indispensable

Townsend E. Harrison. Cammack v. Griffin. to the establishment of their claim. An endorsement on the enrollment decigring the existence of the deed of trust and the date and amount of the notes, and the recital of the deed in the act of sale to the defendant in attachment, are not sufficient against third persons

PPEAL from the Commercial Court of New Orleans, Watts, J. Moore sold to the defendant, Griffin, in October, 1845, the steamer Sea Bird, by notarial act. The act of sale recites: "That this sale is made for the price of \$10,500, in part payment of which said purchaser has paid to the vendor \$3,500 in ready money; and in payment of the balance of said price, to wit, \$7000, the said purchaser has, first, furnished his three several promissory notes, for the sum of \$800 06 each, each drawn to the order of and endorsed by William K. English, dated this day, and payable &c.; and second, the said purchaser hereby puts himself in the place and stead of said vender, and assumes to pay to his acquittance five certain promissory notes, given by him to Albert Todd and Charles H. Haven, as trustees, in trust for Willard Arnold of Kentucky, and secured by deed of trust bearing date 24th September, 1845; one for the sum of \$320 50, payable 24th November, 1845; one for \$1069 83, payable 24th December, 1845; another for the same amount, payable 24th February, 1846; one for same amount, payable 24th March, 1846; and one for the same amount payable 24th May, 1846, with interest from date until paid, at the rate of six per cent per annum." A memorandum of the deed of trust, giving its date, with a description of the notes, was endorsed on the enrollment of the steamer, by the surveyor and inspector, and is set forth in the act of sale to Griffin. Cammack, the plaintiff, having attached the boat, Moore, and the trustees of Arnold, intervened, claiming a privilege as vendors, the former for two of the notes executed in his favor remaining unpaid, and the latter for the amount of the five notes due to them as trustees. There were other intervenors, whose claims the nature of the decision renders it unnecessary to notice. There was a judgment below ordering the payment, in the first place, of certain claims of the first class, for wages of the crew, advances of money, supplies and materials, &c., leaving a balance of \$2517 67, which was ordered to be paid to Todd and Haven, trustees. Moore was also decreed to be entitled to a privilege as vendor, for the amount of his unpaid notes. The plaintiff, Merle, Beylle & Co. and H. C. Cammack & Co., intervening parties, appealed.

C. M. Jones and L. Pierce, for the plaintiffs and appellants. The court below considered that Moore had the privilege, given by the Code to the vendor of moveable things while in the possession of the vendee. But this article of the Code is not applicacle to a ship or vessel, as will appear by examining the articles of the Code touching privileges on certain moveables. The section 2d, beginning at article 3183, says "there are some privileges which act on particular moveables," and, after enumerating various ones, all inapplicable in terms to ships and vessels, at no. 7 mentions that of "the price due on moveable effects, if they are yet in possession of the purchaser." Ships and vessels are never spoken of as moveable effects. The enumeration of the nine cases of privilege shows plainly that the legislator had not, at the time, in contemplation ships and vessels, but intended to treat of them apart; and so he does, after discussing separately the six items from which the others are corollaries: "the privilege of the lessor,"—"the privilege on the thing pledged,"—"the privilege of the depositor,"—"of expenses incurred in the preservation of the thing"—"of the privilege of the vendor of moveable effects"—"of the privilege of the innkeeper." He then commences another section—section 3d—headed, "Of the privileges on ships and merchandise," and says, article 3204, "the following debts are privileged on the price of ships and other vessels," &c.: "8thly, sums due to sellers, &c., if the vessel has never made a voyage," &c. Here, then, is a positive enactment concerning this matter; and it is only before a vessel has made a voyage, that the seller preserves his privilege of vendor. It is in evidence that the Sea Bird had made voyages since her purchase, and under this article the privilege was lost.

But the two notes were taken in payment; and if there had been no voyage, the privilege of the vendor would have been lost. Barrow v. Howe, 2 Mart. N. S. pp. 147, 150. Abat v. Nolle's Syndics, 6 Ibid, N. S. pp. 636, 638. The claim of Todd and Haven, as trustees for Arnold was acquired under a

trust deed, of which we know nothing more than is endorsed on the papers in

the words following:

"I, Isaac H. Hodges, surveyor and inspector, have this day filed a deed of trust in favor of Albert Todd and Charles H. Haven, as trustees, in trust for Willard Arnold, of Kentucky, to secure the said Arnold the payment of five promissory notes," reciting the dates and amounts of the notes. It has been shown that there is no vendor's privilege for this; but it is urged on behalf of Arnold, that this trust deed is intended as a mortgage; that vessels are liable to be mortgaged (art. 3256); that it is not necessary that they should be recorded, but that hypothecations of vessels are made according to the laws and usages of commerce (art. 3272,) and that the mortgage arising from this trust deed, and so noticed on the papers, has its validity recognised by those usages and laws existing in the general Commercial Code, "upheld by general consent, growing out of the matterly waste of patients." out of the mutual wants of nations, and founded on principles of natural equity, which are of universal obligation." Malcom v. Henrietta, 7 La. Rep. 492.

In any case, to be binding on others, the mortgage must be shown to be according to the laws and usages of commerce. What are these laws and usages. By the law of France, mortgages of vessels are forbidden. Boulay Paty, Droit Com. Mar. pp. 106-8. Abbot on Shipping, edit. of 1812, p. 13. By the laws of England, mortgages of a ship or vessel are allowed; and this form of security is regulated, first, by a statute George III, and after, by a statute of 6 George IV, § 110. This statute is of so late a date, that judge Bullard could not have had reference to it, as making the commercial law, and we must therefore go back to the practical difficulties and doubts under the old statutes. Vide Bell's Commentaries, vol. i. p. 158, 164. Holt on Shipping, vol. i, p. 306, says: "Notwithstanding the above cases, Witson v. Hinther, 5 Taunton, 642, &c., it is not to be concluded that there can be no valid mortgage of a ship." "The mortgage of a ship, like the mortgage of any other chattel, may take place subject to the restrictions laid down in courts of law and equity relative to such mortgages. The main and fundamental principle, as respects property in shipping, is this, that there can be no valid mortgage without complying with all the forms of the register acts: a transfer by mortgage, made known to the public, and confined to british subjects, is within the spirit of the acts," &c. The english mortgages, are, therefore, altogether subject to the statutes, passed from time to time, in William, George the Third and George the Fourth's time. Where are the general commercial laws to which we are to That a ship can be mortgaged for debt, we are told by the Code; that it is to be under the general commercial law, &c., we are told by the Supreme Court, in 7 La. Rep., but we are not aware of any nation that has construed these mortgages independent of statute. We know merely what would be a usefulrule of equity to be hereafter established. Judging from analogy to the requi-sitions of the statutes, a mortgage of a ship, to be binding upon third persons, and others acquiring privileges by virtue of laws of their own states or sovereignties and under them, should be so fully stated, recited and explaimed upon the ship's papers, that there could be no mistake or misunderstanding concern-ing the nature and extent of the incumbrance on the part of a creditor seeking information, or persons wishing to require precise information as to his security upon a projected advance.

The plaintiff is deprived of the privilege, given to him by the laws of his country, by an instrument reputed to have been made in the State of Missouri. This instrument is not recorded; the clauses and conditions of the defeasance are not stated, much less recited; and the act is not verified by Hodges.

This would not be a mortgage in England; shall it be so construed here, because Griffin, the purchaser, acknowledges that he has never paid puch notes? It may well be his personal debt if such notes exist; but it is not a lien-it is not a mortgage, entitled to effect against third persons under the commercial law. 5 Taunton, supra.

CAMMACK GRIFFIN.

CAMMACE GRIFFIN. The pretended mortgage, however, in the present case, was made in a common law State, and "there is no substantial difference at common law between a mortgage of real estate and a chattel; in both cases the property vests in the mortgagee subject to be defeated by the performance of the condition; and on forfeiture, or non-performance of the condition, his interest becomes absolute."

Badlam v. Tucker et al., 1 Pick. 399.

Unless, therefore, there was a stipulation in this trust deed leaving the possession with the morgagor, the vessel not having been reduced into possession before the attachment, the latter will have the preference. Edwards v. Harben, 2 Durn. and East, 596. Kidd v. Rawlinson, 2 B. and P., 60. Abbott on Shipping, 10. Portland Bank v. Stubbs, 6 Mass. 425. Putnam v. Dutch, 8 Mass. Rep. 287. Gale v. Ward, 14 Mass. 352. Lamb v. Durant, 12 Mass. 54. Lamphear v. Sumner. 17 Mass. 110. Bartlett v. Williams, 1 Pick 288; and vide 3 Cowen's Rep. p. 187 in note, for all the decisions upon this point. As we have not the trust deed, if any there were, before us, we cannot presume as to its stipulations. There is no reference in the memorandum on the boat's papers to any special agreement as to possession, and it must be considered as a transfer with a defeasance. In such case, under the above decisions, the mortgagee has been negligent, and the attaching creditors have preference, as stated in 2 D. and E. and 1st Pickering.

Cohen and Preston, for the intervenors, Moore, and Todd and Haven. The judgment in favor of Moore is correct. Civil Code, arts. 3194. 3184, no. 7, illustrated by 3230, and 3234. Her claim is postponed only to law charges, 2 Rob. 280, 527. 10 La. 68, Terry's case. Art. 3204 relates to privileges upon ships and vessels for sixty days, into whose hands soever they may come; but the vendor's privilege is only while the moveable belongs to the vendee. These privileges do not conflict: one is special—into whosoever hands; the other is a general privilege, in the hands of the vendee. 17 La. 161. As to the pretence that Moore took the two notes in payment, the authority cited by the counsel of plaintiff only establishes that nothing prevents a debtor and creditor from agreeing, by contract, that a note shall be given and received as a payment. In the cases on this point a recipt was given. The novation resulted from clear expres-

sions used to that effect.

The trustees of Arnold, claim by virtue of the stipulation in their favor, in the sale from Moore to Griffin, that they should be paid as part of the price. See La. Code, art. 1884. But in addition to the vendor's privilege in common with Moore, the trustees had a mortgage. The Civil Code, art. 3272, gives the mortgage, which was made according to the laws and usages of commerce. Abbott on Shipping, p. 36. The Civil Code, article 3256, declares ships and other vessels susceptible of mortgage; and art. 3272 declares, "that hypothecations of ships and other vessels are made according to the laws and

usages of commerce."

An attaching creditor has no priority of payment over privileges and mortgages. An attachment only gives a priority of payment over ordinary creditors, or such as attach later. The attaching creditor can only take the property, cum onere; he attaches the right, title and interest of defendant in the thing, subject to prior liens. But the plaintiff contends that the vendor of a ship has no privilege, because none is given by the section 3, headed, of Privileges on Ships, &c., art. 3204, &c. To this we reply, that articles 3194, and 3184, no. 7, give the privilege, if the property still remain in the possession of the purpurchaser; and articles 3204, &c. give the privilege into whose hands soever the property comes.

T. A. Clarke, for the appellants. H. C. Cammack & Co. W. S. Upton, and

C. M. Randall, for other appellees.

The judgment of the court was pronounced by

Eustis, C. J.* The appeal before us is from a judgment of the late Commercial Court of New Orleans, distributing the proceeds of the steamer Sea Bird among the different classes of creditors. It is prepared with great care, and we regret that it is not in our power to determine several important questions of law which the learned judge has passed upon in his opinion.

CAMMACK E. GRIPPIN.

We concur in the judgment as to the distribution in favor of the creditors, which gives them a preference to the privilege claimed for the vendor. The balance, \$2,517 67, which is assigned to Todd & Haven, trustees of Arnold, we think they are not entitled to receive, adversely to the attaching creditors. It appears that, in October, 1845, in New Orleans, by public act, Moore sold to Griffin the steamer Sea Bird, for the sum of \$10,500, of which \$3,500 was paid in cash, and, in payment of the balance of said price, the purchaser furnished his three promissory notes for the sum of \$800 06 each, payable one at ten days after date, and the others on the first of April and July then next ensuing; and the purchaser placed himself in the stead of the vender and assumed to pay, to his acquittance, five certain promissory notes given by the vendor to Albert Todd, and Charles H. Haven, as trustees for Willard Arnold, of Kentucky, and secured by deed of trust, dated the 24th of September, 1845. The notes were five in number, and bore interest from date, and the last was payable in May, 1846.

An endorsment, on the enrollment, of the deed of trust, giving its date and a description of the notes, was made at St. Louis, and the same endorsement was made in the new enrollment, taken out in New Orleans on the change of ownership. On the steamer being attached, Moore filed his petition and inventory, in which he claimed the vendor's privilege for two of the notes of \$800 06, which he alleges are unpaid. Todd and Haven, as trustees for Arnold, also intervened, and claimed the vendor's privilege, for \$4,599 82, the amount of the five notes which constituted part of the price of the steamer, in the sale from Moore to Griffin, averring that the steamer was subject to the hypothecation created by the deed of trust endorsed on the enrollment. The judgment of the Commercial Court was in favor of the latter claim, which took the balance of the proceeds of the steamer, \$2,517 67; and also considered that Moore's privilege, as vendor, existed, and was in full effect for the amount of the two unpaid notes.

To this claim of Moore, it is objected that the two notes were received in payment of part of the price. The authorities, cited by the counsel for the plaintiff are conclusive on this point, and the words of the act leave no room for doubt. There is a complete novation of the debt, by a substitution in payment of the notes for the price. The notes, on their face, bear that they are in part payment for the steamboat Sea Bird, by act &c. It is clear that the remedy of Moore is confined to his personal action against the parties to the notes. Barrow v. Howe. 2 Mart. N. S. 147. Abat v. Nolte's syndics, 6 Ibid, N. S. 637. In relation to the claim of Tod 1 and Haven, we have no evidence whatever, except the endorsement on the enrollment and the recital in the act of sale from Moore to Griffin. The notes themselves were not produced, nor was the deed of trust exhibited; and on every principle of the law of evidence, against third persons, attaching creditors, their production was indispensable to the establishment of the claim of the intervenors, notwithstanding the confession of judgment by English, in favor of those intervenors. Several reasons have been offered in the written argument of the counsel for Todd & Haven, against the objections taken to the insufficiency of the evidence adduced by them. It is said that Cammack admitted their claim, as proved by the testimony of Marks. We think there is nothing in the testimony which would authorize the belief that, Cammack dispensed with the formalities of law, for his rights as a litigant. It is an error to suppose that Moore, in his intervention, asserted the enforcement of the privilege of Todd & Haven, arising from their alleged debt as being part of the price. Moore claimed only the amount of his two notes, with privilege. It is

CAMMACK T. GRIFFIS. also stated that the pleadings do not deny the claim. A confession of judgment in favor of these intervenors, by *English*, the master and owner of the steamer, was filed on the 16th January, 1846, and, on the 21st of February following, the allegations and rights of the intervenors were formally put at issue, by an answer to the petition of intervenors by the plaintiff.

The intervention of Todd & Haven is not sustained by evidence, and therefore falls; and the balance, \$2517 67, is subject to the attachment of the plaintiff, who has judgment for a sum exceeding that amount.

It is therefore decreed that the judgment of the Commercial Court, in favor of Todd & Haven, trustees, and of Moore, be reversed, and that the sum of \$2,517 67 be held subject to the attachment of the plaintiff, and that the appellees pay the costs of this appeal; in other respects, the judgment of the Commercial Court is affirmed.

EUGENIE v. PREVAL et al.

Prior to the stat. of 30 May, 1846, the removal of the owner, with a slave, into a country where slavery did not exist, and the acquisition of a domicil there, emancipated the slave. That statute cannot be considered as affecting any rights perfected before its passage.

A PPEAL by the plaintiff from a judgment of non-suit rendered by the District Court of New Orleans, Buchanan, J. David, for the appellant. Benjamin and Micou, for the defendants. The judgment of the court was pronounced by

Eustis, C. J. The plaintiff, who was the slave of Gallien Préval, sues for her liberty, and makes Préval, Mrs. Faure, his daughter, and Miss Raynal, defendants. Miss Raynal and Préval disclaimed any ownership, or right of property in the plaintiff. Mrs. Faure asserts her ownership of the plaintiff, and puts at issue the allegations of the petition. Mrs. Faure, before her marriage, left Louisiana, in the year 1830, for France, and the plaintiff was sent with her. She married in France, and returned, after several years, to Louisiana, leaving the plaintiff in France, who only returned in 1838. During the residence of Mrs. Faure, in France, the plaintiff remained in her service. Mrs. Faure has since resided with her father, her husband remaining in the service of France.

Mrs. Faure having married an officer in the french army, her domicil became that of her husband, and must so be held, for all purposes relating to her rights in this suit. Could she hold the plaintiff in slavery in France? It is certain that she could not. The domicil of the servant and her mistress was in France, and the court cannot be ignorant of the institutions of a country whose jurisprudence is every day referred to in illustration of our own. Merlin, Rép. verbe Esclavage, § 1.

This case is nearly the same with that decided in June last, of Josephine v. Poultney, 1 Ann. Rep. p. 329, in which we held that the status of freedom was acquired, not by having been in a country in which slavery did not exist, but by a residence and domicil there. We did not consider the statute of 1846, relied

1666

EUGENIE V. PREVAL.

upon by the counsel for the defendant, as retrospective in its operation, nor in any manner derogating from the general principle, which is established by our Code, in relation to the effect of laws, art. 8: "A law can prescribe only for the future; it can have no retrospective operation, nor can it impair the obligation of contracts." The statute is as follows:

" An act to protect the rights of slave holders, &c.

"Be it enacted, &c. That from the passage of this act, no slave shall be entitled to his or her freedom, under the pretence that he or she has been, with or without the consent of his or her owner, in a country where slavery does not exist, or in any of the States where slavery is prohibited."

It cannot be presumed that it was the intention of the legislature to strike at the past, and divest a right acquired by residence in a foreign country. We understand that statute as operating upon the status of that class of persons for the future, and not upon any rights which had become absolute and vested before its passage. It settles the law on this subject, on the principle laid down by Lord Stowell, in the case of the slave Grace, reported in 2 Haggard's Reports, 94, determined in the High Court of Admiralty of England, on an appeal from the Vice Admiralty Court of Antigua. The common law courts of England have, since the celebrated case of Somersett, maintained the contrary doctrine. Forbes v. Cochrane, 2 Barnwell & Cresswell, 448.

The courts of the different States of the Union, it is believed, have been uniform in their decisions on this subject, and the case of Smith v. Smith, 13 La. 441, was in conformity with them. In that cause the subject is fully examined, and the jurisprudence of the State is shown to be settled by a series of adjudged cases. The right of the legislature to regulate the condition of this class of persons is unquestionable; and, in giving the plaintiff the benefit of the condition which she has acquired, it must be understood, that the judgment is confined to the right of owership and dominion, asserted over her by the defendant, who claims her as a slave.

It is therefore decreed that the judgment appealed from be reversed, and that the plaintiff recover her freedom, and that the defendant, Mrs. Faure, pay to the plaintiff, the sum of \$146, for wages from the institution of this suit; that the said defendant pay the costs of this appeal; those of the court below incurred in proceedings against the two other defendants, to be borne by the plaintiff; the rest to be paid by Mrs. Faure.*

^{*} Benjamin and Micou, for a re-hearing. The court, in its judgment, assumes, "that it is certain that the plaintiff could not be held in slavery in France;" and the opinion is further expressed "that, the court cannot be ignorant of the institutions of a country whose jurisprudence is every day referred to in illustration of our own." The rule of law in Louisiana has been fixed and uniform, "that foreign laws when invoked in favor of a party must be proven as facts," because no tribunal on earth is omniscient. Campbell v. Miller, 3 Mart. N. S. 149. Hernandez v. Garetage, 4 lb. N. S. 419. Norwood v. Green, 5 lb. N. S. 176. Bray v. Cumming, 5 lb. N. S. 254. Malpica v. Mc-Koun, 1 La. 255. Crozier v. Hodge, 3 La. 358. But this is not all at this very moment a bill is pending before the legislature for the purpose of fixing the mode in which the laws of our sister States are to be proven in court; and yet the court declares that it has a judicial knowledge of the institutions of a foreign country. The question before the court is not one of general law, of principles relative to contracts, of those matters of general principle which being based on truth and justice are common to all countries and all ages. It is one of municipal law. It is an eleventary principle that slavery is a municipal institution. If this court has judicial knowledge of the law of France on the subject of slavery, it has the same knowledge of her game laws, of the laws relative to her forests and woods, of the jurisdiction and powers of her mayors, prefects of police and municipal officers.

THE SECOND MUNICIPALITY OF NEW ORLEANS v. DUNCAN.

The ordinance of the council of the Second Municipality of New Orleans of 29th August, 1846. imposing a special tax on all real estate within the limits of the municipality, for the purpose of paying its debts and providing for the support of the public schools, is legal and constitutional.

Art. 127 of the constitution applies to state, and not to municipal taxes.

In the exercise of the power conferred on the council of the city of New Orleans by the 6th sec. of the stat. of 17 Feb. 1805, and subsequently transferred to the councils of the different municipalities by the stat. of 8 March, 1836, of taxing real and personal estate, the corporation is not bound to tax both species of property at the same time; a tax may be legally imposed on either alone.

PPEAL from the Third District Court of New Orleans, Kennedy, J. The defendant appealed from a judgment in this case in the following words: "After evidence and argument, and at the suggestion of the court, a decree is now herein entered, pro forma, in favor of the plaintiffs and against the defendant without prejudice." The action was instituted by the municipality to recover the amount of a tax on real estate owned by the defendant. The tax was assessed under an ordinance of 29 August, 1846, imposing a tax on all real estate within the limits of the municipality.

Lee and Durant, for the plaintiffs, cited stat. 17 Feby. 1805, s. 6. Oakcy v. Mayor, 1 La. 1.

Duncan, pro se.

Schmidt, on the same side. By the 32d article of the constitution, the power of imposing and collecting taxes belongs exclusively to the legislature, the members of which, who are mere temporary agents of the people, cannot delegate this power, because the constitution gives them no such authority. The same inference is the only legitimate deduction which can be drawn from the 127th art, of the constitution, which provides "that taxation shall be equal and uniform throughout the State;" because such equality and uniformity are only attainable by confining the exercise of the power to the legislature, whose authority is coextensive with the territorial limits of the State. It follows that the new constitution has virtually abrogated all powers of taxation possessed by every other political body, except the legislature; and hence, whatever may have been the former powers of the plaintiffs in relation to taxation, they have ceased to exist under the present order of things.

The power of imposing taxes is not an attribute usually belonging to municipal corporations, and when the power is bestowed, it is always limited, so as to be exercised for specific and not for general purposes. Such is the rule deducible from the 6th section of the act of the 17th February, 1805, and from the 2d section of the act of 8th March, 1836, which confer only specific powers, to be exercised for the purposes enumerated, and the special tax does not fulfil any of these

The 1st section of the act of 16th February, 1841, even if in force and constitutional, does not authorize the blending of lawful and unlawful taxation; and the whole ordinance is necessarily void from this inherent defect, and because it is impossible to ascertain what portion of the tax is to be applied to the public schools.

Supposing that the municipality enjoyed the unquestionable right to lay taxes for the purposes mentioned in the preamble of the ordinance, yet it is null and void. All taxation must be fair and equal, "so that no one class of individuals, and no one species of property, may be unequally or unduly assessed," to use the language of Chancellor Kent. 2 Com. 23. If the legislature itself imposed the tax, it must have observed this rule, and it would be preposterous to contend that its creature, the corporation, can, in its exercise of a delegated power, do

more than the principal could have done, had he acted for himself. That it acts unequally, is obvious, since it affects only land and slaves; while horses, car- MUNICIPALITY riages, capital, stock in trade of every description, ships, steamboats, money in banks, and the innumerable moveable effects of a large and flourishing commercial community, are entirely exempt from the operation of the tax.

Because all taxation must be exercised in the usual and ordinary form, and nothing can justify the imposition of a special or extraordinary lax, but some over-

whelming calamity endangering the social existence of the community.

The judgment of the court was pronounced by

Eustis, C. J. This is an action for the amount of a tax on real estate owned by the defendant. It is charged that, by an ordinance of the 29th of August, 1846, a special tax of one per cent was imposed on all real estate within the taxable limits of the municipality, and that the sum of eighty-five dollars is due by the defendant, according to the assessment made on a lot belonging to him, situated within said limits. There was judgment for the plaintiffs, and the defendant appealed. The matter in dispute between the parties not exceeding the sum of three hundred dollars, the duty of this court is confined to a consideration of the constitutionality and legality of the tax. No questions have been raised in argument, except those which relate directly to one or the other of these subjects.

The ordinance is as follows:

"Whereas, by the statement of the acting treasurer of this municipality, it appears that the revenue of said municipality will not be sufficient to meet the demands on the treasury, owing to the maturity of notes and bonds issued by said municipality; and as it is the duty and determination of the council to make all necessary arrangements in their power for the faithful observance of all contracts, and discharge of all debts of said municipality; and, whereas, an expenditure is required for the necessary improvements of said municipality, for the municipal hall, for which an outlay has been made and heavy contracts entered into at the north by the contractor, who relies upon the faithful payment of the instalments by the municipality, as well as for the public schools, which are of paramount importance and utility to the people, and deserving of our warmest support; therefore,

Be it ordained, that by virtue of the authority vested in the mayor and city council by the 6th section of an act to incorporate the city of New Orleans, approved the 17th February, 1805, and by the 2d section of an act approved 8th March, 1836, and the 1st section of an act approved 16th February, 1841, relative to public schools, and other acts of the legislature, a special tax on all real estate situated within the taxable limits of this municipality, of one dollar on every hundred dollars, is hereby imposed on the value of real estate, as ascertained by the assessment of 1846. Also, a tax of four dollars on each slave in said municipality, as per said assessment of 1846: and the treasurer is hereby authorized and required to collect said taxes immediately after the first day of October."

The objects of the imposition of this tax are within the lawful powers of the municipality and proper subjects of administration. The tax itself is said to be unconstitutional, it being in conflict with art. 127 of the constitution of 1845. That article, by its very terms, applies to state, and not to municipal taxes. provides for the equality and uniformity of taxation throughout the State. As an approximation to either of these objects would be impossible without a general valuation of the property to be taxed, the article provides for the postponement

DUNCAR.

SECOND MUNICIPALITY 9. DUNCAN.

of its operation until after the year 1848, thus giving time for the legislature to provide the machinery to carry into effect a principle which has hitherto been a standing monument of the impotency of civil government, in applying to the complicated facts of society, abstractions, however true, just and important they may be. As we have had occasion to observe recently, in the case of Egerton v. The Third Municipality, 1 Ann. Rep. 435, the framers of this constitution had before them the condition of the municipalities of New Orleans, with their debts, their abuses and their wants, and their corporate existence is recognized and continued as to certain public rights, by an express provision. The jurisprudence under which the present system of taxation had grown up, was before them, and the power of remedying the evils of misgovernment was left, in state quo, with the legislature; and the convention confined itself to providing for the state government, leaving the municipal bodies, as it is believed sound policy justified, under legislative control.

It remains next to examine the question of the legality of this tax. It is urged in argument that, by the act of 1805, which is called the charter of the city, the mayor and council are authorized to raise money by taxation on real and personal estate only, and that the right of taxation is indivisible, and must be exercised entirely on both, and not on one alone, of these objects. In the case of Oakey v. The Mayor et al., 1 La. p. 1, et seq. decided in 1830, the Supreme Court thus notices this construction, which was maintained by the counsel who argued that case: "The first objection is that, by the charter, the corporation is authorized to tax real and personal estate, and that the tax now complained of is on real estate alone. It does not appear to us that the power given to tax real and personal estate, renders it imperative on the corporation to tax both. By the same section of the law, the city council are empowered to exercise their authority as to them may seem proper."

It was also urged by the counsel for the plaintiff in that case that, taxes could only be laid under the act of 1805, to meet a deficiency in the ordinary revenues of the city: but this view was not sustained by the court, which recognized in the corporation a general power to raise money by taxation. From that period the power has been exercised, and, on the division of the city, the councils of the municipalities succeeded to that of the corporation of New Orleans. The act of 1841, referred to in the preamble of the ordinance, authorizes the municipalities to establish schools within their limits, and to levy taxes for their support. This construction of the power of the council to lay taxes, has been acted upon ever since that decision was made, not only without any check on the part of the legislature, but with an implied assent, resulting from their legislation on subjects of municipal administration; and, as late as 1844, an act was passed requiring the approval of the mayor, or, in the event of his veto, the votes of threefourths of the members of the council passing the same, te every municipal ordinance creating a special tax on real estate. And this court, in the case of The Second Municipality v. Morgan, 1 Ann. 111, recognized the power of the municipality to lay a special tax on real estate, for the legitimate purposes of administration. The constitutional provision concerning taxation, is the declaration of a principle which has its foundation in political justice, and is one of the bases of the social compact under our institutions. In recognizing it as such, we are not assisted in our inquiries as to the course we are bound to pursue in the matter under advisement.

SECOND

DUNCAH.

We have no means before us by which we can form an idea of the equality of the taxation by this municipality, in its practical results. We are furnished MUNICIPALITY with no evidence of the mode in which the public burthens operate upon the inhabitants. We have a simple admission made in the record, "that there is no other special ordinance of the Second Municipality assessing taxes on personal property." We know of no reason imperative on the municipality to impose their taxes in any particular form, or to include any other species of property in an ordinance imposing a tax on real estate. It constitutes no objection, under any view of the subject, to the validity of this tax, that personal property was not also taxed by special ordinance.

To establish the inequality of a tax like this affirmatively something more must be offered than a naked fact like this, which does not aid us in forming a general conclusion. Nor does it follow that, because article 127 of the constitution does not apply to municipal taxes, the right of municipal corporations to lay taxes is arbitrary and without restraint. That right is always limited by the principles on which our institutions are founded, and which the constitution recognises as sacred. The Supreme Court of Kentucky, in the case of the City of Louisville v. M' Quillan's Heirs, 9 Dana's Reports, 516, in answer to an argument pressed at bar, that the right of the city of Louisville to tax was unlimited, has presented this subject in a very clear light:

"But," say the court, "if the assessment against M Quillan's heirs, should be deemed a tax, we cannot admit that the taxing power is, in this country, altogether arbitrary. Such a doctrine would be no less alarming than anomalous. When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? Ad valorem or specific? And what classes of property are the fittest subjects of taxation, are all questions wisely confided by our constitution to the legislative department, subject to no other limitation than that of the moral influence of public virtue, and responsibility to public opinion. But, in some other respects, and so far as the power of taxation may be effectual without being thus limited, it is, in our judgment, limited by some of the declared ends and principles of the fundamental law. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our state constitution. An exact equalization of the burden of taxation, is unattainable and utopian. But still there are well defined limits within which the practical equality of the constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal; but it must be general and uniform. Thus, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt, upon any other ground than that of public service. The legislature, in the plenitude of its taxing power, cannot have constitutional authority to exact from one citizen, or even one county, the entire revenue for the whole commonwealth. Such an exaction, by whatever name the legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be done constitutionally, without the consent of the owner or others, or without retribution of the value in money.

"The distinction between constitutional taxation, and the taking of private property for public use by legislative will, may not be definable with perfect precision. But we are clearly of the opinion that, whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated, without

SECOND MUNICIPALITY O. DUNCAR.

his consent, to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather, by the same public will, from such constituent members of the same community generally, as own the same kind of property. Taxation and representation go together; and representative responsibility is one of the chief conservative principles of our form of government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible. And, although there may be a discrimination in the subjects of taxation, still, persons in the same class, and property of the same kind must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky. And this idea, fortified by the spirit of our constitution, is in our judgment, confirmed by so much of the twelfth section of the tenth article as declares 'nor shall any man's property be taken, or applied to public use, without the consent of his representatives, and without just compensation being previously made to him.'

"The object of this great guaranty was to secure every citizen against spoliation by a dominant faction, or by a rapacious public power, acting in obedience to the will of a constituent body for whose use his property may be taken, and from whom no similar contribution is required. It intended that public responsibility and the power of exaction for public use, should be in some degree commensurable; and, therefore, it should be understood as providing that the public shall not take the property of any citizen for its own use, without his consent or an equivalent in money, or in similar contributions by itself. If this be not its practical effect, it is mere brutum fulmen, and may always be evaded by exactions made in the false semblance of taxation."

See also the case of Sutton's Heirs v. City of Louisville, 5th Dana's Reports, 28.

The extreme difficulty of approaching an equality in the distribution of the burthens of taxation is obvious to the most seperficial observer, nor is its solution rendered more easy by the progress of the science of political economy. The various, complicated and hidden sources of wealth, and the different opinions of economists as to the operation of any one tax or impost, show the obstacles which would attend any judicial enquiry as to the approximation to equality in a system of taxation. Federalist, No. 21. 2 Story, on Const. § 994 et seq. Debates in Convention of Louisiana, p. 892 et seq. In the case before us, to use the language of Chief Justice Marshall, "we are not driven to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse of the power." M'Culloch v. State of Maryland, 4 Wheaton, 430. In conclusion it may not be out of place to state that, as the guardians of the rights and property of citizens, we should fail in our duty if we were to forbear to exercise our power on any proper occasion te protect them from spoliation; at the same time it must be confined to its constitutional limits, and to those cases in which its authority cannot be questioned, and its action will consequently be effectual.

As this court held in the case of The Second Municipality v. Morgan, 1 Ann. R. 111, in which a citizen was relieved against the enforcement of an illegal municipal exaction, the form of taxation presents no impediment to the action of the judiciary in any violation of common right, and the wrong which it endeavors to cover will be as fully redressed, as in cases of a direct and palpable

unlawful appropriation of private property. That in both cases the citizen has a right to claim judicial protection, and that no judge can withhold it, is equally MUNICIPALITY supported by authority and the sound principles of the social compact.

SECOND DUNCAR.

M Culloch v. The State of Maryland, 4 Wheaton, 427. Bussey v. Gilmore, 3 Greenleaf, 191. Nance v. Howard, Breese's Rep. 183. 3 Howard, 133, 151. 212, 720. 3 Dallas, 171. 5 Wheaton 317. Second Municipality v. Morgan, 1 Annual Rep. 111. Apthorp v. Portland Bank, 12 Massachusetts, 262.

Judgment affirmed.

Youngblood v. Dodd.

Improper behaviour on the part of an overseer, in the use of abusive language and threats of violence towards others in the service of his employer, will authorize his immediate discharge, without rendering his employer liable for his wages for the whole term for which he was engaged.

PPEAL from the District Court of Iberville, Nicholls, J.

Talbot, for the plaintiff, cited Civ. Code, arts. 2719, 2720. Nolan v. Danks, 1 Rob. 332.

Edwards and Labauve, for the appellant, cited Civ. Code, arts. 2719 to 2721. 3 La. 299.

The judgment of the court was pronounced by

Rest, J. The plaintiff alleges that he engaged his services to the defendant, as overseer, at the salary of \$800 a year, and entered upon the discharge of his duties on the first day of January, 1846; that, on the 8th of February following, he was discharged, without cause, by the son and acting agent of the defendant. and that he is entitled and claims to be paid for the whole year. The answer denies every allegation in the petition, and prays that the plaintiff be put to strict proof. The court below gave judgment in favor of the plaintiff for the sum claimed, and the defendant appealed.

We think there is error in the judgment. It appears by the ptaintiff's own declaration that he sent to the defendant's house for a riding horse, which was refused him, and that, upon that refusal, he went to the acting agent of the defendant, used abusive language to him, and threatened him with corporeal chastisement if he meddled with his business.

The court below seems to have been of opinion that the declarations must be taken together, and that the plaintiff had the right to chastise those who meddled with his business. We incline to a different opinion; but, if the law should be, as supposed by the judge, it was no part of the plaintiff's business to use the riding horses of his employer against his will, and he has shown no justification for the threats he made. He avers in his petition the capacity of the person who discharged him, and we consider his outrageous conduct to that person a sufficient cause.

In the case of Conrey v. Brandegee, ante, p. 132, we held that honeste vivere formed part of the contract of agency, and that threats of personal viojence by either party justified the other in withdrawing from it, under a full reservation of his rights. That decision settles this case; and the claim of the plaintiff must be limited to compensation for the time he actually served, at the rate of \$800 per annum. This compensation the defendant is willing to allow.

YOURGBLOOD e. Dodd,

It is therefore ordered that the judgment in this case be reversed, and that there be judgment for the plaintiff for the sum of \$84 50, with legal interest from judicial demand, and the costs of the District Court; those of this appeal to be paid by the plaintiff and appellee.

PARKER v. ALEXANDER et al.

It is not necessary, to enable a lessor to preserve her recourse against the surety of her lessee, that she should enforce her privilege against the lessee himself. It is enough that she has done no act to destroy or impair the privilege, or which could have prevented her, at any moment, from subrogating the surety to all her rights. Per Curiam: A surety is not discharged by the mere omission of the creditor to enforce or preserve a privilege. C. 3030.

Novation will not be presumed. The intention to make a novation must be clearly shown, C. C. 2186.

Interest may be recovered from judicial demand, when the debt is due by contract.

A PPEAL from the Parish Court of New Orleans, Maurian, J. E. T. Parker, for the plaintiff. The surety of a debtor will not be discharged by the mere forbearance of the creditor to sue the principal. Theobald, Princ. and Agent, § 166. Eyre v. Everett, 2 Russ. 381. Orme v. Young,

Holt, N. P. C. 84. Cooly v. Lawrence, 4 Mart. 639. Warfield v. Ludewig, 9 Rob. 240. Huie v. Bailey, 16 La 213. 3 Mart. N. S. 596. 8 Mart. N. S. 277. 3 La. 214. 5 La. 267, 18 La. 470.

Schmidt, for the appellant, contended that the surety was discharged, citing Roman v. Peters, 2 Robinson, 479.

The judgment of the court was pronounced by

Kins, J. The plaintiff, who is a married woman separated in property from her husband, claims from Alexander & Henry, as principals, and Roy, assurety, \$800, with interest from judicial demand, for rent alleged to be due. A judgment was rendered against the defendants for the sum claimed, from which Roy, the surety, has appealed.

The appellant avers in his answer, that he has been discharged from the obligations of his suretyship, by reason of the plaintiff's failure to enforce her privilege as lessor on the property of his principals, and of her having changed the conditions of the contract with the lessees, without his consent. He further contends that, the plaintiff recovered a judgment against Alexander, one of the lessees, for \$49, which was determined to be the only sum due for rent, in March. 1843, a date subsequent to the expiration of the lease; which sum, not having been claimed in the present suit from the surety, is presumed to have been paid, and was a full discharge of all dues under the contract. It is also asserted that the plaintiff has failed to make proof that the lessees were ever in possession of the property leased.

The contract of lease, on which this action is founded, stipulated for the payment of rent at the rate of \$1300 a year, and by its terms expired on the 24th of January, 1844. The appellant became the surety of the lessees for the payment of the rent.

I. The possession of the premises by Alexander & Henry is fully shown, not only by the testimony of witnesses, but by receipts for rent as late as June, 1842, produced on the trial by the defendants themselves.

II. The ground assumed that all the rent due had been paid, we think is unsupported by the evidence. After the expiration of the lease on which the plaintiff's demand is based, the premises were let by a second contract to Alexander alone, who remained in possession, until March. 1843. He failed to pay his rent under this second contract, and a suit was instituted against him, and a judgment recovered for a small sum found to be due. This claim for rent, which accrued under the second contract, to which the appellant was no party, cannot be construed into an admission that that which had accrued under a previous and different contract, entered into with different parties, had been paid.

against her tenants for the collection of rent, and when she commenced her suit the effects upon which the law established a privilege in her favor had been removed beyond her reach. In order to preserve her recourse against her surety, it was not indispensable that she should have enforced her privilege against the lessees; it was sufficient that she had done no act which destroyed or impaired the privilege, or which would have prevented her, at any moment, from subrogating the surety to the full right accorded to her by law. The surety is not discharged by the mere omission of the creditor to enforce or preserve a privilege. To produce that effect, the creditor must do some act, by which the subrogation can no longer be operated in favor of the surety. Civil Code, art. 3030. 7 Toul. no. 172. Pothier, Ob. no. 557.

IV. In support of the alleged change in the conditions of the contract, several receipts have been produced from the husband of the plaintiff, for rent of the premises in question, at \$83-33 per month. No authority has been shown from the plaintiff to her husband to change the contract, diminish the rate of rent, or otherwise stipulate in relation to the lease, and her right to recover rent in accordance with its terms, which accrued subsequent to those payments, remains unaffected by his acts. No change in the terms of the contract is to be inferred from those receipts. They merely show the remission of a part of a debt which had already accrued, of which the surety cannot complain. The evidence, in our opinion, establishes no novation or change in the conditions of the contract, whereby the surety has been discharged. The intention to novate must be clearly shown; it is not presumed. Civil Code, art. 2186.

The plaintiff has prayed that the judgment appealed from be amended, by allowing her interest from judicial demand. To this she is legally entitled, the sum being due on a contract.

It is therefore ordered that the judgment of the lower court be amended, and that the plaintiff recover five per cent interest on the amount of that judgment, from the 11th of January, 1844, the date of citation. In other respects the judgment is affirmed, the appellant paying the costs of both courts.

COLT v. O'CALLAGHAN.

An intervenor may appeal from a judgment though his claim be for less than three hundred dollars, where the amount claimed by the plaintiff exceeds that sum.

A PPEAL from the Commercial Court of New Orleans, Walts, J. Elwyn, for the plaintiff. Howard, for the appellants.

The judgment of the court was pronounced by

COLT 6. O'CALLAGHAN.

King, J. The plaintiff has moved to dismiss the appeal of the interveners, on the ground that their respective claims are not sufficient in amount to give jurisdiction to this court. We think the motion ought not to prevail.

The demands of the intervenors, with one exception, are for sums less than \$300. The plaintiff's demand, however exceeds that amount. In the cases of Hart v. Lodwick, and Buckner et al. v. Baker, it was held that the amount claimed by the plaintiff gave the right of appeal; and this right was exercised in those cases against intervenors, whose respective claims were less than \$300. 8 La. 166. 11 La. 463.

The second section of article 4 of the constitution of 1812, which gave appellate jurisdiction to the Supreme Court, when the matter in dispute exceeded the sum of three hundred dollars, and under which the decisions referred to were rendered, has been incorporated in the 63d article of the present constitution, and must have been adopted with a full knowledge of the interpretation which it had previously received. The jurisdiction of this court, as far as relates to the section referred to, remains unchanged. The application to dismiss is therefore refused.

SEXTON et al. v. McGILL.

The proof of loss which will authorize the introduction of inferior evidence, must depend on the particular circumstances of each case.

The oath of a subscribing witness, attesting the execution of a bond by which the obligor bound himself to make a good title to certain land, taken before the parish judge by whem the bond was recorded, is, prima facie, sufficient proof of its genuineness.

Where the subscribing witness to an instrument resides out of the State, the signature of the party by whom the act was executed may be proved by other witnessess.

The return of the sheriff on a subpœna taken out for a subscribing witness to an instrument, that, after diligent search and enquiry, no person of that name could be found in the parish, is not sufficient to authorize proof of the signature of the party by whom the act was executed. Per Curiam: The degree of diligence to be used in the search for subscribing witnesses to private acts is the same as that required in the search for a lost paper. It must be a strict, diligent and honest enquiry and search.

Plaintiffs' ancestor having acquired, during marriage, a warrant authorizing the holder to enter a certain quantity of public lands previously offered for sale, located it, after the death of his wife, on a part of the public domain which he occupied with his family, and on other adjoining lands, which had not been offered for sale until after her death. Under a pre-emption right acquired by a settlement commenced during the community, and continued after its dissolution, he purchased another portion; and other land was purchased by him after the dissolution of the marriage, under a settlement right of a third person, also acquired by him during the marriage. In an action by the heirs of the wife, against the defendants claiming under a purchase made from plaintiffs' ancestor after the dissolution of the community, the purchase being considered to have been made without notice; Held, that the title to the lands never vested in the community, and that whatever equitable claim plaintiffs may have against their father, the title of the defendant is unaffected by it. Per Curiam: Parchasers, without notice, cannot be disturbed by reason of frauds committed by their vendors, unless their participation in them be proved.

A PPEAL from the District Court of Concordia, Wilson, J. Plaintiffs' father purchased during marriage, a government warrant issued in favor of one Le Page, authorizing the holder to enter any 320 acres of public domain previously offered for sale. This warrant was located by him on a portion of the

EEXTON v. McGill.

public domain which he had occupied with his family, and on other adjoining land, but which was not offered for sale till after the death of his wife. Under a right of pre-emption acquired by a settlement commenced during the community and continued after its dissolution, he purchased another portion of the public land; and a third portion was purchased by him, after the dissolution of the community, under a settlement right of a third person, also acquired by him during marriage. The plaintiffs' claim, as heirs of their mother, one undivided half of the lands, on the ground that the warrants and settlement rights belonged to the community, and that the purchase by their father inured to the benefit of the community. The defendants claim by purchase by their ancestor from plaintiffs' father, and there was a judgment below in their favor, from which the plaintiffs appealed.

The defendants having offered in evidence a copy of a bond, signed by plaintiffs' ancestor, by which he bound himself to make them a valid title to the lands in contest, the following bill of exceptions was taken to the opinion of the court, admitting it:

"Be it remembered that, on the trial of this cause, the defendants, by their counsel, offered in evidence, to prove the existence, loss, and contents of a certain title bond or deed, declared upon by them as title, a record contained in book E, pp. 452-3, in parish judge's office, Concordia, purporting to be a copy on record of said title bond or deed, with the oath of a subscribing witness showing its execution, and the certificate of the parish judge attesting the record: also the testimony of judge Guion to verify the said record, and to prove the existence of said original instrument, and contents of same; and the testimony of McCall, agent of the defendants, that he had made diligent search for the original, without success: also the testimony of Sparrow and Copley, that diligent search had been made at the land office at Ouachita and at Washington city, without success, for said instrument. Also proof that the loss of said instrument had been advertised during the year 1842, in the manner required by law: and upon this testimony they offered the said record as secondary evidence of the contents of said instrument, which evidence contained in said record plaintiffs, by their counsel, objected to, on the ground that the existence and loss of said instrument were not sufficiently shown; that the loss should have been shown by the affidavit of the defendants; that the genuineness of the original instrument recorded was not shown; that the record of the same was illegally made, not having been proved by acknowledgement of the party, nor by the oath of a subscribing witness before a notary and two witnesses, and the said acknowledgement or proof recorded with the instrument as required by law; and that the testimony of judge Guion going to establish said original and said record was inadmissible, so far as his impressions were given, and so far as they went to establish by parol the correctness of said record:-all of which objections the court overruled, and admitted the said secondary evidence of said title bond or bill of sale. By the Court: It was proved that search was made diligently in the parish judge's office, at Vidalia, for said paper, and that written notice was served on the counsel of the plaintiffs to produce it."

The condition of the bond signed by plaintiffs' ancestor is in these words: "The condition of the above obligation is such that, whereas the said Daniel Sexton hath this day bargained and sold to said James McGill, all and singular the tracts, or parcels, or body of land, claimed by him, and lying and being on lake Bruin, in the parish of Concordia, State of Louisiana, about forty miles

BEXTON v. McGill. above the town of Vidalia, snpposed to contain in the entirety, seven hundred and eighty acres, be the same more or less, for and in consideration of the sum of \$5,500: now, if the said Sexton shall make to said McGill, a good and sufficient deed or deeds for said body of land, so soon as he shall get his title thereto derived from the government, completed by patent, &c., the said deed or deeds to be with warranty, general against all persons whatever, then the above obligation to be void; else to remain in full force.

DANIEL SEXTON. [Seal]

Witness, T. T. GRAYSON."

J. Dunlap and T. P. Farrar, for the appellants. The copy of the bond was improperly admitted as evidence: First, because it is but the copy of a copy of a private act, the absence of the original not being accounted for. Secondly, because the execution of the original was never duly proven, and the record of the same was itlegal. C. C. 2250, 2242. 8 Mart. N. S. 565 and 140. 3 La. 419. 11 Mart. 243. 3 Mart. N. S. 396. If the document was properly received, still it is not evidence of a sale, because: first, there is no description of the thing sold; second, it was never accepted by the vendee. C. C. 2414, 1794, 1759, 1804. 4 Mart. N. S. 261. If it be evidence of a sale, it conveyed only the undivided half of the lands belonging to the community. No evidence was offered to show that the vendor claimed the whole of the lands in dispute, nor what lands he did claim; and therefore the law presumes that the sale was limited to his legal interest in said lands, which was one-half. The decision in 7 La. p. 230, is conclusive as to this point.

The endorsement on the land receipts is no evidence of a sale, for want of acceptance and of a fixed price. 4 Mart. N. S. 263. Nor of a ratification of any previous sale. C. C. 2252. 1 Rob. 457-59. 11 Mart. 612. 17 La. 293. Stery's Equity, 307. Whatever right Sexton acquired during the marriage, either in or to the land, one-half vested in his wife's heirs on the dissolution of the community. Civil Code, art. 2371 and 2374. Merlin's Rép. verbo Communauté, § v., Gomez, Ad leges Tauri, 57 in notis. Neither the act of 1810 nor that of 1813, nor the Code, require that the title of the wife in community property should be recorded, to give it effect as to third persons. In relation to the title of wives,

the rule of Caveat emptor applies.

H. A. Bullard, on the same side. The husband acquired, during the existence of the community, a warrant which authorized him to locate three hundred and twenty acres of public land, or to give it in payment of land at two delars per acre. He acquired from Johnson a right to an improvement, which was made before the pre-emption law of 1814. The family resided on the land during the life time of the wife, and valuable improvements were made. After her death the warrant was located on the same land, and a small fraction besides, was purchased for cash. The rest of the land was acquired in virtue of the pre-

emption which existed at the death of Mrs. Sexton.

We contend that these rights, not certainly in the land, but to it—jus ad rem, acquired and improved by the community, belonged to the community the moment they were acquired; and that these rights, which are essentially property, became irrevocably vested, on the dissolution of the community, in the spouses, each for one undivided half. That rights of this kind constitute property (biens) cannot be doubted. They are appreciable in money. They were acquired out of the means of the community, and the lands afterwards acquired in consummation of these equitable titles was improved by the collaboration of the parties. The husband, after his wife's death, had no right to dispose of more than his half; and, in perfecting liis title by locating the warrant and entering the preemption, he must be regarded as having acted for the heirs of his wife, as a trustee or negotiorum gestor. See the case in 7 La.

The Code (article 2371) enumerates the property which composes the acquests and gains of the community. It consists of the produce of the reciprocal industry and labor of the parties—of the estates (les biens, in the French text) acquired during the marriage, except by donation or inheritance. Article 2374, which declares that all the property or effects possessed by the parties at the dissolution of the marriage, are presumed to belong to the community, establishes only a rule of evidence, throwing upon the party who claims a part of such

property, as exclusively his, the burden of showing it. But the moment pro-

perty is acquired, it becomes common property.

Gomez, in treating on the 72d law of Toro, says: "Item confirmatur, quia in bonis superlucratis et acquisitis constante matrimonio ipso jure transit dominium et possessio in uxorem pro medietate," &c. Ad Leges Tauri, page 689, sec. 2, in notis. Hence the very next text of the law of Toro, saves from confiscation the share of the wife, on the conviction of her husband of a crime followed by a confiscation of his property. The same law exists in France. Merlin's Rép. de Jurisp., verbo Communauté, sec. v. The property is vested at once in such a manner, that the right of the wife cannot be defeated by a fraudulent alienation, during the marriage.

But the warrant was a real right—a right to appropriate to the exclusive use of the holder, a portion of the domain. It was an equitable right to three hundred and twenty acres of land. It was a right to the thing on the fulfilment of a single condition, and although it conferred no exclusive title to the particular tract, it was an equitable right, binding on the government, and would have entitled the holder to take the whole domain, if it had consisted of only three hundred and twenty acres. The entry of it at the land office was nothing more than giving to that right a more definite character, a kind of assiette. The land officers had no discretion in the matter. The pre-emption right was still incomplete. The settlement and cultivation of Sexton's vendor authorized him to enter and purchase the specific tract occupied and improved by him. Both, then, were equitable rights to land, and the legal title is still in the government, unless patents have issued, which is not shown.

The question then arises, could the husband, acting after his wife's death, in taking in his own name a certificate of purchase and consummation of these equitable titles belonging to the community, make the property his, and could he confer on his vendee a valid title for more than one-half. It is, I believe, conceded, that if he had done so before the death of his wife, the land itself would have belonged to the community. There can be no doubt on that point. If so, it appears plain, that the title would have been to every essential purpose the same acquired during the marriage, by the purchase of the land warrant and the pre-emption right. Nothing else had been done than to obtain from the government a recognition of these primitive titles and the completion of the inchoate

right.

But it is said the defendant had no notice of these rights and of the title in the community. In the first place, I answer, that he knew that Sexton and his wife lived on the land, and cultivated and improved it; and, secondly, that no law requires that the title of the wife should be recorded. If the husband dispose, during marriage, of property in fraud of his wife's rights, there is no doubt she can recover the specific property thus fraudulently alienated, even in the hands of third persons, although the original purchase was made in the name of the husband alone. In the case of Hennen v. Caldwell, your predecessors held, that acts under private signature by the husband during the marriage, conclude the wife. He is considered as acting for her. No statute requires that her right and title should be made known by registry, any more than her legal mortgage. I refer the court to the statutes of 1810 and 1813. See B. & C.'s Digest, 596. The law has provided no means for giving publicity to such rights or titles of the wife, and yet they undoubtedly exist, or else they could not be the object of a It follows, therefore, that like tacit mortgages, the purfraudulent disposition. chaser runs the risk of them, if he deals with a man in such a situation in life as to expose his property to such secret encumbrances, and acquires no greater right than his vendor had. The husband was, in relation to the heirs of his wife, being their self-constituted agent, a negotiorum gestor, in making the entry at the land office. That act consummated the title, and it is a well settled doctrine, that the principal may, in all cases, identify and trace his property, and claim its restoration; and if the question were between the plaintiffs and their father, their right to one-half the land appears to me self-evident. He could not gain at their expense—he could not divest them of a right and invest it in himself.

It is with these views of the rights of the parties originally, that the court ought to put a construction on the conveyance made by Sexton to McGill. It will appear that he does not sell a specific quantity of land, but only all his land on lake Bruin. The deed ought to be construed as the will of Theall was, in the case referred to in argument. He should be considered as having sold only one-

SEXTON. O. McGill.

SEXTOR McGILL. half, which alone was his, leaving the defendant his recourse and warranty on his vendor. if it should appear from the acts of the parties that, as between them-

selves, the intention was to sell the whole land.

Stacy and Sparrow, for the defendants. At the death of Ann Sexton, the community had no title to any specific land by virtue of the land warrant. Acts of Congress of 1807, p. 107, vol. 4th, U. S. Laws. 7 Wheaton's Rep. Hoofnagle v. Anderson, p. 217. It was simply an incorporeal right, subject to be exercised at some future time. It was either real or personal. If personal, the vesting it in lands gave the heirs no title to those lands, even as against Sexton, any more than if it had been money of the community which Sexton had appropriated to the purchase. If real, Sexton had no right to alienate the share of the minors, without the intervention of justice, nor to acquire lands by purchase for said minors. Civil Code, arts. 334, 333, 337, 338. 6 Mart. N. S. p. 21. If these heirs now ratify the purchase of the land by their father, they are bound also to ratify the alienation of it made by him (Civil Code, arts. 1786, 1788 1789,) and to look to him alone for their part of the price.

Admitting that Sexton entered the lands by virtue ot pre-emption rights acquired by him during the existence of the marriage, the community had no title to the land. The law was nothing but a pollicitation on the part of the government, unaccepted at the death of Mrs. Sexton.) Civil Code, arts. 2414, 1794. Milligan's Heirs v. Hargrove, 6 Mart. N. S. p. 341. 7 Wheaton, p. 217. The husband had no right after the death of his wife, to accept it so as to bind her heirs, If they now accept the purchase, they can do it only by ratifying the sale he

Sexton was the head and master of the community. Civil Code, art. 2373. As such, he could accept or reject the proposition of the government. The community ceased to exist with this pollicitation unaccepted, and with no right acquired to it. 7 La. pp. 222, 224. Civil Code, art. 1804.

There is no evidence that the defendant, McGill, under whom defendants claim, knew that this land was entered by virtue of a pre-emption right and land warrant; or, if he knew this, that he knew that those incipient rights had been acquired by Sexton before the death of his wife, which took place nearly six years before Sexton entered the land. This knowledge is not to be presumed in him, for bad faith is never presumed. 10 Mart. p. 439. 15 Peters, 104. then being a purchaser in good faith and of a person having the only legal title to the property, cannot be affected either by the previous fraud of Sexton, or the equitable rights of his children to the land. 6 Cranch's Rep. p. 133. Fletcher v. Peck, 8 Mart. N. S. p. 342. Thomas v. Mead, Ibid. p. 227. 9 La. pp. 288, 298. 13 La. 130. 11 La. 407. 10 Johnson, p. 196. Ibid. 14, 415.

The judgment of the court was pronounced by

Rost, J. The plaintiffs claim one undivided half of several adjoining tracts of land, under the following circumstances: Their father acquired during marriage, a warrant, issued in favor of one of the companions of Lewis and Clarker which authorized him to locate three hundred and twenty acres of public land previously offered for sale by government, or to give it in payment of public lands at the rate of two dollars per acre. He occupied at the time, with his family, a portion of the public domain, which was not offered for sale till after the death of his wife. When he was authorized to do so, he acquired a portion of those lands, and others adjoining them, with the warrant. Under the settlement commenced during the community and continued after its dissolution, he purchased another portion; the remainder was purchased under the settlement right of another person, also acquired by him pending marriage.

The plaintiffs allege that the defendants are in possession of the lands without title, and claim one undivided half of them, on the following grounds: 1st, That the warrant and settlement rights belonged to the community existing between their father and mother. 2d, That the purchases made by their father after its dissolution, should inure to their benefit, for one undivided half. 3d, That the document on which the defendants claim title, if proved, purports to be a promise of their father, to sell all his lands on lake Bruin, and must be understood as conveying only the land he had; that is to say, one undivided half of the whole.

The defendants set up title by purchase from Daniel Sexton by their ancestor, and want of notice. The case was tried in the first instance, before a jury, whose finding was in favor of the defendants, and the plaintiffs have appealed from the judgment rendered on the verdict.

The defendants offered certain evidence to prove the existence, loss and contents of the title under which they claim, to the introduction of which the plaintiffs' counsel excepted, on the ground that the existence and loss of the instrument was not sufficiently shown; that the evidence adduced was not supported by the oath of the party; that the genuineness of the original act was not proven, and that it had not been properly recorded.

There is no error in the decision of the court below overruling those exceptions. The original was recorded as required by art. 2250 of the Civil Code, in order to have effect against third persons; and the sworn declaration of the subscribing witness establishes, prima facie, its genuineness. The defendants are the widow and minor heirs of the original purchaser, and as it has not been shown that the title was ever in their possession, they cannot be required to swear that they lost it. The evidence of the loss satisfied the court and jury, and, in our opinion, justified the introduction of the secondary evidence adduced by the defendants. The proof of loss which will authorize the introduction of inferior evidence, must depend on the particular circumstances of each case. 7 Mart. N. S. p. 548.

The title, of which the record is offered, is a promise of Daniel Sexton, to sell to the defendants' ancestor, for the sum of \$5,500, all his lands on lake Bruin, supposed to contain, in the whole, seven hundred and eighty acres, under the penalty of \$10,000. It is supported by an assignment to the purchaser, for value received, of the receipts given by the receiver of the land office to Sexton, for the price of all the lands purchased by him, and also by delivery of the land at the time, and actual possession ever since by the purchaser and his heirs.

The plaintiffs excepted to the introduction, in evidence, of the receipts of the land office and of the transfer of Sexton, on the ground that the subscribing witness should have been produced, or at least an attempt made to procure his testimony. It is proved that this witness resides out of the State, and, under the aniform practice of our courts, the signature of Daniel Sexton was properly proved by other witnesses.

Two other documents were also offered in evidence, to prove circumstances tending to corroborate the sale. The plaintiffs excepted to their introduction, on the ground that it was not shown that the subscribing witnesses were either dead or absent, and that they alone were competent to prove the signature of Daniel Sexton. It appears that subpenss were taken out for those witnesses, upon which the sheriff made return that, after diligent search and inquiry, there were no persons of that name to be found in the parish. The court erred in suffering the signature to be proved by other witnesses, under that showing. The degree of diligence in the search for subscribing witnesses to private acts, is the same which is required in the search for a lost paper; it must be a strict, diligent and honest inquiry and search, 1 Greenleaf's Evid. p. 574.

The sheriff's return of non est inventus, on the subpana, is not, by itself, a compliance with the rule.

SEXTON O. McGill.

SERTON D. McGill. But disregarding this evidence, there is no reason to doubt the reality of the transfer and the good faith of the purchaser. We consider that the defendants have made out their allegation, that their ancestor was a purchaser without notice: and this court has repeatedly decided, that such purchasers cannot be disturbed, by reason of frauds committed by their vendors, unless their participation in them is proved. In the case of Tippet and others v. Everson, which does not materially differ from the present, judge Mathews, a high authority in questions involving equitable considerations, said: "Whether this court would interfere to enforce the inchoate rights of settlers on the domain of the United States, and to determine on the preference which is to be given to one or the other of two individuals contending for a right of pre-emption, while the contest remains between the original settlers, is unnecessary to determine. The defendant is an innocent purchaser, without notice of the claim of the plaintiffs, and ought not to be disturbed in his property and possession, on so vague and uncertain a title." 8 Mart. p. 719.

We concur in these views. The land in this case was not purchased till after the dissolution of the community. That acquired with the warrant could not have been purchased during its continuance, because it had not been offered for sale. The title to the land never vested in the community, and whatever equitable claim the plaintiffs may have against their father, the title of the defendants is unaffected by it.

Judgment affirmed,

URQUHART et al. v. SARGENT.

The adoption in art. 237, of tit. 2, book 3, of the Civil Code of 1803, of the general principle of the spanish law, that property acquired by one spouse from the other by donation before or after marriage or otherwise, or through the succession of a child, shall, in case of a second marriage by the surviving spouse, belong to the children of the first marriage, did not repeal the exceptions to that principle existing under the spanish laws. The principle must be considered to have been adopted here, subject to the limitations and modifications which belonged to it in Spain.

A testatrix living in Pennsylvania, having two children by her first husband, and one by a second, conveyed "in consideration of natural affection and of the sum of five dollars," to the last child, by deed, all her right and interest in certain lands represented by her as having belonged to her last husband. By her will, made several years after, she bequeathed all the residue of her estate, in equal portions, to her three children: Held, that though the sale be considered as a docation, the lands so conveyed would not be subject to collation, the terms of the conveyance showing unequivocally that it was the intention of the donor that the property should inure as an advantage to her son.

A PPEAL from the District Court of Concordia, Curry, J. This action was instituted by Mary Urquhart, the only surviving child of Mary Sargent, by her first husband David Williams, and by the children of James C. Williams, her brother. The ancestor of the plaintiffs, David Williams, died in 1792, leaving four children. Mary, one of the plaintiffs, and James C., David, and Anna Williams. His widow was married, in 1793, to Winthrop Sargent, who died in 1822, leaving two sons, George W. Sargent, the defendant, and another son, who died in 1823, intestate, unmarried, and without issue. David Williams, the son, also died intestate, unmarried, and without issue. Anna Williams was married to one Thompson, by whom she had three

URQUHART

SARGERT.

children; but Thompson and his wife died in 1823, and their three children a few days after them. The plaintiffs allege that the estate left by Thompson's children was inherited equally by their paternal and maternal ascendants, and that Mary Sargent, the only surviving ascendant on the maternal side, was only entitled to the usufruct of one moiety of the estate, her second marriage having deprived her of the absolute title, which vested in the petitioners, descendants of her first marriage. They aver that the successions of Thompson and his wife consisted, in part, of certain lands, for which the defendant, as heir of Mary Sargent, has brought suit, claiming them as his property; and they pray that he may be compelled to desist from setting up title thereto, and for damages. They allege that Winthrop Sargent, acquired, by purchase, two tracts of land in this State; that there was no administration on his succession here; that after his death, his widow, Mary Sargent, by a deed of sale conveyed to the defendant all her interest in the two tracts for the sum of five dollars, and for the maternal love and affection which she bore to him; that this sale was intended as a donation, and must be so considered; and they pray that the defendant may be required to collate the property, or to surrender it for division according to law. They aver that Mary Sargent was entitled to one half of these tracts of land as being community property, and that, on the death of defendant's brother in 1823, Mary Sargent became entitled to his half of the other half of the property.

The defendant prayed that the plaintiff's demand might be rejected, claiming to be the owner of the two tracts of land acquired by his father by purchase,* and of one undivided third of all the property of every description belonging to the succession of Mary Sargent, his mother.

The deed from Mary Sargent to the defendant, and her will, were offered in evidence. It was admitted that the english common law formed part of the law of Pennsylvania; that Mary Sargent, and her second husband, Winthrop Sargent, never resided in Pennsylvania; that one of the tracts of land conveyed by Mary Sargent to the defendant was a donation to Winthrop Sargent from the spanish government, and that the other tract was acquired by Winthrop Sargent, by purchase, during marriage; and that the property forming the successions of Thompson and his wife, was acquired by them by purchase, during their marriage. The deed to the defendant was executed by Mary Sarent, in 1840; and she died in 1843. The sourt below ordered the defendant to collate the two tracts of land conveyed to him by his mother; and from this judgment he has appealed.

Frost and Prentiss, for the plaintiffs. Mary Sargent having contracted a second marriage, inherited only the usufruct of the Thompson property. Code of 1808, p. 258. It will be urged that there was by the spanish law, an exception to the general rule, restricting the wife's rights to the usufruct, in cases where the property was acquired by the labor of the child, as was the case with the property left by the Thompsons.

The question is whether that exception was abolished by the statute adopting the Code of 1808, or whether it remained in full force until the repealing act of 1828? In support of its existence there are three decisions. 6 Mart. N S. 31. 7 Ibid. 666. 15 La. 112.

It is a settled rule that, when any statute is revised, or one act framed from another, some parts being omitted, the parts omitted are not to be revived by construction, but are to be considered as annulled. 1 Pick. 45. 12 Mass. 544.

^{*}An error, in the answer, as to the interest of the defendant in these tracts, was corrected, apparently by consent.

URQUILART SABGEST

6 Dana, 589-90. 9 Pick. 97. 11 Mart. 149. 12 Mass. 537, 545. 10 Pick. 30. 5 Pick. 109.

The preamble of a statute is the key to its construction. sets forth the necessity for "collecting in a single work the laws in force, which might serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books, which being for the most part written in foreign languages offer in their interpretation inexhaustible sources of litigation." This of itself shows that the legislature meant this single work to be the guide for courts and juries.

"Such a construction ought to be put upon a statute as may best answer the intention which the makers had in view. And this intention is sometimes to be collected from the cause or necessity of making the statute, and sometimes from other circumstances." 15 Johns. 381.

The second section is in these words, "whatever in the ancient civil laws of this territory, or the territorial statutes, is contrary to the dispositions contained in said digest, or irreconcilable with them, is hereby abrogated." Now an exception is certainly something contrary to, and irreconcilable with, the general rnle.

The principle of stare decisis, will be invoked. We reply, "it is obvious that when the intention of the legislature is clearly to the contrary, no current of decisions can or ought to counteract that intention." 3 Chitty's Pract. 55. 1

Black. 69, 70, 77. 1 Chitty's Rep. 299.

The deed to the defendant is both by the civil and common law a deed of gift. The burden of proof is on the vendee, to prove a valuable consideration. No such evidence has been introduced, and under article 1326 the son is bound

Stockton and Steele, for the defendant. 1st. No court of Louisiana can entertain a demand for collation on the part of the plaintiffs, because such claim, being a merely personal demand, like all other personal or moveable property, is to be governed by the laws of the domicil of the deceased, to wit, the laws of Pennsylvania, where the succession is administered; and it can be prosecuted only before the court in Pennsylvania having jurisdiction of the distribution of the estate.

2d. Collation can be asked only on a final distribution of the estate: it is never competent for the parties claiming collation to institute a petitory action for the thing on account of which collation is claimed to be due; and consequently, if there is no distribution about to be made, on which to found the claim for colla-

tion, then there is no foundation on which to base a judgment.

3d. If the court shall be of opinion that a case is shown requiring any other judgment than one of dismissal for want of jurisdiction, we hold that the judgment, in so far as it orders the defendant to collate, is erroneous, and ought to be reversed, and, in all other particulars, confirmed; because the act of Mary Sargent making a will in Pennsylvania, which was her domicil, is in fact an express declaration, on her part, that the donation of the lands in Louisiana, made in her lifetime to the defendant, was intended as an advancement to him, over and above what she bequeathed to the other heirs, and therefore, no collation is due; and we hold there was no forfeiture, on the part of Mary Sargent, of her fee simple right in the lands descended to her from her grand-children, because the said lands were acquired by Mrs. Anna Williams, wife of Jonathan Thompson, by purchase, &c.

First. As to the first point—the objection to the jurisdiction. To sustain this position, it is, perhaps, only necessary to establish, that the claim of collation, set up by the plaintiffs, is simply a personal demand, or demand of money. The law of Louisiana is conclusive on this subject; for it makes the thing which has been given, and on account of which collation is claimed, to be the property absolutely of the donee, to whom it tenders, however, the option, in case collation is due, of surrendering the thing, or of keeping it, and taking less in the distribution of the estate; and in case he exercises no choice, then it treats the property as belonging to the donee. See C. C. 1254, 1255, 1256. If the donee elects to collate in kind, from the moment of his election, the thing belongs to the succession, and is no longer at his risk. See Civil Code, 1339. This election to collate in kind is equivalent to a sale or conveyance made by the donee to the succession: he may sell it, or burden it with mortgages; or it may be taken in execution for his debts, &c. See C. C., 1348, 1349. This thing, therefore, forms no part of the succession which is to be divided: it is

the property of the donee, the value of which he may, perhaps, owe to the succession of the doner; and if so, it is an incorporeal right—a debt—personal property belonging to said succession, to be governed, disposed of, and distributed according to the laws of the donicil of the donor, at the time of his death. See Story's Conflict of Laws, § 481.

Second. But even if the domicil of the testatrix was in Louisiana, the succession there opened, and the claim for collation well founded, still there must be a suit for partition on which to found it; because, collation is but an incident to a suit for partition. The present suit is, in fact, a petitory action, in which no valid judgment can be rendered, except one of dismissal. By reference to art. 1258 of the Louisiana Code it will be perceived that it is there expressly stated, that the claim for collation is but an incident to a suit for partition.

Third. There is sufficient evidence of the intention of the donor, that the lands in Louisiana were given to the defendant, as an advancement over and

above what is given to the other heirs.

By articles 1309, 1310, 1311 of the Civil Code, the heir who has received from the ancestor a donation or legacy, is not bound to collate what he has so received, if the ancestor has sufficiently expressed that it was intended by him,

as an advancement over and above what is given to the other heirs.

There is an apparent contrariety in these three articles of the Code, as to the evidence to be furnished by the heir who desires to excuse himself from the obligation of collating. Art. 1309 says, "the donee shall not be bound to collate, if the donor has formally expressed his will, that what he thus gave was an advantage or extra part," &c. Article 1310 allows proof to be made of this expression of will, by a public act made subsequent to the donation, &c. And lastly, art. 1311 says, "the declaration that the gift or legacy is intended as an advantage or extra portion, may be made in other equivalent terms, provided they indicate, in an unequivocal manner, that such was the will of the donor." There is a like contrariety between arts. 221 and 227 of the Code, which have reference to the acknowledgment of illegitimate children; the first requiring that it shall be made by public act, and the latter admitting other means of evidence as equivalent and sufficient. In a late case, Complum's Heirs v. Prescott et al., 12 Rob. 56, arts. 221 and 227 are reconciled and construed, and other evidence than that by a public act is deemed sufficient. We therefore suppose, that the intention of the donor that the donation should be an extraportion, may be established by any reasonable evidence.

The common law of England is proved to be the law of Pennsylvania, according to which, the claim for collation could take place only in case lands had been given by way of advancement in marriage, and afterwards, other lands descended in fee simple, from the same ancestor, to the donee and her sisters. It was necessary, in order to warrant the claim for bringing the lands so donated into hotchpotch, that the other lands should have descended in fee simple; a descent of lands in fee tail would not support the claim, as an estate tail can be created only by the express direction of the donor. See 2 Blackstone's Com. 190, 191. The particular customs of London and Yorkshire are much the same as to personal property: such is, also, the law of Scotland. See Black.'s Com. 517. There was no proof in this case, that the statute law of Pennsylvania has altered the common law; but we are aware that such is the fact, and that, by the statute law of Pennsylvania, collation is due by the heir who has received any donation from the ancestor in his lifetime, provided the ancestor dies intestate, and not otherwise. It appears, then, that both the common law and the statute law of Pennsylvania demand, that the donation shall be brought into hotchpotch (or shall be collated), unless the ancestor shall have expressed his intention to be otherwise. The making a will, or the creation of an estate tail, is, however, evidence that the ancestor intended the donation as an advancement to the donee, over and above what is given to the other heirs. The common law, and the statute law of Pennsylvania, in reference to this subject, are both founded (as is the Louisiana law) on the supposed desire of the ancestor, in the absence of evidence to the contrary, that his heirs shall share equally all his property. Now, any evidence which shall destroy this presumption, is sufficient to defeat the claim for collation. This is effectually done in Pennsylvania, by making a will. This was done by Mary Sargent, who, at the date of making her will, and at the date of her death, resided in Pennsylvania. She must be presumed in making her will in the place of her domicil, to have had reference to the laws of Pennsylvania, according to which the act of making a will is an express deUBQUHART SARGENY.

claration that, she gave the defendant the lands in Louisiana, as an advantage and extra portion, over and above what was given to the other heirs. Mary Sargent never, at any time, resided in Louisiana; had she resided in Louisiana at the date of her death, a more explicit declaration of intention, than the mere act of making a will, would have been necessary to excuse the defendant from collation, because she would then have been held to have acted with reference to the laws of Louisiana. The case is very different where she acted with reference to the laws of Pennsylvania, which require no other act than the mere making of the will to evidence her intention, that the donation of the lands

should be an advancement over the other heirs.

The question is, whether it is to be believed that Mary Sargeant, in making a deed of gift to the defendant, in 1840, of the lands in Louisiana, and afterward in 1843, making a will in Pennsylvania, by which she devises all her estate equally to be divided among her own heirs, has not thereby sufficiently expressed her will and intention that said gift should be an extra portion, &c.? The strict rules of law as to the formalities of executing a will, are rigidly adhered to; but when established, the law is liberal in so construing the contents Therefore, of the instrument, as to carry out the intention of the testator. where the intention of the testator is manifest, to dispose of property, although he entirely misdescribes it—calls it personal, when he intends real property, &c., yet effect shall be given to his real intention. See the case of *Doe ex dem. Tofield* v. *Tofield*, 11 East's Rep. 246, mentioned in Roberts on Wills, 387, Exeter, N. H., edit. See also Roberts on Wills, 413. lbid. 465.

The testatrix in this case had resided most of her life in Pennsylvania. She may reasonably be supposed to have been well advised by the best counsel, as to the requirements of the laws of Pennsylvania, in order to make a valid will; and we may fairly conclude, without any presumption of law to that effect, that she well understood that if she did not make a will, and died intestate, the gift of lands in Louisiana to the defendant, would not avail him anything. It is fairly presumable that she made the will to prevent this contravention of her wishes and intentions. But the law presumes, that she knew the law of Pennsylvania, and that she acted in reference to it; that she intended by her will, what that law intends, to wit, that the donation of the lands in Louisiana should be an extra

portion to the defendant.

The case of Anstruther v. Chalmers, mentioned in Story's Conflict of Laws, 491, reported in 2 Simons' Reports, 1, and 3 Hagg. Ecc. Rep. 444, is perfectly to our purpose. The court there laid down the rule, "that in the construction of a will, the lex domicilii must govern, unless there is sufficient on its face to show a different intention in the testator;" "that, being domiciled in England, it was presumed that the testatrix intended the law of England to be applied; and that there was not enough in the will to repel that presumption." The will of Mary Sargent must, then, be construed by the lex domicilii, by the laws of Pennsylvania, which make the will itself to be a declaration of the donor that the gift was intended as an extra portion. See the case of Gordon v. Brown,

Story C. Laws, § 490.

Fourth. The case must be governed entirely by the laws of Pennsylvania; and by the laws of that State, collation cannot be lawfully demanded from the defendant before any tribunal whatever. Story says, in his work on the Conflict of Laws, § 481: "The universal principle now recognized by the common law, though it was formerly much contested, is, that the succession to personal property is governed exclusively by the law of the actual domicil of the intestate, at the time of his death;" and again, in the same paragraph and page, he says, "and this doctrine is maintained with equal broadness by the generality of foreign jurists." In the case of Balfour v. Scott, the facts were these: "A person domiciled in England died intestate, leaving real estate in Scotland. The heir was one of the next of kin, and claimed a share of the personal estate. To this claim it was objected that, by the law of Scotland, the herr cannot share in the personal property with the other next of kin, except on condition of collating the real estate; that is, bringing it into a mass with the personal estate, to form one common subject of division, It was determined, however, that he was entitled to take his share without complying with that obligation. There the English law decided the question." See Story's Conflict of Laws, § 486.

A claim for collation, according to the laws of Pennsylvania, can be effectually made only in case of intestacy; and according to the laws of Louisiana, only

URQUHART

BARGEST.

ia case of actual or quasi intestacy: consequently, the above authority is directly in point, to show, that the distribution of the estate of Mary Surgent must be made in Pennsylvania, and according to the laws of that State, which was the placel of her domicil. To succeed under the laws of Pennsylvania, the plaintiffs are bound to show that Mary Sargent died intestate. We have established that there was a valid and legal will; that the land given to defendant did not in any manner belong to Mary Sargent at the time of her death; and any claim which plaintiffs might pretend to set up sgainst defendant in consequence of such gift, is only a personal demand, is only personal property, and must be governed by the laws of Pennsylvania.

As to the forfeiture of the lands descended to the testatrix from the children of Anna Williams, her daughter: it is admitted that these lands were acquired by purchase, by Anna Williams; and so, under the decision in 15 La. 112. it is clear that no forfeiture has taken place under article 1746 of the Louisians

Code.

The judgment of the court was pronounced by

EUSTIS, C. J. Winthrop Sargent married the widow of David Williams. The plaintiffs are Mrs. Urquhart, issue of the first marriage, and the children of James C. Williams, her brother. George W. Sargent, the defendant, is the only surviving issue of the second marriage. The late Mrs. Sargent, as surviving ascendant in the maternal line, took half the succession of her three grand children, the minor children of the late Jonathan Thompson, in 1823. It is contended by the plaintiffs that she was only entitled to the usufruct, in consequence of her second marriage subsequent to the death of the father of Mrs. Thompson, the mother of the minors.

This is a question which has been very fully discussed, and decided several times by the Supreme Court, under the jurisprudence which prevailed before the repeal of the laws of Spain. The court always held that, the article in the Code cited in argument, did not repeal the exceptions which still existed limiting its operations. Verret and others v. Theriot, 15 La. 112. Le Blanc v. Landry, 7 Mart. N. S. 668. Duncan's Executors v. Hampton, 6 Mart. N. S. 32.

Winthrop Sargent, the husband by second marriage of Mrs. Sargent, died possessed of two tracts of land on lake St. John, in the parish of Concordia, In 1840, Mrs. Sargent conveyed to her son, the defendant, all her right, title and interest in said lands, in consideration of the natural affection which she bore him, and also of the sum of five dollars to her in hand paid. By her will, made in March, 1843, after some legacies, the testatrix gives all the rest, residue and remainder of her estate, real and personal, whatsoever and wheresoever, one third part to her children, Mrs. Urquhart, and the defendant Geo. W. Sargent, and to the children of her deceased son, James C. Williams.

The intention of the testatrix that the undisposed of portion of her estate should be equally divided among her children and their descendants, in equal shares, as directed, is evident; but the form of a sale, in which the conveyance of these tracts of land is made, we think shows the intention that something beside a donation, subject to collation, was intended by that act. Both the conveyance and the will were made in Philadelphia. The petition charges that "said sale was intended as a donation, and is to be considered as such." If it was, the manifestation of will on the part of the donor that it should inure as an advantage to her son, we think unequivocally results from its terms. She considered that these lands might of right be given to the defendant, without doing injustice to her other heirs; and of this we have evidence in this recital of the conveyance: "Being the same tracts formerly belonging to Winthrop Sargent

URQUHART e. Sargest. and John Steele, and which, by conveyance of his share by said John Steele to said Winthrop Sargent, became wholly vested in said Winthrop Sargent, in fee simple." One of the tracts, called the Winthrop Sargent tract, was granted to the father of the defendant by the spanish government, and formed no part of the community existing between him and his wife. Heirs of Rouquier v. His Executors, 5 Mart. N. S. 99. Frique v. Hopkins, 4 Mart. N. S. 212. Gayoso de Lemos v. Garcia, 1 Mart. N. S. 324.

The donor appeared to consider them as of right the patrimony of the only sen of her last husband, and we think made the conveyance in the furtherance of that idea, to the exclusion of the relatives of the half blood. This view is fortified by the fact that the donor was a resident of, and domiciliated in, Pensylvania, where both instruments were made, by the laws of which collation cannot be exacted, as under the laws of Louisiana. Harrison v. Nixon, 9 Peters, 503. Story, Conflict of Laws, § 491. Gordon v. Brown, 3 Haggard Ecc. Rep. pp. 455, 444, et seq.

The judgment appealed from is therefore reversed, and judgment is rendered for the defendant, with costs in both courts.

*Prentiss, for a rehearing. The plaintiffs ask for a rehearing of so much of this cause as relates to defendant's liability to collate with them, such portion of the two tracts of land as he received by donation from his mother during her life time

The court erred in deciding that the donation to defendant, by his mother, is not subject to collution.

I. The deed from Mary Sargent to G. W. Sargent, is to be governed entirely by the laws of Louisiana, both as to its construction and effect. Nor does the fact of its having been executed in Philadelphia, alter the matter; it has precisely the effect it would have if executed in Louisiana, and no more. Story lays down the doctrine in his Conflict of Laws, as 424, 427, 428, 435, as being recognized by the common law, and also by all the foreign jurists, "that the laws of the place where real property is situated, exclusively govern in respect to the rights of parties, the modes of transfer, and the solemnities which should accompany them." Art. 10, Civil Code, says: "The effect of acts passed in one country to have effect in another country, is regulated by the laws of the country where they are to have effect." At all events, this rule is universal in regard to lands. It is the law of Pennsylvania, as well as all the common law States. The legal presumption is that, Mary Sargent knew that her deed to lands in Louisiana, would be governed in its effects, by the laws of Louisiana. The fact that the deed, as well as the will, "were made in Philadelphia," so far as the disposition of lands in Louisiana is concerned, does not change the legal construction of either instrument.

II. The conveyance of these tracts of land, notwithstanding its apparent form of a sale, is upon its face a pure donation inter vivos. It is not a sale even in form; it wants one of the essential requisites of a sale, to wit, a price. The nominal price of five dollars is no price. Vide Pothier, "Traité du Contrat de Vente," nos. 16, 17, 18. "A price that bears no proportion to the value of the things sold, is not a true price; for instance, if one sells a large tract of land for one crown, for the price being the estimate made by the contracting parties of the value of the thing, an estimate which bears no proportion to its value cannot be considered a serious one, nor consequently a real price. Such a contract is not a sale, but a donation, falsely termed a sale, which must be subject to all the formalities of a donation-Pothier "Traité du Contrat de Vente," nos. 19, 20. This doctrine of Pothier is recognized and relied upon by Judge Rost, in the case of D'Orgenoy et al. v. Droz., 13 La. 389-398. Also in Holmes v. Patterson, 5 Mart. 693. The rule is expressly adopted by our Code. Art. 2439 provides that the price "cught not to be out of all proportion to the value of the thing; for instance, the sale of a plantation for a dollar, could not be considered as a fair sale; it would be considered as a donation disguised." The same is the rule of the common law. Vide 2 Kent's Com. 477. In the present case, the conveyance is of sixteen hundred arpents of valuable land. The consideration is "natural affection and five dollars." Now, this five dollars is no real price, nor does this conveyance constitute a real sale, either according to the civil or common law. At common law, it is the usual, almost the universal mode, of making gifts, or pure donations inter vivos.

It is never presumed that the nominal consideration is actually paid; and nine out of ten of all the pure donations ever made, at common law, have been clothed in the form of the present conveyance, and no common law lawyer ever dreamed of considering such a conveyance as any thing but a pure and simple donation. The court suggests in its opinion, "that something besides a donation, subject to collation, was intended," &c. This conclusion we think wholly unwarranted both in law and fact. But we will consider this point by itself.

URQUHART

III. We have attempted to show that the conveyance from Mary Sargent to G. W. Sargent, was not a sale, but a pure donation inter vivos, and is to be governed in its operation and effect by the laws of Louisiana, where the lands lie, and not by the laws of Pennsylvania, where the deed was executed. Now, is this donation subject to collation by the laws of Louisiana? Let us refer to the rules laid down in the Code on this subject. Art, 1306, of the Civil Code, provides "that children or grand children coming to the succession of their fathers or mothers, or other ascendants, must collate what they have received from them by donation inter vivos, directly or indirectly, unless the donations and legacies have been made to them expressly as an advantage over their co-heirs, and besides their portion." The same article preseribes that "this rule takes place, whether the children, &c., succeed to their ascendants, as legal or as testamentary heirs," 4-c. This conveyance is to be construed then precisely as if Mrs. Sargent had died intestate, unless there is something in the will affecting it. Art. 1307 lays down the foundation of "the obligation of collating," to wit: "the equality which must be naturally observed between children and other lawful descendants, who divide among them the succession of their father, mother, &c." Art. 1308, says: "Collation must take place whether the donor has ordered it, or has remained silent on the subject; for collation is always presumed where it has not been expressly forbidden," Art. 1309 provides that collation shall not take place, "if the donor has formally expressed his will, that what he thus gave was an advantage or extra part, unless the value of the object exceed the disposable portion, &c. Art. 1310 provides that, "the declaration that the gift is made as an advantage or extra portion, may be made not only in the instrument where such disposition is contained, but even afterwards by an act passed before a notary and two witnesses." Art. 1311 says: The declaration that the

The last four articles show conclusively, that gifts or donations inter vivos are subject to collation, unless the donor has expressly declared the contrary, either in the act of donation, or some subsequent instrument; and this declaration must be in terms indicating in an unequivocal manner, such an intention on the part of the donor. Now there cannot be found in the conveyance from Mrs. Sargent, nor in her will, any express declaration that this donation was intended as an advantage, or extra portion; nor can there be found, according to art. 1311, any declaration made in other equivalent terms, indicating in an unequivocal manner, that such was the will of the donor.

What are the expressions in this conveyance, equivalent to an express declaration, indicating unequivocally the donor's intention, that this donation should be held as an extra portion, &c. Let us examine those upon which the court rely as the basis of their judgment.

The court says: "But the form of a sale in which the conveyance of these tracts of land is made, we think shows an intention that something besides a donation subject to collation, was intended by that act." Now we have attempted to show that, both by the civil and the common law, this form of sale, with a mere nominal price, does not alter its character and effect, as a donation; but even as a donation disguised in a sale, it is subject to collation equally with a pure donation. In the case of Bossier v. Vienne, 12 Mart. 421, the court decided that, "when the father sells to the son at a very low price, the advantage thus conferred is subject to collation. In Benton's heirs v. Benton et al., 14 La. 352, it was held "that every donation, or advantage given to heirs is liable to collation, suless expressly excepted by the donor." This, too, was a case in which the donation had been made in Georgia. But the rule is expressly laid down in the Code, art. 1326, which is as follows: "The advantage which a father bestows upon his son, though in any other manner than by donation or legacy, is likewise subject to collation. Thus when a father has sold a thing to his sonat a very low price, or has paid for him the price of some purchase, or has spent money to improve his son's estate, all that is subject to collation." Under this article, how can it be urged that the form of a sale, with a mere nominal consideration, indicates an intention that the property so conveyed shall not be subject to collation? Such a deduction is at war with both the Code and the adjudicated cases.

But the court proceeds: "The manifestation of will on the part of the donor, that it should inure as an advantage to her son, we think unequivocally recults from its terms. She considered that these lands might, of right, be given to the defendant, without doing injustice, &c.; and of this, we have evidence in this recital of the conveyance, being the same tracts formerly belonging to Winthrop Sargent and John Steele, and which, by conveyance of his share by said John Steele to said Winthrop Sargent, became wholly vested in Winthrop Sargent, in fee simple." The donor appeared to consider them as of right the patrimeny of the only son of her last husband, and, we think, she made the conveyance in furtherance of that idea, to the exclusion of the relatives of the half blood."

Now, as to the description of the land having been acquired from John Steele, &c., this does not constitute an express declaration, that the donation was intended as an extra portion, nor does it amount to a declaration in equivalent terms, under art. 1311; and we respectfully urge that, unless it amounts to such a declaration, it cannot overcome the positive presumption of the Code, that collation is intended and understood. But what does the expression amount to? It is mere description of the property. It contains no declaration

URBURARY

of motive or intention. The motive or consideration had already been fully expressed. It was "natural affection for (her) son." But the court says this land originally belonged to the defendant's father, and therefore Mrs. Surgent thought he had a right to it. We see no warrant for this presumption. At the time of the donation, the land belonged to her absolutely, at least the portion we claim to be collated; the heirs were all equally of her blood, and there is nothing to show that she did not equally regard them. On the contrary, her will shows that they occupied perfect equality in her regard. By her will, she divides her estate equally among them. This estate consisted of lands principally in Louisiana; among these lands are the Thompson tracts, which the court has decided in this very case, are to be divided between defendant and the children of the first marriage. Now, if Mrs. Sargent, in her will, made no distinction among her children as to the origin of the promoter, who should it be presumed she intended it by the conveyance to defendant? The Surgent, in her will, made no distinction among her children as to the origin of the preperty, why should it be presumed she intended it by the conveyance to defendant? The
Thompson lands came to her by inheritance from one of her children of the first marriage;
the lake St. John tract came to her in part as community property, and part by inheritance
from one of the children of the second marriage. She divides the Thompson tracts equally
between the children of both marriages. We think this affords strong presumption, but the
she did not intend the donation of the lake St. John tracts to be an extra portion, but that
they should be collated. But on which ever side may be the weight of presumption, is of
little importances; we invoke the benefit of articles 1307, 1308, 1309, 1310 and 1311 of the little importance; we invoke the benefit of articles 1307, 1308, 1309, 1310 and 1311 of the Louisiana Code, and under these articles deny the right of the court to presume that collu-tion was not intended, unless such presumption is drawn from an express declaration of the donor to that effect.

IV. The conveyance from Mary Surgent to defendant, is null and void. As a sale, it is clearly void for want of a serious price, according to the authorities already cited above. It is void as a donation for want of form; it not being executed in the manner and with the solemnities required by the Code. We have already attempted to show that this was not a sale but a douation inter vivos. The Civil Code, art. 1523, declares that "an act shall be med before a notary public and two witnesses, of every donation inter vivos of immovapassed before a notary public and two witnesses, of every conaction there views or immovable property, of slaves or incorporeal things, such as rents, credits, rights or actions, under the penalty of mulity." In the present case, the donation is by private act. It was executed in presence of three witnesses, but not before a notary. After its execution, it was acknowledged before the mayor of Philadelphia. This is clearly not an authentic act under the provision of the article just cited, and we contend that it is null. The corresponding article of the Code of 1808, was different in its phraseology, and was subjected to a ponding article of the Code of 1808, was different in its phraseology, and was subjected to a different construction. That article (53, Code of 1808, p. 220.), declared "all acts containing donations inter vivos, must be passed before a notary public and two witnesses, &c., otherwise they are null and void.

In the case of Traken v. McManus, 2 La. 209, the court decided that a denation under the form of an enerous contract, was not void, because not made as an authentic act. But the reason given by judge Porter, is founded upon the peculiar phraseology of the old Code. He says: "The opinion called for embraced the question whether a donation under the form of an enerous contract, was null and void. This our Code has not said. It does not declare that all donations shall be null and void, unless they pursue the form indicated," Again, in the same opinion, "the prohibition does not extend to the centract, but to the instrument which is the evidence of it. If the legislature had intended to prohibit all dones. assument which is the evidence of it. If the legislature had intended to prohibit all donations except those by public act, it must be presumed they would have said so, and would not have limited it to acts which contain them. A benefit disguised under the form of an exercise contract, is an indirect donation, and is not contained in the act." Article 1523 of the new Code, is not subject to this technical construction. It declares that "an act shall be passed before a notary public and two witnesses, of every donation inter vivos." This donation was not passed before a notary and two witnesses; it is therefore null and void.

But this article has been already adjudicated upon. In Flores v. Lemée, adm.'r, 16 La.

273, the court says a donation cannot be validly made in any other form but that pointed out by articles 1523 et seq. under the penalty of nullity.

The question came up more directly in Britain v. Richardson, 3 Rob. 68. The question was, whether a note for \$4,000, executed for an inconsiderable consideration, could stand as a disguised donation mortis causa. The court says, "an instrument, the real object of which was a disposition mortis causa, if executed without the formalines required by law to give it validity as such, can have no effect." The court further says that, the same rule is applicable to donations inter vivos, and that "all donations inter vivos, must be passed before a notary and two witnesses." They also notice the case of Trahan v. Me-Manue, and note the difference between the old and new Codes on this point.

In conclusion, it may be proper to remark, that this last point was not made in the argument, because it was supposed the liability of the defendant to collation, would not be disputed. Indeed, defendant's answer admits the liability to a certain extent. It is further resectfully urged, that if the court does not feel authorized, under the pleadings, to annul the donation, it will so modify the judgment as to dismiss our bill without prejudice, and

reserve to us the right to attack the donation in a more formal manner.

Rehearing refused.

DAVIS v. DALE.

The mere civil or legal possession of lands, not preceded by a real, actual possession, is insufficient to support a possessory action. C. P. 49.

Where depositions were admitted without objection at the time, a new trial will not be granted on the ground, that the defendant, by whom they were introduced, retained themfin his possession until plaintiff had noarly closed his evidence, in consequence of which he was taken by surprise.

A PPEAL from the District Court of Concondia, Curry, J. Shaw and Lawrence, for the appellant. Stacy and Sparrow, for the defendant.

The judgment of the court was pronounced by

King, J. This action is instituted by the plaintiff to recover the possession of a tract of land of which he claims to be the owner, and in the possession of which he alleges he has been disturbed by the defendant, Dale. The defendant avers that he took possession of the land in controversy under the authority of its lawful owner, which possession he held for more than twelve months previous to the institution of this suit; and he further denies that the plaintiff was ever in possession. The cause was tried by a jury, whose verdict was for the defendant, and the plaintiff has appealed.

The principal point presented in this controversy is, whether the plaintiff has ever been in actual possession of the land in dispute, under the title which he exhibits. The character of the possession necessary to maintain actions of this kind has been considered as settled, since the interpretation given to the 49th article of the Code of Practice on the final decision of the case of Ellis v. Prevost, in which the question underwent an elaborate investigation. 19 La. p. 254. 13 La. 230. That article requires that the possessor who claims to exercise this action, should have been in actual possession of the property at the instant when the disturbance occurred. A mere civil or legal possession is insufficient. In the case of Ellis v. Prevost, it was held that, civil or legal possession, which has been preceded by a corporeal detention of the property, authorised a resort to this action, although the possessor should not be in the actual occupancy at the moment of the disturbance, but that the mere civil or legal possession, which has not been preceded by such actual possession, was insufficient. The correctness of these principles has not been seriously questioned, nor is it believed that they can be successfully controverted. It remains to apply them to the facts of this case. The plaintiff exhibited perfect titles in himself to the land in contest, and it devolved upon him to show that at some time he had held actual possession under them. He never resided upon or cultivated the tract, and relies upon other circumstances to show the possession. These are, that he caused the land to be surveyed, and for many years previous to the institution of this suit was in the habit of cutting trees upon it for the use of his plantation.

One of his witnesses states that he is the parish surveyor of Concordia, and was employed as such by *Davis*, in the summer of 1841, to ascertain the lines of the land, and particularly where the lines of the lots 47 and 48 met the lake; that he did determine where they met the lake, and marked them.

DAVES V. DAGE.

This person was not deputed to take possession for the proprietor, but merely employed to perform a professional act. This cannot be considered a taking of corporeal possession, but appears rather to have been a measure preparatory to that end. Another witness states that he acted as the agent of Davis, from the spring of 1839 to the spring of 1843, and during that time, annually, cut timber on the land in question for the use of the plaintiff's plantation, and with the plaintiff's authority. These are the only witnesses relied on by the plainfiff to show actual possession, and the foregoing is the substance of their testimony in his behalf. The witness last referred to underwent a second examination, when he qualified materially his previous statements. When last examined he testified that, personally, he had cut no timber on the land; that, in the year, 1837, he directed nove to be cut; that, in 1838 or 1839, Favor, the plaintiff's overseer, cut timber on the land under his instructions. In 1840, none was cut; and in 1841 or 1842, basket timber, for the use of the plantation, was taken from the tract. Favor, the person referred to, who was the overseer of the plaintiff, from 1837 to 1841, says, that during those years no timber was cut upon the land in contest, nor does he know of any having been cut at any time by slaves of the plaintiff. That the timber cut in 1839, was upon land more than half a mile distant from that in controversy. Several other witnesses, who appear to be well acquainted with the lines, and to have known the land for many years, state that Davis has never taken timber from it, that they are aware of, and could not well have done so without their knowledge. A jury, taken from the neighborhood, probably acquainted with the land and with the means of information possessed by the witnesses, appear to have concluded that the agent of the plaintiff had fallen into error, in supposing that the timber cut by his directions was taken from the land in dispute, and the weight of the testimony supports that conclusion. The character of the evidence is certainly not such as to authorize us to disturb their verdict. It does not, in our opinion, show conclusively any act indicating that the plaintiff has, at any time, either in person or by agent, had actual possession of the land in dispute.

A motion for a new trial was made on the ground that, the defendant's comsel retained in his possession the depositions of several of his witnesses taken in writing, until the plaintiff had nearly closed his evidence, whereby he was taken by surprise. These depositions were admitted without objection at the time, and the objection came too late after the trial of the cause. The irregularity of the proceeding, if it be one, should have been excepted to at the time when the depositions were offered.

Judgment affirmed.

JOHNSON v. HAMILTON, Administrator.

Proceedings under the stat. of 10 March, 1834, relative to the titles of purchasers at judicial sales, cover matters of form only.

It is no objection to a judgment rendered by a Court of Probates, that the judge, in signing it, annexed the words "Parish Judge" to his name. The discharge of the duties of judge of the Probate Court is part of the functions of the parish judge.

In an action by a creditor against the administrator of a succession, there is no occasion for the appointment of an attorney of absent heirs.

No period is fixed by law within which the property of a succession, offered for sale at the suit of a creditor, must be appraised.

PPEAL from the Court of Probates of Concordia, Mc Whorter, J. The petitioner, Johnson, applied to the Probate Court for an order of seizure and sale of certain property mortgaged to him by the deceased. The property was sold, and purchased by Johnson, who applied for the homologation of the sale under the stat. of I834. The homologation was opposed on the grounds: 1, That the judgment by which it was ordered, was signed "James Dunlap, Parish Judge," instead of judge of Probates. 2, That no counsel was appointed to represent the absent heirs. 3, That the property sold was not appraised within a year preceeding the sale. 4, That the property was not legally advertised. The oppositions were overruled, and the sale homologated; and from"this judgment the defendant has appealed.

Rowley and Frost, for the opponents, cited Civil Code, art. 1157. 11 La-116. 13 La. 431. 16 La. 65. 3 Robinson, 35. 10 Rob. 398. 1 Howard's Miss. Rep. 444. 6 Ibid. 114, 234.

T. P. Farrar, on the same side, contended that the property should have been appraised immediately before the sale, citing Code of Pract. art. 990. The appraisement in this case was made, when the inventory was taken, in March, 1840, and the sale on the 19th February, 1842. Lawrence, also appeared on the same side.

Stacy, Sparrow, and H. A. Bullard, for the petitioner. The validity of the judgment in this suit is contested on the ground that it was signed by James Dunlap, as "Parish Judge." The petition was addressed to "James Dunlap, Parish Judge, and ex-officio Judge of Probates, in and for the Parish of Concordia, State of Louisiana." The suit was brought against the defendant as administrator. The minutes of the proceedings in the suit, show that they were had in the Probate Court. The default was taken, and the judgment made final in that court. The probate judge is such from the fact alone of his being parish judge; his probate jurisdiction is derivative and incidental. It is an ex-officio authority. Code of Practice, art. 923. The petition must mention the name or title of the court to which it is addressed. Code of Practice, art. 172. The petition in this suit is addressed to the Probate Court, and to James Dunlap as ex officio judge of that court. This was clearly sufficient.

The next objection is, that there was no attorney appointed to represent the absent heirs. In August, 1840, Miles B. Hamilton was appointed administrator of the succession and tutor ad bona to certain absent minors, who, with Miles B. Hamilton, were then recognized by the Probete Court as the only heirs of the deceased H. C. Hamilton. They were then the only known and recognized heirs. They were represented by a tutor ad bona, under the 946th article of the Code of Practice (Berluchaux v. Berluchaux et al., 7 La. 543,) and they, with M. B. Hamilton being at that time the only known heirs, and being represented in this State, no attorney for absent heirs could have been legally appointed. C. C. art. 1204. Robouam v. Robouam's Executor, 12 La. 73. Addison v. New Orleans

Savings Bank, 15 La. 530.

An attorney of absent heirs does not represent the succession, but the heirs. He is the guardian of their interests against the illegal acts of the curator, who particularly represents the succession in all suits bacught against it by creditors. Civil Code, art. 1146. Code of Practice, arts. 986, 984, 945. Pratt v. Peets, 3 La. 276. No doubt he could intervene in a suit to prevent the creditors and curator from colluding together to injure the succession. But he is not to be made a party defendant by the creditor-but the curator alone. He is simply designed as the protector of those he represents, against the voluntary and discretionary acts of the curator as to the succession. When the curator attempts to act, he must make an issue with the attorney; upon that issue a judgment is rendered. Civil Code, arts. 1156, 1157, 1208. But the *creditors* of the succession do not, and could not, legally make him a defendant in a suit against the succession for a debt of the deceased.

The third objection urged against the rule is, that the property had not been appraised within a year next preceeding the sale. A sufficient answer to this is that, no law requires it, and as it is nowhere stated at what time the appraisement of the property of a succession, sold for the payment of debts, shall be made. Code of Pract. arts. 990, 991. There are two cases inwhich appraisements are

HAMILTON.

JOHESON 9. HAMILTON. required to be made within the year. One where the property of a succession is offered at first on a credit. Civil Code, arts. 1203, 1202. This is to prevent the property from being sacrificed; and the other, in case of a partition among the heirs. C. C. arts. 1247, 1248, 1249. Both in probate and in sheriff's sales, the appraisements are required for the protection and interest of the debtor. The creditor cannot get his money in cash unless the property brings the amount required: otherwise he must aubmit to a delay of twelve months. Now, if a sale for cash is not made, it matters not what might have been the appraisement. C. P. art. 290. The property of this succession was appraised at \$48,563 25. This appraisement served as a basis at the offer to sell for cash; when so offered there was no bid to that amount, and it was then advertised on a credit. All this was in favor of the succession and adverse to the mortgage creditor. The appraisement completely affected the object intended by law, i. e. to prevent the sacrifice of the property by a forced sale for cash. 16 La. 555.

The judgment of the court was pronounced by

Eusris, C. J. This is an appeal from a judgment confirming a sale under the monition act of 1834. The proceedings under this act cover merely questions of form udicial sales. City Bank v. Walden, 1 An. Rep. 46.

There is nothing in the objection raised, concerning the title which the judge appended to his signature. The proceedings were in the Court of Probates, and the judge acted as the judge of that court, which is a part of the functions of his office as parish judge. Nor was there any necessity for the ministry of an attorney of absent heirs.

We consider this as an ordinary case in which an administrator was bound to sell mertgaged property of a succession for the payment of debts, and the judgment of the plaintiff against the succession rendered the sale indispensable. The objection to the original appraisement as the basis of the sale, we consider untenable. The advertisements appear to have been made in conformity with law.

We are of opinion that there is no defect of form in the sale which renders it invalid, and that the court below did not err in confirming it.

Judgment affirmed.

Rowly v. Rowly et al.

Where a wife sues to establish her right to have the proceeds of property applied to the satisfaction of certain mortgages in her favor, in preference to a mortgage executed by her and her husband in favor of a third person to secure the payment of their joint and several notes, on the allegation "that her renunciation was not binding, because she was not instructed by the notary, before whom the set was passed, of the nature of her rights and of the contract, and that the requisites of the law to render such renunciation valid were not compiled with, and that she acted in ignorance of her rights," the plaintiff cannot recover on the ground that, the debt for which the mortgage was executed was one for which she was not bound. The ground of nullity should have been specially alleged.

Laws intended for the protection of married women will not be extended to their assignees, who have no claim on the equity of the court by reason of their personal incapacities.

A PPEAL from the District Court of Concordia, Curry, J. E. D. Farrar, and R. N., and A. N. Ogden, for the appellant. Stacy and Sparrow, for the defendant, Cox.

The judgment of the court was pronounced by

Eustis, C. J. This is an action in which the plaintiff claims precedence, resulting from her legal mortgage, and a special mortgage as established by judg-

ROWLY.

ment against her bushand, and reported in 19 La. p. 557. The appellee, Daniel W. Cox, and the minor heirs of the late James Kemp, whose mortgage rights are sought to be postponed to those of the plaintiff, are the defendants. The judgment was in their favor, and the plaintiff has appealed, so far as relates to the precedence given by the judgment to Cox. The court came to the same conclusion which we have adopted in the case of the heirs of James Kemp, as to the right of precedence claimed for their benefit.

The ground on which the plaintiff rests her right of precedence over the mortgage of Cox is, that "her renunciation is not valid and binding on her, because she was not instructed by the notary, before whom the act was passed, of the nature of her rights and of the contract she was entering into, and that the requisites of the law to render such renunciation valid and binding were not complied with; that she acted in ignorance of her rights, and that such renunciation is altogether irregular, null and void, as will appear by said act."

There is no objection other than this stated to the validity and binding effect of the mortgage of Cox. In that act, Rowly and wife acknowledged themselves to be justly and truly indebted to the mortgagee in the amount of the mortgage, and gave their notes jointly and severally therefor. If the debt was one of those for which the wife is not bound, she ought to have alleged it. In the case of Dumartrait v. Deblanc and wife, 5 Mart. N. S. 38, in which a married woman, separated of property but authorized by her husband, was sued on a note, executed by her, jointly and severally, with a third person, the court excluded evidence offered to prove that the debt did not inure to her benefit, but was given for the advantage solely of her co-obligor, on the ground that the special defence ought to have been made in the answer, that the plaintiffs might have been prepared to gainsay it. In the cases which have come before us of this kind, we have only given the wife relief agaist her contracts, on express allegations of the grounds on which it is claimed.

The obligation of Mrs. Rowly, by the notes and mortgage, is not attempted to be invalidated, except on the alleged defective and void renunciation in the act. But to give effect to that obligation, the postponement of her mortgage rights is necessarily implied and forms a part of the agreement of the parties, for she virtually binds herself that there is no mortgage to the prejudice of that which she executes, except one in favor of a bank, which is released in the act. It would be to carry into effect a fraud, to enable a married woman to set up a tacit mortgage to defeat her own act, the validity of which is not otherwise impugned.

We could remand this case for the purpose of enabling the parties to amend their pleadings, and receive evidence of the true appropriation of the loan from Cox, but the justice of the case forbids such a course; the mortgage was made in 1835, and time enough has been given to invalidate it, if any just cause existed in the conscience of the party supposed to be injured. The plaintiff has transferred her rights; and no principle requires the laws intended for the protection of married women to be extended to assignees, who have no claim on the equity of the court by reason of their personal incapacities.

Judgment offirmed.*

^{*}R. N. and A. N. Ogden, for a rehearing. Art. 2412 of the Civil Code declares that, "the wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage." Art. 12 of the Code declares that, "what-

ROWLY.

ver is done in contravention of a prohibitory law, is null and void, although the nullity be not formally directed." The mortgage in this case imports, on the face of it, that it is given to secure a debt contracted by the husband during the marriage, and for which the wife binds herself conjointly with him. The mortgage, it is true, states that it was for a loan made to them jointly. It was, however, not the less a debt contracted by the husband during the marriage; he gave his notes, by which he bound himself in solido with his wife, for the whole amount, and she could not, therefore, bind herself conjointly with him. The court say: "If the debt was one of those for which the wife is not bound, she ought to have alleged it." The mortgage, on its face, shows that the debt was that of the husband, and contracted by him to the extent of one-half of the loan. It appearing on the face of the act itself, that it was a debt of the husband for that half, it was unnecessary for her to allege that it was a debt for which she was not bound. She sued for the sole purpose of having the mortgages classified, and their priority so established and determined, that a said of the property might be effected. She alleges that Cox claimed precedence over her, on the ground that she had renounced her rights in his favor, but that the renunciation which she had made was informal, and consequently null and void. Cox joins issue with her on the validity of that renunciation, but does not attempt to strengthen it by any averment that the debt was contracted for her separate use and benefit, which would have been contradicted by the act itself. The issue then in the court below, was exclusively as to the validity of the renunciation and the effect of subsequent acts between the parties. The mortgage itself, which contains the renunciation of which Cox claims the benefit, is the strongest evidence to prove that at least one-half of the debt was that of her husband, for which the plaintiff could not bind herself. A wife has never been held liable for a debt contracted jointly with the husband, except when there was an averment that the debt was contracted for, or had inured to her separate use and benefit. 8 Mart. N. S. p. 407. The case of Rawle v. Skipwith and wife, 8 Mart. N. S. p. 407, was that of a notarial act, executed by the wife conjointly with her husband, and she was held liable; but this act expressly stated that the debt was converted to the benefit of the wife. In Davidson v. Stuart, 10 La. 146, where the wife had bound herself conjointly with her husband, and where the consideration of the obligation was a conveyance made to the wife alone, the court decided that it was a debt. of the community, and that the wife could not be liable. A loan made to a husband and wife jointly, becomes a debt of the community, unless, perhaps, where the wife has the administration of her paraphernal property, and borrows the money in the course of administration; though even in that case it would probably come within the prohibition of the art. 2412 of the Code. Here the wife did not have the administration of her paraphernal property at the time the debt was contracted. The case of Dumartrait v. DeBlanc, 5. Mart. N. S., does not sustain the decision made in this case. It was the case of an obligation contracted by the wife, separated from the husband, and alleged to have been authorized by him. On the face of the obligation she was liable, and if there were any facts which destroyed that liability, it was incumbent on her to allege and prove them in her defence, and the court so decided. Here the case is different; the pleadings on neither side shows that she was not liable, making it necessary for Cox to aver and prove that the debt had been converted to her use and benefit. If Cox should bring a suit against her on that mortgage, to make her personally liable, without averring that the debt, although contracted by the husband jointly with his wife, was in fact for her use and benefit, without making any defence, she could, in case of judgment against her, relieve herself in this court by assigning, as error apparent on the face of the record, the absence of that indispensable averment. If judgment be not rendered in favor of the plaintiff, the cause should be remanded. The fact that the judgment has been assigned to a third person, is immaterial. All the rights of the plaintiff are vested in the assignee.

Rehearing refused.

FARRAR et al. v. STACY.

The title of one who purchases property, sold under execution issued on a judgment from which a devolutive appeal had been taken, will not be affected by the reversal of the judgment.

Allegations in a petition, signed by one as the attorney of a third person, inconsistent with claims set up by him in an action in his own name, commenced on the same day, will estop him from recovering.

FARRAR

STACY.

NEW ORLEANS, FEBRUARY, 1847.

A PPEAL from the District Court of Concordia, Curry, J. T. P. Farrar, J. Dunlap, Thomas and O. N. Ogden, for the appellants. Stacy and Sparrow, for the defendant.

The judgment of the court was pronounced by

SLIDELL, J. This is a petitory action for a slave, and the plaintiffs also claim the value of the slave's services during the alleged wrongful possession of the defendant. The plaintiffs purchased the slave of one Spencer, on the 16th June, 1841, and the act of purchase was duly recorded. At the time of the purchase, this slave, with fourteen others, was under attachment in the suit of Briggs, Lacoste & Co. v. Spencer, and this fact was stated in the act of sale. Subsequently there was a judgment for the plaintiffs in the attachment, with privilege upon the slave; the judgment was assigned to one Reynolds; execution was issued, and the slave was sold under execution to Reynolds, who received possession, and leased the slave to the defendant, Stacy. Stacy disclaimed ownership, and Reynolds was made a party defendant. The cause was tried by a jury, who gave judgment in favor of the defendant Reynolds, and the plaintiffs have appealed.

If it be conceded that Reynolds, as assignee of the judgment, is to be considered as standing upon the same footing as though he had been the original plaintiff in the cause, still we are of opinion that the title vested in him was not affected by the fact that, upon the devolutive appeal taken in the case of Briggs, Lacoste & Co. v. Spencer, the judgment upon which the execution issued was reversed. That point is settled by the cases of Baillio v. Wilson, 5 Mart. N. S. 219, and Williams v. Gallien, 1 Rob. 94.

But it is contended that the sale did not vest a good title in Reynolds, because the formalities of the law were not observed—that the sale was not preceded by proper advertisements. The plaintiffs in this cause were the attornies at law of Spencer, in the suit of Briggs, Lacoste & Co., during the pendency of which the sale was made to them by Spencer, subject to the attachment. On the same day upon which the plaintiffs instituted this action, claiming the ownership of the slave and damages for the loss of his services, they also instituted, as the attorneys at law of Spencer, an action against Stacy, the surety on the attachment bond of Briggs, Lacoste & Co. In this action, Speneer claims damages for the wrongful issuing of the attachment. He alleges title in himself, during the pendency of the attachment of the fifteen slaves therein attached, making no exception whatever with reference to the slave now in question ; he also alleges that this property was injured by the carelessness of the sheriff; that the price at which it was sold under execution was not equal to one-fifth of its value, at the time it was taken from his possession by the sheriff; and that damages to a large amount were sustained by the deprivation of the use of the property pending the attachment. The damages are laid at \$17,500, and, although vaguely stated, are evidently intended to cover the loss of the use and services, and the injury arising from the attachment and judicial sale of the entire property attached, of which the slave now in question formed a part. This suit of Spencer, brought by the present plaintiffs as his attornies, is an affirmance by him of the judicial sale, and is manifestly inconsistent with the present action, and with the allegations of title, and of a right in these plaintiffs to recover for the lost services of the slave. The two actions, so far as this slave is concerned, cannot be maintained, and the allegations made in Spencer's petition over the signature of the plaintiffs as his attorneys at law, are an estoppel in this suit. Judgment affirmed.

21

DUNLAP v. HUNDLY.

The provisions of the Code of Practice, art. 746 et seq., authorizing the summary execution of foreign judgments, must be construed strictly.

An order of seizure and sale, obtained on a foreign judgment purporting to have been rendered on the confession of the defendant made through his attorney, will be enjoined, where the transcript of the foreign record has a suspicious appearance on its face, and where, though the plaintiff in injunction denied under oath the authority of the attorney to confess a judgment for him, and swore that he never abandoned his defence, no evidence is offered to disprove his allegations.

PPEAL from the District Court of Madison, Curry, J. The plaintiff enjoined an order of seizure and sale obtained by the defendant Hundly, against the plaintiff, on the record of a judgment rendered in Mississippi. The petition charges in substance: "That in the winter or spring of 1837, the petitioner purchased a negro man, Henry, from Thomas Hundly, a negro trader, who had brought said negro from the State of Virginia to the State of Missis, sippi, for sale as merchandize: that the sale and purchase of the slave was made in Mississippi: that said slave was brought into the State of Mississippi for sale, and sold to him afer the adoption of the present constitution of that State, which petitioner avers prohibits the introduction and sale of slaves introduced for sale: that he purchased said slave for a house servant, the vendor representing him as sober and honest, when he knew him to be an inveterate drunkard, and that he had been sold to him in consequence of his intemperate habits; that he made to David Hundly his note for \$1,800, payable four months after date, for the price of said slave: that at the maturity of his note he refused to pay it, on the ground that the slave was not such as he had been represented, and was wholly unfit for the purpose for which he had been bought; that suit was brought on the note, in which he filed a plea in person, expecting to be relieved from the payment on two grounds; first, because a fraud had been practiced on him in the sale of the negro, in representing him as possessed of steady and temperate habits: second, because the sale was a nullity, being made in direct violation of the constitution of Mississippi: that after suit was commenced, petitioner sent the slave to Hundly, who took him back and kept him, only crediting the note with \$1,400: that at the September term, 1840, some person representing himself as the attorney of the petitioner, withdrew the plea filed by him in said suit, thereby depriving him of the means of making his defence : that he never authorised the withdrawal of his plea; that at that term a judgment was rendered against him, without any plea, for the sum of \$394: that at the June term 1842, said judgment was altered and rendered against him for \$753 40: that said suit was brought in the name of David W. Hundly for the use of Thomas Hundly: that Hundly has obtained an order of seizure and sale on said judgment, which the petitioner avers is void, being rendered on a void note: that the demand is unjust: that the order of seizure and sale issued illegally on the record of a judgment without plea filed." The petition concludes with a prayer, that the injunction may be perpetuated and for general relief.

The defence is: 1. That the affidavit is insufficient, not being positive and unconditional. 2. That the judgment was rendered after issue joined, is properly authenticated, and cannot be enquired into. 3. That the plaintiff cannot

set up fraud or new matter, the judgment having been rendered after appearance and issue joined. 4. That the allegations of the plaintiff are not correct.

A witness proved that the note was given for the price of the slave *Henry*, the property of *Thomas Hundly*: that the note was handed to *Hundly* shortly after the sale: that he sold the slave to *Dunlap* as the agent of *Hundly*, in the State of Mississippi, for \$1,800, and took the note for the payment of the price: that *Hundly* was a negro trader at the time, and told witness he had bought the negro from Virginia, and brought him to Mississippi, with many others, for sale. That he was brought to Mississippi a few weeks before the sale to *Dunlap*. That plaintiff returned him to *Hundly*, who said he would take him back, and sue the man he got him from, for damages.

Snyder proved that he was a licensed lawyer in Mississippi, and that by the laws of that State, under the general issue, the defendant could have shown, that the note sued on was given for the purchase of a slave, that the slave was afflicted with a redhibitory malady, and had been introduced into the State for sale as merchandize, and was sold in violation of the constitutional prohibition.

The injunction was perpetuated and the defendant appealed.

Thomas, for the plaintiff. The first ground of defence is untrue in fact. The second and third grounds are substantially the same. Neither are true in fact or in law, if "after appearance and issue joined" means "upon appearance and issue joined," and is not a mere play upon words. The contestatio litis is formed by an answer or judgment by default, and is the foundation of the suit. B. and S. Dig. 509, E. 1, and cases cited. The record shows that the case was put at issue by the plea filed by the defendant in person, and that some one, representing himself as of counsel, withdrew the plea, destroyed the issue, and suffered judgment to go against the defendant. The present petition shows that the defendant in that case appeared in person, and that his plea was withdrawn and judgment taken, without his knowledge, authority or consent, when he had reason to suppose the suit was at an end by the return of the slave. The affidavit annexed to the petition verifies the truth of the facts stated therein, and throws upon the defendant the proof of authority in the attorney to represent Dunlap in withdrawing his plea, destroying the issue made by him, and thus depriving him of his defence. 9 Mart. 88. 12 M. 70, 255. None was attempted. Miller v. Gaskins, 3 Rob. 94. A judicial confession can only be made by the party, or by one specially authorised by him. Civil Code, art. 2270. 8 Mart. N. S. 547. 6 La. 296. What the law of Mississippi is on the subject is not shown, and it will be presumed to be the same as ours. This presents a stronger case than that contemplated in article 747 of the Code of Practice, as ground for an injunction. Here there was not even a judgment by default, to form a constructive contestation on which to rest a judgment. Article 749 authorises an injunction to restrain the execution of an order of seizure and sale, issuing upon a judgment rendered by "a tribunal other than of this State," for any of the "causes which prevent the sale of property mortgaged, or otherwise bound by virtue of an act importing a confession of judgment." Article 739 declares that: "The debtor can arrest the sale of things thus seized, by alleging some of the following reasons, to wit: that the debt has been extinguished by transaction, novation, or some other legal manner; that it was obtained by fraud, violence, fear, or some other unlawful means."

The plaintiff alleges in his petition, and has proved that the debt was extinguished by the transaction, in returning the slave, and that the judgment was obtained by surreptitiously withdrawing his defence. The thing adjudged can only take place between parties, upon a contestation "formed" between them, either express or implied. Code Prac. 357 to 360. C. C. art. 2265. B. and

S. Dig. 509, E. 1. 2 Peter's Dig. 544, note 29.

The judgment was subject to the equitable revision of a court of Chancery in Mississippi. It can have no greater effect here. If the door was open to relief there, it is here. Our courts possess all the power necessary to give relief, although our system of juresprudence differs in the form of reaching and applying the remedy. Courts of equity will always relieve against judgments at law, unfairly obtained. 1 Story's Eq. ss. 32, 82. A fortiori when it

DUNLAP V. HUNDLY. DUNLAP 0. HUNDLY. is not only unfairly obtained, but upon an unlawful cause. They will not ordinarily relieve against judgments at law, where the defence might have been made full and complete, but was not, owing to the fault, or neglect of the party applying for their aid. Dunlap had done all he was bound to do. He made his defence in person; rescinded the contract of sale and purchase by the re-

turn of the slave; and extinguished the note by the transaction.

The judgment of a State court, has the same credit &c. Conklin, 241-2. 2 Peter's Dig. 544, sec. 2. Whatever plea could be pleaded to it in such State, can be pleaded to it in an action on it in another State, and none other. 3 Wheaton, 234. 4 Cowen, 243. That such is strictly the law, where a distinction is recognized between the redress which is afforded at law and in equity is clear. But under our system, where no such distinction is recognized, the rule would defeat the ends of justice, and enable a party to enforce a judgment here that equity would relieve against in the State where it was rendered, unless our courts interpose their equity powers, or hold the judgment of another State to conclude the parties only when rendered in the last resort upon a full hearing. Why drive a party, when proceeded against here upon a foreign record, into the court of Chancery where the judgment was rendered, for relief which the equity powers of our courts can as well afford. Civil Code, 21. 1 Story's Eq. ss. 14, 26 to 33, 59.

The fourth and last ground of defence is a general denial. The plaintiff relies apon two grounds to maintain his exemption from liability to pay the note, which was the foundation of the action in Mississippi: 1. That the note was extinguished by transaction, in cancelling the sale and surrendering the slave, for the purchase of which it was given. The evidence of MKouen, the agent who made the sale, is full upon this point. The inducement to cancel the sale, witness shows, was the intemperate habits of the slave, Hundly declaring he would sue his vendor in Virginia for damages. 2. That the note was given for the purchase of a slave, introduced and sold to him in violation of the constitutional prohibition of Mississippi. The second section, title slaves, of the constitution of Mississippi, prohibiting the introduction of slaves for sale, as merchandise, after May, 1833, is inevidence. The witness proves that the slave Henry, with many others, was introduced into the State of Mississippi, and sold in violation

of this prohibition.

The Supreme Court of the State of Mississippi, in the case of Bryan v. Williams, 5 Howard's Reports, and this court in the case of Cotton v. Bryan, 6 Rob. 115, have decided that all contracts made for the sale and purchase of slaves introduced into the State of Mississippi for sale, and there sold after May, 1833, are null and void, and that they will not lend their aid to enforce

them.

It is alleged in the petition, and shown by the record, that at the September term, 1840, Dunlap's plea was withdrawn, and judgment taken against him for \$394. That at the June term, 1842, without notice of any kind, in the name of correction, the judgment was altered or amended, increased and entered for \$753 40.

Which is the proper judgment? Certainly, if either, the first. The order of seizure issued on the last. Code of Practice, 546, 547, 548. 6 La. 69. 12

Mart. 558.

After a judgment is once rendered, the party against whom it was rendered, is no longer, after the close of the term, presumed to be in court.

Amonett, for the appellant,

The judgment of court was pronounced by

SLIDELL, J. Hundly had obtained an order of seizure and sale on a judgment recovered against Dunlap in Mississippi. Dunlap thereupon filed his petition for an injunction, in which he avers, under oath, that a plea which he had filed to the merits in the suit in Mississippi had been fraudulently withdrawn, and a confession entered without his authorization. He then sets forth various grounds of defence which he had against the action, and avers the note upon which the suit in Mississippi was brought to have been void under the constitution of Mississippi, in which State it was made. An injunction was obtained, commanding the sheriff not to proceed with the sale of the property, until the

further order of the court. After trial the order of seizure and sale was annulled, and the injunction was perpetuated. Hundly appealed.

The record of the suit in Mississippi shows that Dunlap first filed, by his attorney, a plea of the general issue. The record then sets forth that his attorney appeared at a subsequent term, withdrew the plea and confessed the justice of the plaintiffs claim, upon which judgment was entered against Dunlap for \$394 and costs. Upon this judgment there was an execution, and return of nulla bona.

About two years subsequent to the rendition of the first judgment, and after the return of the execution, an application was made by motion to correct the judgment theretofore rendered for \$394, upon a suggestion that the same should have been for \$753 40. It is stated that the defendant having had notice of this motion, the judgment was thereupon amended, and it was decreed "that the plaintiff recover of said defendant the sum of seven hundred and fifty three dollars, forty cents, with interest from the — day of October, 1840, the date of rendition of said judgment originally recovered in said court, and also costs of suit."

There is something very extraordinary and suspicious on the face of this record; and although the plaintiff in injunction has denied under oath the authority of the attorney to confess judgment for him, and swears that he never abandoned his defence, no evidence to the contrary, except the record itself, has been adduced.

We have not been assisted with any testimony to show what faith and credit would be given in Mississippi to a record, which varies so materially not only from the forms and mode of proceeding adopted in our own courts, but from what we have supposed to be the practice at common law. It is our duty to construe strictly the provisions of our Code authorizing the summary execution of foreign judgments; and litigants who choose that remedy must bring themselves fully and unequivocally within its requisitions. See Miller v. Gaskins, 3 Rob. 94. 8 Martin, 236.

Judgment affirmed.

LEDBETTER v. LEDBETTER.

A son cannot recover from the succession of his mother any compensation for services rendered by him during his minority, as an overseer on an estate belonging to the community, in the absence of proof of any promise of payment by the head of the community; nor will an acknowledgment of his claim made by the mother, after the death of the father, be binding on her, or on her heirs. Per Curiam: For the services rendered by the son during the minority there could be no debt, and the acknowledgment of a debt which had no existence, is not binding on the mother or her heirs.

A PPEAL from the Court of Probates of Carroll, Harris, J. This suit was brought to recover \$4,500, the half of plaintiff's wages as overseer for nine years, at \$1,000 a year, for services rendered on a plantation owned in community by the defendant, plaintiff's mother, and her late husband. The petition states that the community property had been divided between the defendant and the heirs of her deceased husband, and that the defendant expressly assumed to pay the plaintiff one half of his wages, to wit, the sum sued for; that he has in vain demanded payment, &c, The defendant pleaded to the jurisdiction of the court, and a general denial. She died pending the suit, and the

DUNLAP C. HUNDLY.

LEDBETTER case was transferred to the Court of Probates, James Ledbetter, administrator of the deceased, appeared to defend the suit, and filed his answer, adopting the original answer.

From the evidence, it appears that the defendant repeatedly acknowledged plaintiff's claim.

There was judgment in favor of the plaintiff for \$2,416 66, that is, the half of his wages, from the date of his majority in March, 1832, to 1836. From this judgment the plaintiff appealed.

Prentiss and Finney. for the appellant. It is contended that the original defendant, the mother of the plaintiff, was entitled to his services until the age of majority, and therefore her promise was nudum pactum. By what law or code of laws is the mother entitled to the services of her child during his minority? In the absence of any law on the subject, we should rather think the mother was bound to educate the child according to her position, and that it was her duty to do so, instead of having a right to subdue him to hard toil, and thus deprive him of all opportunity of improvement. According to the roman law, the father had a right to the acqusitions of his son except the peculium castrense; but in the time of Justinian the law was changed, and it was ordered that the proceeds of the son's labor should be entirely his own, reserving the usufruct thereof to the father in certain cases. Vide 2 Domat., Eng. Ed. 644. By the spanish law, the proceeds of the son's labor belonged to the son. 1 Moreau & Carleton's Partidas, 558. Partida 4, title 17, law 5. Neither by the roman nor the spanish law had the mother any right to the labor of her child. Our Code is silent as to the right of either father or mother to the labor of the child, and until this case we have never heard of such a pretension. By the common law, the father was entitled to the labor and services of his child; and this principle of the common law, we presume, suggested his defence to the counsel of the defendant. But at common law the mother had no such right. 1 Black. Comm. 453. 4 Binney, 487. Nor are we aware of any law or code of laws that gives the mother the right to the services of her child. At common law, if a father relinquish to his child the proceeds of his labor, the son is absolutely entitled to the same even against the father's creditors. 12 Mass. 375. 6 Conn. 547. 5 Verm. 556. So also at common law, if the father receive the proceeds of the son's labor, and in consideration thereof make any promise to the son, the consideration is good in law to support the promise. 12 Mass. 375. And there can be no doubt that even if the father or mother be entitled to the labor of a minor child, and yet agrees to pay the child for his services, the receipt of benefit from the child's labor, in connection with a concurrent promise of remuneration, will impose a natural obligation on the parent that will support any subsequent promise. La. Code, 1750, 1751.

We have argued this question as though it were properly presented by the

record, but are satisfied, that, even if the defence be a good one, it should have been specially pleaded, and that evidence in the record cannot cure the want It is one of those unconscientious defences which, like prescription must be pleaded, and, however patent upon the record, the court will not supply.

Selby, for the defendant.

The judgment of the court was pronounced by

Rost, J. The plaintiff claims from his mother, as common in acquêts and gains with the heirs of her deceased husband, the sum of \$4,500, for one half of his services as overseer on a plantation, for the period of nine years, during part of which he was a minor. The petition alleges, and it is proved, that, in the act of partition between the heirs and the defendant, and at divers times since, the said defendant acknowledged the claim to be due. The defendant filed a general denial, and the plea of prescription. After issue joined she died, and the suit was removed the court of Probates, and revived against her administrator. The court below allowed the plaintiff the wages claimed by him, from the time he became of age; and he has appealed.

There is no error in the judgment. The father of the plaintiff was living LEDBETTER during his minority and owed him no reward for services rendered till he be- LEDBETTER. came of age, if any such services were ever rendered, which is not shown. The plaintiff shows no promise from the head and master of the community, and his pretended legal rights are incompatible with the paternal power. "Quando filius de mandato patris negociatur, neque hoc casu aliqued salarium debebitur filio." Gregorio Lopez, on the law 5, tit. 17, Partida 4.

For the services rendered during minority there could be no debt, and the acknowledgment of an obligation which had no existence is not binding upon the defendant, or her legal representatives.

The judgment is affirmed with costs in the court below, the plaintiff and appellant paying the costs of this appeal.

HARRIS v. PATTEN et ux.

The fact that the subscribing witnesses to an act sous seing prive reside out of the State, will not dispense with the necessity of proving the signature, or ordinary mark, of the party. Proof of the signature of the subscribing witnesses is not enough. C. C. 2241.

PPEAL from the District Court of Carroll, Curry, J.

A Selby, for the appellant, cited Greenleaf on Evidence, p. 611, ss. 574, 755. McPherson v. Rathbone, 11 Wendell, 98, and same volume. p. 123. Jackson v. Waldon, 13 Wendell, 196. Chitty on Bills, 379, 380. In the case of Dismukes v. Musgrove, 7 Mart. N. S. 58, there was no proof of any inability to prove the signature of the obligor, and that was a written signature; here the party only made his mark.

Stacy and Sparrow, for the defendants.

The judgment of the court was pronounced by

Rost, J. There was a judgment of non-suit in this case, because the plaintiff, claiming under a private act alleged to have been signed with an ordinary mark in presence of two witnesses, who are living and reside out of the State, failed to make proof of the signature of the party, and only proved the signature of the subscribing witnesses.

We adhere to the rule laid down in Dismukes and others v. Musgrove, 7 Mart. N. S. 58, and since recognized in Tagiasco et al. v. Molinari's Heirs, 9 La. p. 520. When a signature is disavowed art. 2241 of the Civil Code requires it to be proved by witnesses, or comparison of hand writing. Proving the signature of the subscribing witnesses, satisfies neither of these requisitions.

The witnesses in this case reside in North Carolina, and appear to be well known to the plaintiff. It was easy for him, under our rules of practice, to annex the document he wished to prove to a commission, and to procure their evidence of its execution. The nature of the proof resorted to by the plaintiff is so uncertain and dangerous, that courts of justice ought not to notice it, whenever it is shown that better evidence exists. Judgment affirmed.

BOYD v. BROWN.

A carpenter employed to do certain work on a house belonging to two partners, in which they kept a grocery and billiard table, when the work was nearly finished purchased the interest of one of the partners, and finished the work afterwards. Held, that he might sue the other partner for his proportion of the price of the work; and that it is not necessary that he should sue for a settlement of the partnership accounts, the work not being a partnership transaction.

A PPEAL from the District Court of Carroll, Curry, J.

The plaintiff alleges that he performed work worth \$1,010, on a house

owned by the defendant and himself jointly; and that the defendant had agreed, and expressly promised to pay half of such a sum as the work was fairly worth; that nevertheless he had refused, &c.

The defendant excepted that the suit was for a specific item of an unsettled partnership account. This exception was overruled.

The testimony establishes that while the house belonged jointly to Bell and the defendant, they agreed to divide equally the cost of the work which the plaintiff was employed to perform. With this understanding, the plaintiff had almost completed the job, when he purchased Bell's undivided share of the house, assuming in every respect Bell's position as joint owner. The work was then completed by the plaintiff. The defendant appealed from a judgment against him.

Prentiss and Finney, for the plaintiff. The house upon which the work was done was not partnership property. The plaintiff and defendant were joint owners as to the house, not partners. The plaintiff's claim, therefore, for half the work done on the house, was not a specific item of an unsettled partnership account. The deeds introduced in evidence show that each purchased a moiety individually, and if they had taken the title in the name of the firm, they would stilf have been joint owners each of an undivided half. Civ. Code, arts. 2777, 2807. 3 La. 494. 17 La. 596.

Selby, for the appellant.

The judgment of the court was pronounced by

Rost, J. The plaintiff, who is a carpenter by trade, was employed to do some work on a house, belonging, at the time, to the defendant, and one Bell. When the work was nearly finished, he purchased the undivided half of Bell. The act of sale also contains the sale of the undivided half of a billiard table, and of the furniture and contents of a grocery shop, then in the house, the other half of which belonged to the defendant. The plaintiff continued to work as before on the house, and now claims from the defendant one-half of the value of the work done and of the materials furnished by him.

The defendant excepted to the action on the ground that, after the plaintiff's purchase, they kept the grocery shop in partnership; that the house and grocery belonging alike to the partnership, the only action which the plaintiff can maintain is one for a settlement of accounts. This exception was properly overruled. Most of the work was done by the plaintiff before the date of his purchase, and is, in no sense of the word, a partnership concern. The defendant is not a carpenter, and has no right to enrich himself by the plaintiff's labor. The court below rightly decided that the partnership concerns, if any there be, could not be settled in this suit.

BOYD

NEW ORLEANS, FEBRUARY, 1847.

The case was tried before a jury, who gave a verdict in favor of the plaintiff, and there is nothing in the judgment which requires our interference.

nterference. Brows.

Judgment affirmed.

Hood v. STEWART.

Trespassers cannot call in warranty persons under whose authority they act, and relieve themselves from responsibility by substituting the latter in their places.

Uninterrupted possession as owner, for more than a year, will exempt the party from liability in damages for acts of ownership done while such possession continued; and in such a case, an agent of the party in possession cannot be made liable for acts which his principal might have done without subjecting himself to damages.

A PPEAL from the District Court of Carroll, Curry, J.

Selby, for the appellant.

Stockton and Steele, for the defendant. A trespasser may call in warranty the party under whose authority he acted. Larchev. Jackson, 9 Mart. 424. 8 Ibid, N. S. 468.

The judgment of the court was pronounced by

KING, J. This is an action of trespass, in which the plaintiff complains that his enclosures have been torn down and removed from his land by the defendant, from whom he claims remuneration in damages. The defendant admitted that he had removed the fencing, but averred that, at the time of the removal, it stood upon land in the possession and forming a part of a plantation owned by Robert Stewart, whose agent he was, and by whose order the act was done, and prayed that Robert Stewart might be cited to defend the suit. The right of the defendant to call his employer in warranty was resisted by the plaintiff. His opposition was overruled, and he excepted to the opinion of the judge. R. Stewart filed an answer, in which he avowed that the acts of the defendant were done by his direction, and averred that, under the belief that he was the proprietor of the land on which the fencing stood, he had cleared forty acres of the tract, enclosed it, and constructed ninety rods of levée upon it, for which, as a possessor in good faith, he was entitled to be remunerated; and he prayed a judgment for the value of these improvements. The cause was tried by a jury who rendered a verdict in favor of R. Stewart, for the value of his improvements; and the plaintiff has appealed.

The court erred, in our opinion, in permitting Robert Stewart to be called in warranty, for such, in effect, was the defendant's plea, and in allowing him, when so called, to set up a reconventional demand. Parties sought to be rendered liable as trespassers, are not permitted to escape from the responsibilities consequent upon their acts, by pleading, in defence, the authority of third persons. 8 Mart. N. S. 549. The call in warranty being unauthorized in actions of this character, Robert Stewart became improperly a party to the suit, and his answer, with the issues its presents, must be disregarded in the present litigation. Our inquiry must be confined to the controversy between the plaintiff and the defendant, S. M. Stewart. It appears from the evidence, that Robert Stewart is the proprietor of a plantation adjoining the land on which the enclosures in controversy stood. Several years previous to the alleged trespass, he cleared, en-

closed, constructed levées on, and put under cultivation, about twenty-five acres

Hood v.

of the plaintiff's land, of which he held uninterrupted possession up to the moment that the fencing in question was removed from it. This possession, which had continued for more than a year, created such a legal presumption of ownership, as would have protected him against a possessory action. It so far legalized his possession, as to authorize him, during its continuance, to exercise acts of ownership without exposing himself to an action of damages; otherwise the protection given by law to such ownership would be nugatory. The plaintiff could only have proceeded against him in a petitory action for the recovery of the land; and, in that action, the respective claims of the parties for improvements and rents, could have been adjusted, Code of Prac. art. 58. 13 La. 396. We are clearly of opinion that the plaintiff could not have maintained an action against Robert Stewart, as a trespasser, for the alleged act. The defendant was the agent of R. Stewart, holding possession and managing the property for him, and could perform every act of ownership in relation to it, permitted to his employer, with equal exemption from an action of trespass.

It is therefore ordered that the judgment of the District Court be reversed, and the verdict of the jury set aside. It is further ordered that the plaintiff's demand be rejected, and his suit dismissed; that he pay the costs of the lower court; and that the appellee pay the costs of this appeal.

Wood et al v. HENDERSON.

Where the record shows that the judgment of the lower court was rendered on an exception to the petition, on the ground of the insufficiency of the allegations to authorize the issuing of the injunction prayed for, and that the exception was overruled, the judgment may be examined on appeal without any formal assignment of errors. Per Curiom: This is not such a case as is contemplated by art. 897 of the Code of Practice.

Allegations in a petition for an injunction against an order of seizure and sale issued on a foreign judgment, that the petitioner was not cited in the foreign tribunal, and that the attorney who entered an appearance and filed an answer for him had no authority to do so, are sufficient grounds for relief.

When an exception to the sufficiency of the ground for an injunction is overraled, the court cannot proceed at once to pronounce a final judgment in favor of the plaintiff. The defendant is entitled to file an answer, and put at issue the allegations on the petition.

PPEAL from the District of Carroll, Curry, J.

11 Pepper, Browder and Garland, for the appellants. Thomas and Finney, for the defendant. The judgment of the court was pronounced by

SLIDKIL, J. The plaintiffs obtained an order of seizure and sale upon a judgment rendered in the United States Circuit Court in Mississippi, against Henderson and others. That judgment was obtained in a suit upon a promissory note drawn by "B. Hardison & Co. in liquidation," of which firm it was alleged that Henderson was a member. The record exhibits an appearance in the case by Henderson and the other defendants, through an attorney at law.

Menderson obtained an injunction restraining this order of seizure and sale. He alleges, among other things, that the party who thus signed the name of the firm "in liquidation," was unauthorized so to bind the firm, which was dissolved before the making of the note; that he was never legally cited in that suit; that the attorney at law who made an appearance for him had no authoristy to do so; and that he was not legally represented therein. He prayed for damages for the alleged illegal seizure of his property, that the injunction be

made perpetual, and for general relief. Thereupon the seizing creditors moved for the dissolution of the injunction. The motion was filed in writing, and set forth various grounds, all based upon the alleged defectiveness of the allegations of the petition. It was in effect an exception to the petition of injunction, as not exhibiting any lawful grounds for the issuing of the injunction and the relief prayed for: it was endorsed as an exception by the clerk, and was so styled in the judgment of the court below.

The court below overruled the exception, and, at the same time, "by reason of the law and the evidence," gave final judgment in favor of *Henderson*, rendering the injunction perpetual, and thus finally concluding the rights of the parties. The clerk certifies that the record contains all the evidence on which the cause was tried, but the record exhibits no statement of facts. The defendants in injunction appealed, and the appellee has moved to dismiss this appeal upon the ground that, there is no statement of facts, bill of exceptions, special verdict, nor timely assignment in this court of errors apparent on the face of the record.

The record and proceedings certainly exhibit a very confused, and, in some respects, contradictory aspect; but after carefully considering them, we cannot concur in the proposition asserted by the appellees, that this cause was tried on the merits. Our opinion is that, the case was tried on the motion or exception, and that the confusion has arisen from the ignorance of the clerk in treating the trial of the exception as a trial on the merits.

The exception having been overruled by the court below, we are permitted to consider it and the decree of the court upon it, without a formal assignment of error. This is not such a case as is contemplated by article 897 of the Code of Practice. The exception was, that the petition exhibited no legal grounds for an injunction and relief as prayed for. The petition, exception and judgment thereon are fully presented by the record, and if a mere bill of exceptions can be examined in this court without filing an assignment of error, the matter in question is certainly open to consideration without that formality.

This brings us to the enquiry whether the exception was properly overruled. The exception, for the purposes of its trial, admitted the truth of the allegations of the plaintiff in injunction. There is one allegation, which, if true, would entitle the latter to relief. He was not eited in the cause, and if the attornies at law who entered his appearance and filed an answer for him had no authority to do so, the judgment against him is void. We deem it unnecessary, at the present time, to consider how such an authority may be conferred, or to pass upon the other questions raised upon the face of the petition.

We are of opinion, therefore, that the petition for injunction did exhibit sufficient ground for relief, and that the exception was properly overruled. But this did not justify the court below in proceeding further, and rendering, upon the exception, a final judgment in favor of the plaintiff in injunction. Upon the dismissal of the motion or exception, the defendants in injunction were entitled to file an answer in the cause, and put at issue the allegation of the plaintiff's petition.

It is therefore decreed that so much of the judgment of the court below as dismissed the motion or exception of the defendants in injunction be affirmed, and that said judgment, as to the residue thereof, be reversed, and that this cause be remanded for further proceedings according to law, the said *Henderson* paying the costs of this appeal.

SPENCER v. KNOWLAND.

On an application for executory process on a foreign judgment, which is silent as to interest, plaintiff cannot, by producing an authenticated copy of a statute of the State in which the judgment was rendered authorizing execution to issue on such a judgment for the principal with interest at a certain rate, obtain an order of seizure and sale for more than the principal sum. The court cannot look beyond the foreign record itself. Per Curian; A proceeding by which the property of a party is summarily seized and sold, without citation, is one of great severity, and cannot be extended beyond the cases for which it was expressly and clearly provided.

A PPEAL from the District Court of Madison, Curry, J. The defendant appealed from an order of seizure and sale granted, on the transcript of the proceedings in a suit in which judgment was rendered in Mississippi. The original judgment was silent as to interest; but the plaintiff offered in evidence an authenticated copy of a statute of Mississippi, authorizing execution to issue on such a judgment, for interest at eight per cent a year. The court below authorized an order of seizure and sale to be issued in favor of the plaintiff for the principal sum, with interest at eight per cent a year from the date of the judgment, till payment. The defendant appealed from a judgment overruling a motion to set aside the order of seizure and sale.

Dunbar, Hyams, and Elgee, for the plaintiff.

Shannon, for the appellant. The judgment in Mississippi does not show that plaintiff was entitled to any interest. Nothing is said of interest in it; and the judge had no authority to take any proof whatever in relation to interest, or to take cognisance of any matter dehors the judgment rendered in Mississippi. He could only direct the judgment of a foreign court to be executed as he finds it in the record presented to him; if the judgment gives interest, he can do so; if not, he cannot. Code of Pract. art. 746.

The judgment of the court was pronounced by

SLIDELL, J. This is a proceeding by executory process upon a judgment obtained in the State of Mississippi. The judgment itself made no mention of interest, and under our law would be considered as not bearing interest. The plaintiff averred in his petition for executory process, that, by the law of Mississippi, such a judgment bore interest at the rate of eight per cent per annum from its rendition, and he annexed to his application for the order of seizure and sale, a copy of a statute of Mississippi passed at a time several years anterior to the date of the judgment.

The proceeding by executory process, by which the property of the defendant is, without citation, summarily seized and sold, is one of great severity, and should not be extended beyond the cases for which it is expressly and clearly provided. The Code of Practice gives a creditor who has obtained a judgment in another State of the Union, the right, which we believe is granted by the legislature of no other State, of obtaining instant execution in our courts, without the citation of the debtor, upon presentation of a duly authenticated copy of the foreign record. But the record alone is spoken of in the Code as the basis of the proceedings. The legal import of the record, under our law, was, as we have said, that the judgment bore no interest. Of a foreign statute, the judge could not take judicial notice. But he was called upon, ex parte, to receive evi-

SPENCER C. KNOWLAND.

dence of the foreign law in the form of an authenticated statute of Misoissippi, and give judgment of seizure and sale for the amount of the judgment and interest from its date, at the foreign rate. This, in our opinion, he could not do-Under the provisions of the Code, he had no authority to look beyond the authenticated foreign record to ascertain its legal effect. If the plaintiff was not satisfied with a decree of execution for the principal sum stated in the judgment, the court was open to him for a proceeding in the ordinary mode by citation. We may also add that, it is true that the authenticated statute of Misaissippi, exhibited with the foreign record, and passed many years before the date of the judgment, established a rate of eight per cent; but non constat by the certificate appended to that statute, that it was in force at the date of the judgment; and we are not prepared to say that, in an ex parte proceeding of this sort, the matter should have been left upon a legal presumption. The principle, so frequently recognized in our decisions, is one from which we are not disposed to depart, that all remedies by which, on ex parte orders, the property of a defendant is taken out of his hands, must be strictly construed. The motion to set aside the order of seizure and sale should have been sustained.

It is therefore decreed that the judgment of the court below be reversed, and the petition dismissed, with costs in both courts.

LE BLANC v. NOLAN.

Although in actions of trespass the enquiry is restricted exclusively to the questions of possession, and of the damages resulting from the injury complained of, yet, where the defendant asserts an adverse possession, the title under which he holds is admissible in evidence in support of that possession. This production of title does not authorize an adjudication upon the question of property, but is admissible to show the beginning and extent of the possession.

When, from inadvertence, or other cause, a plaintiff has failed to offer all the evidence on which he relies for a recovery, it is discretionary with the judge, even after the evidence for the defence had been closed, to permit the deficiency to be supplied, where the evidence offered is not of a character to surprize the opposite party.

In actions of trespass there can be no examination into title. Possession alone is sufficient to support the action.

A PPEAL from the District Court of West Baton Rouge, Burk, J.

1 W. B. Robertson, for the plaintiff. Lobdell and Greves, for the appellant. The judgment of the court was pronounced by

King, J. This action was instituted to recover damages for a trespass, alleged to have been committed by the defendant, by cutting trees on a tract of land which the plaintiff claims to possess as owner, in virtue of titles derived from the United States. The defendant denies the alleged trespass, and asserts title in himself to the land on which the acts complained of were committed. The cause was submitted to a jury, who gave a verdict for the plaintiff, and from the judgment rendered thereon the defendant has appealed.

Our attention is called to several bills of exception presented on the trial. The first is to the introduction in evidence of the defendant's titles to the land in question. We think the judge did not err, in permitting them to be offered. Al-

LE BLANC

though, in actions of trespass, enquiry is restricted exclusively to the questions of possession, and of the damages resulting from the injury complained of, yet when the defendant asserts an adverse possession, the title under which he holds may be exhibited in support of that possession. This production of title does not authorise an adjudication upon the question of property, but is admissible to show the beginning and the extent of the possession. 16 La. 395.

The second exception was to the permission granted by the court to the plaintiff, to offer in evidence the title by which he holds the land in question, as ter the plaintiff had closed his testimony in chief, and after the evidence for the defence had also been closed. The plaintiff ought, before closing his evidence in chief, to offer all the testimony on which he relies for a recovery. When, from inadvertence or other cause, he has failed to do so, it is always discretionary with the judge to permit the party to supply the deficiency, when the testimony offered is not of a character to operate a surprise upon his adversary. In the present instance the plaintiff averred title, and the title produced being in conformity with that recited in the petition, the defendant cannot complain of surprise.

The third exception is to the refusal of the judge to charge the jury that, "where a plaintiff claims damages for cutting down trees, he must show and prove title to the land on which the trees were growing." The judge did not, in our opinion, err. It has been repeatedly held that, in actions of trespass, there can be no examination into title. Possession alone is sufficient to support the action. 6 La. 559. 4 Mart. N. S. 136.

As regards the merits, the plaintiff has shown that, as the owner of a tract of land of one and a fourth arpents front, on the Mississippi river, by forty in depth, he availed himself of the act of Congress and purchased the back concession, containing forty five acres, for which a patent has issued in his favor. The witnesses state that the side lines of the double concession, are parallel and extend back forty arpents; that they are marked, blazed, and staked plainly, and that the plaintiff has possessed, in conformity with them, since 1833; that his enclosures extend back, about twenty five arpents, and that several of the trees cut by the defendant stood within two or three arpents of the plaintiffs rear fence. It is also shown that, the defendant has a fence running back the entire forty arpents within sixty feet of the plaintiffs line, and that he has always, until recently, respected the plaintiff's possession.

The defendant contends that the true lines of the plaintiff, as established by the approved government survey, diverge from the front to the rear, in consequence of which the quantity contained in the front tract was obtained by extending the lines less than forty arpents in depth. The evidence which he has adduced renders it probable that, in regard to a small portion of the land, there is a conflict of possession between the parties; for while the plaintiff proves possession of a tract of one and a fourth arpents front, by forty in depth, with parallel side lines clearly defined, the defendant exhibits an extract from a township map, on which it is represented as being a little less than thirty one arpents in depth. The plaintiff also produces a title from the United States to a tract of land owned by himself, which, as represented in the township map, embraces ten or twelve acres of the land claimed by the plaintiff. The exact point of conflict has not been shown, nor do we deem it important, in the present con troversy, as several of the trees appear, by the testimony, to have been cut within the limits assigned by the defendant himself to the plaintiff's tract.

The damages assessed by the jury do not appear to us to be excessive. The question was one peculiarly within their province, and they have not so exercised the discretion vested in them by law as to require our own interference.

Judgment affirmed.

STONE v. ROSE.

Where the affidavit of a plaintiff sets forth that, since judgment was rendered, material evidence in support of her demand has been discovered, which could not have been obtained before, though due diligence was used, and states fully the facts expected to be proved, and the name of the witnesses to establish them, and the facts are such as, if satisfactorily established, would authorize a recovery, and no circumstances are disclosed which conflict with the affidavit or indicate a want of due diligence, a new trial should be granted. C. P. 560, 561.

PPEAL from the District Court of Madison, Selby, J.

A Pepper and R. C. Downes, for the appellant, contended that a new trial should have been granted, citing 4 Mart. N. S. 132. 10 Lu. 409.

Amonett, for the defendant.

March Congress of the Congress

The judgment of the court was pronounced by

Kine, J. This action was instituted to recover a debt alleged to be due by the defendant. After its inception, the plaintiff died, and his administratrix was made a party to the suit. The proofs on the trial were insufficient to establish the plaintiff's demand, and a non-suit was rendered. An application for a new trial was made, on the ground of newly discovered evidence, which was overruled, and the plaintiff appealed.

We think the judge erred in refusing a new trial. The affidavit in support of the application brings the plaintiff strictly within the rule which provides for this kind of relief. It sets forth that, since the rendition of the judgment, matorial evidence has been discovered in support of the demand, which could not be obtained before, although due diligence was used. The facts expected to be proved are fully stated. They are such as, if satisfactorily established, would authorise a recovery, and the witnesses by whom they are to be proved are named. Code of Practice, arts. 560, 561.

No circumstances are disclosed by the record which conflict with the affidavit, or indicate the want of diligence in the preparation of the cause, and the judge has assigned no reasons for refusing the application. But a short time interroned between the institution of the suit and the trial, and during that interval the plaintiff died. This event probably deprived his counsel of the means of discovering the testimony necessary to prove the demand, which it is stated in the affidavit is now known to exist.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that a new trial be awarded, and that the cause be remanded to be proceeded with according to law, the appellee paying the costs of this appeal.

is no mages and legal bits convening adapting analy

Guice v. LAWRENCE, Syndic.

The husband as head and master of the community may alienate à titre onereux the immovables of which it is composed, without the consent of his wife. The laws of Louisiana, like those of Spain, recognize no title in the wife, during marriage, to any part of the acquets; she becomes the owner of one half, only after the dissolution of the marriage. C. C. 2373.

A voluntary surrender of property, made by the husband to his creditors; becomes, after acceptance, an alienation of the property, vesting the title thereto in his creditors; and, where the property surrendered was acquired during marriage, the proceeds must go to the payment of the debts proved in the concurso, giving the preference to those contracted during the community (stat. 29 March, 1826, § 2); and where the community is dissolved by the death of the husband after the surrender, the wife will preserve only her recourse against the syndic, for one-half of any balance remaining in his hands after payment of all the debts.

Where property belonging to the community of acquets has been alienated by the husband infraud of the rights of the wife, the only recourse given to her by art. 2379 of the Civil Code is

against the heirs of the husband after the dissolution of the marriage.

PPEAL from the District Court of Concordia, Curry, J.

The petitioner represented that, in August, 1839, she was married to one Smalley, and that the parish of Concordia was their matrimonial domicil. That, in the autumn of 1840, Smalley purchased one thousand acres of land of the United States, at the public sales at Monroe, partly in the name of the petitioner and partly in his own name, for the price of \$1 25 per agre : That, in March, 1841, he made a surrender of his property, when the defendant was appointed his syndic; and that, in May following, he died: That he surrendered to his creditors the lands acquired by the community, and that they were sold for \$8,000, or \$10,000 -That she has accepted the community existing between her husband and herself, and has demanded of the syndic to be placed on the tableau as entitled to onehalf of the nett proceeds of the community property, after deducting the debts contracted during its existence: The petition avers that the defendant refuses to recognize her as entitled to any thing, until all the debts of Smalley are paid. She prays that she may be placed on the tableau for one-half of the proceeds of the community property, subject to the payment of one-half of the community debts.

The syndic denied her right to be placed on the tableau for any sum whateverselst, Because Smalley's debts are more than sufficient to consume the whole of the property surrendered: 2d, Because the property surrendered was mortgaged for more than its value before the surrender, and said mortgages must be first paid: 3d, Because the debts contracted during the community must be paid before any thing can be appropriated to the petitioner, and they are more than sufficient to consume the property.

It appears from a statement of facts made by the connsel of the parties, that Smalley was married in Mississippi, in August, 1839, and that he purchased lands as alleged in the petition; that he made a surrender of his property to his creditors, in March, 1841, which was accepted, and the defendant appointed syndic, and that Smalley died in May following; that the largest part of Smalley's debts was contracted before his marriage; that judgments were obtained on some of them after the marriage, and legal mortgages acquired subsequent to the marriage and before the surrender; that ordinary debts were contracted during the

GUIOR v. LAWRENCE.

marriage; that Smalley's wife brought no property into the marriage, and had nothing; that their matrimonial domicil was in Louisiana; that the lands sold for between \$8,000 and \$10,000; that the legal mortgages were for more than the property surrendered, and were acquired subsequently to the marriage, but were, for the most part, founded on debts contracted previously thereto. There was a judgment below rejecting the demand of the plaintiff, from which she appealed.

Rowly, Frost and Sanders, for the appellant. The plaintiff's pretensions are based on the following propositions: 1st, That the community property, after the payment of its debts, is to be equally divided between the parties. C. C. art. 2372. 2d, That the husband cannot validly surrender the wife's portion, for the payment of his private debts contracted prior to the marriage. Civ. Code, art. 2373. 3d, That a surrender is not an alienation, but a pledge. C. C. arts. 2171, 2174, 2176. 2 Rob. 193. 4th, That the wife has a right to attack any alienation or encumbrance made by the husband to her injury. 5th. That the action which she may exercise against the heirs of the husband is a cumulative remedy, and does not preclude her from claiming the property itself. 2 Mart.

N. S. 573. 4 La. 192. 9Ibid, 583.

The old Code gave the husband express power to give away the community property. The new Code expressly forbids it. Code of 1808, p. 336. The community is but a civil partnership, of which the husband is the active partners. In any other partnership, would one partner be allowed to pay his individual debts out of the partnership funds, to a creditor who had notice. The Code of Practice gives her the power to prevent sales by the husband to her prejudice. C. P. art. 298. The judgment should be reversed, and the syndic ordered to place the plaintiff on the tableau for one-half of the surplus of the community property after the payment of its debts. The syndic contends that, among the community debts, should be included certain judgments rendered against Smalley during his marriage, but on debts contracted previously. We cannot so understand the law. The date of the debt, not of the judgment, fixes its character. A pre-existing debt is not a valuable consideration for a sale, as against creditors. Why should not the rule apply here?

Perkins, on the same side.

Shaw and Lawrence, for the defendant, as to the first position of plaintiff's counsel, contended that art. 2372 must be construed with art. 2378. As to the second portion, they cited 9 Rob. 210-219. As to the third, they alleged that though the surrender be considered as a pledge, it cannot better the plaintiff's position. 2 Rob. 193. C. C. art. 3124. Bul. and Curry's Dig. 495. The fourth position they contended was erroneous. Under art. 2373 the remedy of the wife is not to annul the alienation, but against the heirs. The rights and position of creditors cannot be changed by the fortuitous event of Smalley's death, subsequent to the surrender. Actus Deinemini facit injuriam. Were Smalley alive, his widow could insist upon no claim whatever, and his death does not alter her position in this respect. C. C. arts. 2126, 2176. 11 La. 438. B. & C. Dig. 492.

The judgment of the court was pronounced by

Rost, J. The plaintiff married one Abner Smalley in the State of Mississippi. She had no property, and Smalley was much in debt. They came to Louisiana, and, a few months after, Smalley bought at public sale, from the United States, one thousand acres of land, partly in his own name and partly in the name of the plaintiff, and paid for it. His creditors pursued him in Louisiana, and obtained against him judgments, which were duly recorded after the purchase of the lands. In consequence of those judgments, Smalley made to all his creditors, in March, 1841, a voluntary surrender of his property, which was accepted by them. They appointed a syndic, and, in the month of May following the surrender, Smalley died. There are some debts due by the community; but the larger portion were due by him previous to his marriage. The proceeds of the sale of the lands are not sufficient to pay the amounts of the judgments recorded against him. The plaintiff, who has accepted the community, now asks to be placed on the tableau for one-half of the nett proceeds of the land, after deduct-

Guice E. LAWRENCE. ing the community debts, on the ground that she was half owner of the community property, and that her share cannot be taken to pay the debts of her husband, anterior to marriage. The judge of the court below refused her application, and she appealed.

The laws of Louisiana have never recognized a title in the wife during marriage, to one-half of the acquets and gains. The rule of the Spanish law on that subject, is laid down by Febrero with his usual precision. The ownership of the wife, says that author, is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half. But, soluto matrimonio, she becomes irrevocably the owner of one undivided half, in the manner provided by law for ordinary joint ownership. The husband is, during marriage, real y-verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable. Febrero Adic., tomo 1 y 4, part 2d, bk. 1st, chap. 4. parag. 1, nos 29 and 30. Pothier, Communauté, p. 35 and following. 12 Toullier, chap. 2, nos. 72 to 31. 14 Duranton, Droit Franc. p. 281 and foll. 10 Dalloz, Jurisp. p. 198 and fol.

The provisions of our Code on the same subject are the embodiment of those of the spanish law, without any change. The husband is head and master of the community, and has power to alienate the immovables which compose it by an encumbered title, without the consent or permission of his wife. Civil Code, art. 2373. The voluntary surrender of his property by Smalley to his creditors, became him, after acceptance, such an alienation. Under the express provisions of the act of 1826, he was absolutely divested of the title, and his creditors were vested with it. 2d Moreau's Dig. p. 437.

If this alienation can be considered as made in fraud of the rights of the wife, the only recourse which the above article gives her is, against the heirs of her husband after the dissolution of the marriage. In the case cited from 9th La, the alienation complained of, took place after the title of the wife had become irrevocable, by the dissolution of the marriage. We agree fully with the opinion delivered by judge Bullard on that occasion, and consider it, as far as it goes, a correct exposition of the law on the subject. With the reasoning of the court in 4th La. we cannot agree; although the conclusion to which they came, may have been correct on other grounds. The difference supposed by the court to exist between our Code and that of France, is imaginary. Under both, cases of fraud are excepted from the general power given to the husband to alienate the acquêts and gains. See 7th Sirey, 1st sect. p. 401. The proviso of art. 2373 cannot be construed as giving or recognizing a title to or in the wife. As well might it be said that children have a title in the property of their father, because he is prohibited from disposing of it in fraud of their légitime. Dixon v. Dixon, 4 La. 188.

The plaintiff had not applied for a separation of property, and could not have obtained it, as she brought nothing into marriage, and appears to have had no separate avocation of any kind. The surrender was, after acceptance, an alienation, by which she is bound. The proceeds of the land must go to the payment of the debts proved in concurso, giving the preference to those contracted during the community, and reserving to the plaintiff her rights against the syndic for one-half of any balance in his hands after the payment of all the debts, and also the rights she may have against the heirs of her husband, under art, 2373 of the Civil Code.

Guice v. Lawrence.

For the reasons assigned, it is ordered that the judgment in this case be amended, so as to reserve to the plaintiff her right to one half of any balance remaining in the hands of the syndic after payment of all the debts, and also any rights she may have against the heirs of her husband under art. 2373 of the Civil Code. It is further ordered, that the judgment as amended be affirmed, with costs.

SUCCESSION OF NORA.

The stat. of 15 March, 1830, s. 1, merely makes lawful certain sales of the property of successions made by auctioneers. It does not purport to interfere with the power of courts to direct such property to be sold by their officers. Under the new organization of the judiciary and of the office of sheriff, by the constitution of 1845, such sales should be made by the sheriff.

A PPLICATION for a mandamus to the judge of the Second District Court of New Orleans. The testamentary executor of the widow Nora represented that, with the consent of the heirs of age and by the advice of a family meeting on behalf of the minors, he had, in his capacity of executor, applied for the sale of the immovable property of the succession, to be made by one Tricou, a licensed auctioneer of the city of New Orleans: That the judge refused to comply with the petitioner's demand, that the sale should be made by the auctioneer named by him, thus refusing to the petitioner the exercise of a right granted to him by a particular statute, that of having the property administered upon by him sold by a licensed auctioneer: That this refusal is a denial of justice which can only be remedied by a mandamus, and that the property in question exceeds the sum of \$300. He prayed for a mandamus to the judge of the court below, commanding him to comply with the demand of the petitioner.

In answer to a rule to show cause why a peremptory mandamus should not be issued, Canon, J., alleged: That the sale prayed for had been ordered to be made on the 25th of January, 1847, under the provision of the Code of Practice, arts. 760, 767: That it is provided by the Code of Practice, art. 1046, that the sales of property belonging to successions shall be made, in New Orleans, by the register of wills, under the direction of the judge: That by the 1st sec. of the stat. of 15 March, 1830, it was declared that the sales of such property night be made by auctioneers, "provided that the executor, &c. cause the proces-verbal of such sales when made in the parish of Orleans, to be recorded in the office of the register of wills, and when made in any other parish of this State in the office of the judge;" that since the re-organization of the the judiciary system, and the suppression of the office of register of wills, the right to employ an auctioneer to make such sales must be considered as done away with, since the proces-verbal of the sales can no longer be recorded in the office of the register of wills.

Le Gardeur, for the petitioner. A mandamus is the only means by which the plaintiff can obtain redress. The judge alleges that he has ordered the sale prayed for, to be made by a competent officer. But that officer is not the one we have designated, as we had a right to do, and the order given is not the order prayed for. This order is not final but interlocutory, being rendered on mat-

SUCCESSION NORA

ters incidental to the settlement of the estate; and such judgments are not appealable from, unless they produce an irreparable injury. In this case, not only is there no irreparable grievance, but there is not even a grievance so far as the succession is concerned, as it will certainly not be contended that the parties interested can by any means be aggrieved, or injured, simply because the sale would be made by the sheriff. Indeed the only party aggrieved is the executor, who is denied the exercise of a right which is secured to him by law; but as the succession is neither aggrieved nor injured, the consequence is plain that the executor had no right, for the redress of his individual wrongs, to appeal from that judgment, had it been appealable from. The Code of Practice, art. 831, provides that a mandamus may issue at the discretion of the judge, even when a party has other means of relief, if the slowness of ordinary legal forms is likely to produce such a delay, that the public good and the administration of

justice will suffer from it.

It is not contended that the sheriff had no right to sell succession property. But can this general authority destroy the right vested in executors by a special law of the land? In other words, can a special law be repealed by implication? This is the only question before the court. Until 1830, the probate judges in the country and the register of wills in New Orleans were the only persons authorised by law to make sales of the property. Code of Practice, art. 924, no. 5, and art. 1046. In 1830, the legislature passed an act, the first section of which provides "that it shall be lawful for testamentary ex-ecutors, administrators and curators to cause the property, real and personal, of such succession or successions as may be under their administration, to be sold by any commissioned auctioneer, and such sale or sales, so made, shall be good and valid in law." So that, previous to the abolition of the parish and probate court system, the law with regard to the sale of succession property stood thus: The power to sell was vested in the probate judges in the country and the register of wills in New Orleans, and this was the general rule on the subject; but under the 1st section of the statute of 1830, executors, administrators and curators, had a right to cause the property under their administration to be sold by any commissioned auctioneer; and this was the exception to the general rule. How does the law stand on this subject now? The sheriff, if the reasoning of the lower court be correct, and we have no interest or disposition to question its soundness, is the officer who has superseded the register of wills, so far as the sales of succession property are concerned. The power to sell such property would then vest in him, under the general rule of law, But as no change has taken place in our system of laws relative to the settlement of successions, although the ministerial officers, through whose agency it was carried into effect may have been changed, the consequence is that the exception in the 1st section of the act of 1830, which existed before the adoption of the new constitution, and was a limitation of and a restriction upon the general powers of the register of wills, still continues to exist as an exception to the general rule, under which, in the opinion of the lower court, the sheriff is now authorized to make the sales in question. Registers of wills are no longer known to our laws; but the duty was imposed on auctioneers to file a procès-verbal of the sales made by them in the register's office, because the latter was the clerk of the probate court; and this formality can easily be complied with now, by recording the proces-verbal in the clerk's office of the court which orders the sale, Besides, the new constitution, art. 142, provides that "all laws in force at the time of the adoption of this constitution, and not inconsistent therewith, shall continue as if the same had not been adopted;" and the statute of 1830 is certainly not inconsistent with the constitution which vests no new powers in sheriffs, but simply provides (art. 83) that "a sheriff shall be elected in each parish by the voters theof, for the term of two years."

If it be correct that no express repeal of the act of 1830 can be found; that there is no contrariety between the general power to sell succession property as claimed for the sheriff by the lower court, and the special power vested to the same effect in auctineers by the statute of 1830; and lastly, that the statute under consideration is not inconsistent with the new constitution, the conclusion must be that the statute is still in force, unless abrogated by considerations of a general character. And this brings us to the only question before the court,

that is, whether a special law can be repealed by implication.

Zachariæ, "Cours de Droit Civil Français," vol. 1, p. 31, § 29, says: "Toute fois, l'abrogation tacite ne peut résulter que d'une contrariété formelle; dan

le doute, il faut, en la rejetant, interprèter la loi nouvelle de manière à la mettre en harmonie avec la loi antérieure. Posteriores leges ad priores pertinent, nisi contrariæ sint. D'un autre côté, une loi spéciale n'est pas tavitement abrogée par une loi générale postérieure. Lex specialis per generalem non abrogatur." Pothier, in his Pandects, title De Legibus, sect. 1, art. 5, no. 25, speaks thus: "Cum duæ leges contrariæ videntur, quarum altera specialiter de casu de quo judicandum aut respondendum est, disponit, altera generaliter duntaxat disponit, prævalere debet illa quæ specialiter disponit." Merlin, in his "Répertoire de Jurispradence, Vo. Loi, § 11, art. 3, says: "Les lois spéciales sont-elles abrogées de plein droit par les lois générales pestérieures? Non." The Court of Cassation, in a decision dated August 8th, 1822, (Journal du Palis 17, page 561,) held that "en principe, les lois et règlemens relatifs à des matières spéciales ne peuvent être considérés comme abrogés par des lois générales postérieures, qu'autant que celles-ci contiennent des dispositions formelles et expresses d'abrogation." The same learned tribunal, in another decision of July 13th, 1826, held the same doctrine, but in a different language. They said: Les lois générales ne dérogent point tacitement aux lois speciales, qui, par leur nature méme, conservent leur effet tant qu'elles ne sont pas spécialement abrogées." Journal du Palais, 20, p. 688.

Sir Wm. Blackstone, in his celebrated Commentaries on the laws of Eng-

land. at page 89, of vol. 1st, says:

"Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one. And this, upon a general principle of universal law, that "leges posteriores priores contrarias abrogant;" consonant to which it was hid down by a law of the twelve tables at Rome, that "quod populus postremum jussit, id jus ratum esto." But this is to be understood when the latter statute is couched in negative terms, or where its matter is so elearly repugnant, that it necessarily implies a negative. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. If by a former law an offence be indictable at the quarter sessions, and a latter law makes the same offence indictable at the assizes, here the jurisdiction of the sessions is not taken away, but both have a concurrent jurisdiction, and the offender may be prosecuted at either, unless the new statute subjoins express negative words, as that the offence shall be indictable at the assizes, and not elsewhere."

In the case of De Armas, (10 Mart. p. 172,) the Supreme Court adopted the principles recognized by the authorities above quoted, and held: "That a particular law is not repealed by a subsequent general law, unless there be such repugnancy between them, that they cannot be complied with under any circumstances." But nowhere is this principle more clearly and forcibly illustrated, than in the recent case of the Bank of Louisiana v. Farrar and wife. 1 Ann. Rep. 49. Mrs. Farrar had bound herself jointly and in solido with her husband, in favor of the bank, under the 32d section of the charter granted to that institu-When sued upon that joint obligation, she resisted the claim, on the ground that the 32d section of the charter was repealed by art. 2412 of the Louisiana Code, which prohibits a wife from binding herself for her husband. But your honors thought differently; and his honor, the chief justice, who delivered the opinion of the court on that occasion, said: "In Louisiana, special laws form a large portion of our legislation. It is one of the evils of the times. effort was made in the late convention, to place some restraint on what was felt to be an abuse in legislation; but it failed, and special legislation is a part of our sys-We cannot hold this section to be repealed by what we consider an impli-For the exception of the 32d section is no more in contradiction with art. 2412, than it was to the laws in reference to which it was passed; the relation it bears to each, is to all intents and purposes, identical. It was an exception to the former law; it remains an exception to this."

The case of the Bank of Louisiana v. Farrar and wife, is alone decisive of this. In that case, the wife resisted the plaintiff's demand, on the ground that the special law of 1824, was repealed by the general law of 1825. But the court thought differently, and decided that the exception in the special law of 1824 was no more in contradiction with the general law of 1825, than it was with the law in reference to which it was passed; that it was an exception to

Succession of Nona. SUCCESSION OF NORA. the former law, and remained an exception to the latter. In this case, the executor claims the exercise of a right vested in him by a special law of 1830; and that right is denied to him by the learned judge of the Second District Court, because, in 1845, the office of register of wills was abolished, whence he concludes that the sheriff has the right to sell succession property, under the general powers of his office. But it will be decided, in accordance with the principles laid down in the case of Farrar, that the exception in the special law of 1830 is no more in contradiction with the laws of 1845, than it was with the laws in reference to which it was passed; that it was an exception to the former laws, and remains an exception to the latter.

Grymes, contra. The plaintiff in his anxiety to prove that he has no other remedy but that of mandamus, has succeeded in showing most clearly, that he is not entitled to that writ. He admits in his argument that there is not only no "irreparable grievance," but no grievance at all, "so far as the succession is concerned; as it will certainly not be coutended that the parties interested can by any means be aggrieved or injured, simply because the sale would be made by the sheriff: indeed, the only party aggrieved is the executor, who is denied the exercise of a right secured to him by law," etc. From this we see clearly the issue tendered by the petitioner, and the true grounds of his com-

plaint, and what he calls a denial of justice.

It appears by the answer of the honorable judge of the Second District Court, that the order for the sale prayed for by the plaintiff, was actually granted on the 25th of January, 1847. The return of the judge is not traversed, nor its truth denied; it must, therefore, be taken as true. It is distinctly admitted that the succession, and those interested in it, are in no manner aggrieved or injured by the nature and tenor of the judge's order; and that the plaintiff, in his representative character of executor, in which capacity the whole proceedings in the cause were conducted, has sustained no injury. The whole cause of complaint is, that the plaintiff has not been permitted to exercise his arbitrary caprice in the choice of an agent to execute a judicial judgment or decree, in opposition to judicial discretion, fairly and clearly exercised. The object of the struggle is to deprive the court of all discretion in the choice of the officer who is to execute its mandates and judgments, and to vest it in the arbitrary will of an irresponsible suitor, one acting (as in this case) not in his own right, but in a fiduciary capacity, under the saction and by the appointment of that very court, immediately amenable to it, and considered in law as administering in all respects under its supervision and control.

From these facts, and others appearing in this case, we submit, in support of the cause shown by the judge of the Second District Court, the following pro-

positions:

1. In the language of Lord Bacon, that "a mandamus is a writ commanding the execution of an act where otherwise justice would be obstructed, or the king's charter neglected, issuing regularly only in cases relating to the public and the government; and is therefore termed a prerogative writ." A Bacon, page 498—verbo Mandamus. And, in the language of the Code of Practice, that "the object of this order (mandamus) is to prevent a denial of justice, or the consequence of a defective police," and should be issued where the law has assigned no relief by the ordinary means, and where justice and reason require that some mode should exist of redressing a wrong or an abuse.

2. That no obstruction of justice has taken place, the order prayed for having been granted. That no injury has resulted either to the thing, nor the persons interested in the thing over which the court exercised jurisdiction in the course of the proceedings complained of, and no injury or damage caused to the immediate party in his representative or fiduciary character, in which capacity alone he was before the court; nor any actual damage or loss to him in

his individual capacity.

3. That the exercise of a sound discretion by the court, is a power and a right inherent in all courts, unless forbidden by positive law, and more especially in courts of probate, which are invested by law with the supervision over the administration of estates in the hands of trustees, such as executors, administrators, tutors etc. etc.; and that the exercise of such discretion involves nothing in relation to the public and the government, in the true sense of the authors quoted, and is nothing more than ordinry judicial action upon matters coming before the courts, in the exercise of their acknowledged jurisdiction.

NOBA.

4. That there is nothing in this case in relation to defective police. There Succession is no wrong to redress; for it is expressly admitted that the parties interested have suffered none. There is no abuse to correct; for the privilege contended for by the plaintiff is a bare naked right, uncoupled with any perceivable interest-not granted to him by any statute, positive in its terms, passed upon any considerations of a public nature, but subject to judicial interpretation and judi-

cial discretion.

5. That the statute of 1830, quoted by the plaintiff, (Bullard and Curry's Digest, p. 2,) is directory only in its terms: it creates and vests no positive and absolute rights in the persons named in the statute, independent of all judical interpretation, discretion, or control: it does not, in direct terms, exclude judicial action; and this can never be done by implication-by the general terms of the law: it cannot be conclusively inferred that it relates to the sales of property to be made by the judgment or order of the court. In its terms it would seem to relate to the extra-judicial action of the executor, curator, etc. To suppose that a statute contemplated judicial action as necessary to the accomplishment of an act—that it should be done by virtue of a judgment or decree of a court, and at the same time deprive that court of all power or discretion as to the organ or means by which its judgement should be executed, and vest that power in a party to the suit, would be to suppose a case that might be within the scope of legislative power; but it is a conclusion which no court should arrive at by implication. It would render the court the mere organ of the party to the proceedings-invest him, with an arbitrary authority, to be exercised ex parte, and without opposition, destructive of the legitimate power and authority of the court, and tending to disorder, fraud and numberless abuses. When the powers of the judiciary are necessarily called into action, for the accomplishment of any lawful purpose, they are necessarily seized of the whole subject—have a right to act upon it in all its parts—to look to the execution, as well as the rendition of their judgments, unless restrained by some clear, positive, and prohibitory law. No such law is to be found in the statute quoted and relied on by the petitioner. If the court had any discretion in the matter, then a mandamus will not be granted (Louisiana College v. The State Treasurer, 2 La. 394); nor is a mandamus in this case at all necessary to aid this court in its appellate jurisdiction, as contemplated by the Code of Practice, art. 838.

6. The privilege claimed by the plaintiff has no appreciable value; it could not come before this court, nor be considered by it, in the exercise of its appellate jurisdiction. It has no permanent, fixed, or useful existence. It may be used capriciously, or it may not be used at all, and, if not claimed or used, the matter would belong to the court, which is the strongest argument to prove that the court is not wholly without power or discretion in the matter. For all these

reasons we believe that this is not a case for a mandamus.

Supposing all these objections to the remedy by mandamus to be overruled, and the court in possession of the cause, what judgment should be rendered?

1. The probate system and all its machinery, as it existed prior to the adoption of the new constitution, has been abolished, or modified by the new constitution, to such an extent as to repeal or render inapplicable many of the statutes passed in relation thereto. In relation to the particular statute relied on by the plaintiff, the first section declares that the sales to be made by auctioneers shall be good and valid in law, upon an express proviso: that the procesverbal of such sales shall be recorded in the office of the register of wills, when made in the parish of Orleans, and in the office of the parish judge, when made in any other parish. The office of register of wills in the parish of Orleans is abolished, and so are the parish judges throughout the State; and, neither the constitution, nor any law passed under it, has endowed any other office or officer with all the faculties or functions exercised by either the register of wills or parish judges; yet the proviso of the statute is clear that such sales shall only be valid in law upon that condition.

But suppose it should be considered that by necessary implication those duties and functions have been transferred to some other officer, and that a recording in some other office would satisfy the exigency of the law. is this to be? Surely it would be for the judiciary to decide this, upon a fair and legal interpretation of the constitution and laws; and travel round the whole circle of this case, and we must come back to this point of judicial interpreta. tion. In the present state of the law there is no escaping from it; it must be gin in the inferior court, for this court has no original jurisdiction.

Succession of Noral

rectness of the judgment of a court of the first instance, pronounced on matters of law arising in the course of judicial proceedings, and submitted to its decision, connot be inquired into on a mandamus; and if the powers of this court, in the exercise of its ordinary appellate jurisdiction, will not reach the case; if the thing claimed has no value, or none but an imaginary one which will not support the jurisdiction of this court, it only proves that it is a case in which the constitution has not provided the means of revising such judgments.

By this statute it is made the duty of the executor, curator, &c. &c., or some one else, to cause the proces-verbal of sales to be recorded. Suppose the executor or curator fail to do it? Suppose no person else takes the trouble to do it? The statute makes it a condition precedent to the validity of the sales, that the recording should take place. Judges of the District Court cannot be expected to devote their time to watching the conduct of suitors, of executors, curators, &c., or to the performance of any extra judicial functions; this is forbidden by the constitution. If the law invoked by the petitioner be in force, and gives him what he contends for, the absolute right, independent of all judicial power or action, to the exercise of this privilege, the validity of all sales of this nature must depend upon the conduct and will of executors, administrators, curators, &c. and great confusion, frauds and litigation must be the natural consequence. Such a state of things must be sufficient to open the door and let in the judiciary to act upon the subject, and its judgments must be considered as judgments in the discharge of their ordinary judicial functions, and to be revised and corrected in the ordinary indicial functions, and to be revised and corrected in the ordinary indicial functions, and to be revised and corrected in the ordinary indicial functions.

dinary manner, and where this cannot be done, to remain final, as in other cases. 2. We take it for granted, that the sheriff, by virtue of his office, is the proper person to execute all orders, judgments, decrees and mandates of the several courts of justice of this State. That this is the peculiar, appropriate, universal and necessary attribute of his office, independent of any special statute or law so declaring it. That a judgment, order, or decree of a district court, directing or ordering a sale of property, is, in every sense of the word, a judicial act or judgment, done or rendered by such court; and that the execution of such a judgment or decree would fall directly within the legal and natural attri-butes and functions of the sheriff's office. That all special legislation, by which any part or portion of the duties, powers or rights of the sheriff are transferred to any one else, is an exception to the general rule; and, if the person to whom any such powers, rights and duties are transferred be an officer of the State, it is to all intents and purposes a transfer of the duties and powers of one office under the State, to be held and exercised by another. The 126th article of the constitution of the State declares, that "no person shall hold or exercise at the same time more than one civil office of emolument." The act of 1830, authorizing auctioneers to execute the judgments of the courts, is in conflict with this article of the constitution, and, of course, repealed by it. Auctioneers are officers of the State—they are appointed by the governor, by and with the advice and consent of the senate—and commissioned as such, and their duties are regulated by law; they are the collectors of a considerable portion of the revenue of the State; and it is not competent to the legislature to get round the true meaning of the constitution, by cutting up and parceling out the legitimate and lawful powers, duties, and attributss of one office, and accumulating and adding them to another; and thus doing indirectly, that which it would be unconstitutional to do directly. No court of justice would be justified in sanctioning such a course, under the actual legislation on the subject; nor will this court, by mandamus, compel a district judge to act as in the case of an acknowledged, valuable, indisputable and useful right, in a case where the construction of the constitution and the statutes of the State are called in question, and where his judicial discretion is necessarily called into action.

3. The judge of the Second District Court returns, that the order for the

3. The judge of the Second District Court returns, that the order for the sale, as prayed for by the plaintiff, has been granted; but, that he has ordered it to be made by the sheriff of the parish of Orleans. In this he has exercised a sound legal discretion, upon every principle of public order, safety and convenience. To execute the judgments and decrees of the courts of justice, is the natural and almost exclusive duty of the sheriff, as laid down and regulated by law. He acts under an oath of office, and a heavy official security. His office is in immediate contact with all the courts of justice, and he is under their easy and constant superintendence; and, as an officer of the courts, he is subject to their authority by summary process. All the records, documents and proceedings in

relation to the business of the courts, are kept together in one office, and of easy access to the public. Being an independent public officer, and his duties regulated and prescribed by law, and the most summary remedies provided to restrain him within the bounds of his duty, and to punish him when he exceeds them, the public business is more safe in his hands; and his fees or compensation being fixed and regulated by law, all temptation to bargains and collusions with executors, administrators or curators, for a share in commissions and emoluments is done away with. He is elected by the people of the parish and is amenable to them; and in addition to all the other checks and securities created by positive law, the slightest violation of duty is subject to the action of public opinion through the ballot box, at short periods. The struggle on the part of the petitioner in this case is for the exercise of an arbitrary privilege or will, that has no intrinsic value to him in the fair and honest exercise of his functions as executor. Its only object is to enable him to distribute his patronage, and the emoluments arising from sales of this nature among the auctioneers of the city, at his pleas-This is a dangerous power with which to invest individuals, who are parties to judicial proceedings—who are mere trustees, guardians, or administrators of property for others. It is dangerous to the public to entrust the execution of judicial decrees or judgments to many persons who are not under the immediate cantrol of the courts, who act under no official responsibility, and who owe their employment and its emoluments to the patronage or choice of one party to a suit or judicial proceeding. As to the emoluments arising from business of this nature, if they must accrue, it is certainly better that they should go to the sheriff than to any one else. His office is essentially a public one-he is not supposed to be engaged in any private business, trade or calling—it is wholly for the public—it is a very expensive one, and the profits or emoluments are divided among a host of deputies, clerks and employés, whom he is obliged to maintain for the public service, whether the emoluments of his office be great or small, and being thus distributed contribute to the support of a large number of persons and famlies who are in need of such employments. Auctioneers, on the contrary, are not only officers of the State, but they are also private merchants, traders and dealers—the whole trade and commerce of the country is open to them, they are subject to all its vicissitudes, from the accumulation of large fortunes to bankruptcy. They employ no more clerks or persons than are necessary for their private business; they contribute to the emolument or living of no one beyond the exigencies of their own interests.

They are appointed by the governor, and in proportion as you add to their functions and emoluments, and introduce them into the administration of justice, you add to executive patronage and power, and take away from the people that power and authority over public officers, and weaken their accountability to them, which it is clearly the object of our new constitution to create and estab-

lish upon an effectual and lasting basis.

The auctioneer, not being an officer of the courts of justice, but owing his employment to the good will of a party litigant, is beyond the reach of the summary process and proceedings of the court; in many cases he could only be reached by the ordinary and tardy process of the law. He is without the restraint of an approaching popular election and accountability to the people; he may trust to explanations, and appeals to executive elemency, mercy or favor, for a re-appointment; when appointed by partnerships and associations in commerce, he may be the mere holder of a sinecure commission, and all the public business placed in his hands be entrusted to the management and control of persons not elected by the people—not even appointed by the executive—but private merchants and traders, wholly irresponsible to the public, and in whose appointment and induction into the most important public concerns, the public has never been consulted, directly or indirectly; or he may bring his commission as so much capital into the partnership, thus trafficing in executive patronage, and advancing his private fortune at the hazard of the public good.

From all these considerations it is submitted that the judge of the Second District Court has exercised a sound, legal and just discretion in this matter,

and that the mandamus asked for should be refused.

The judgment of the court was pronounced by

EUSTIS, C. J. The executor of the last will of the widow Nora applied to the Second District Court of New Orleans, for the sale of the property of the

SUCCESSION OF NORA. SUCCESSION OF NORA.

succession, and prayed that the sale might be made by an auctioneer designated in his petition. The judge considering that the sale ought to be made by the responsible officer of the court, who is bound by law to execute all its orders, directed it to be made by the sheriff. The executor has applied to us for a mandamus which was granted nisi, and on the return we have the reasons for the action of the district judge, which are conclusive. This is no case for a mandamus. The law of 1830 merely makes lawful certain sales made by auctioneers. It does not even purport to interfere with the power of courts to direct the property of successions to be sold by their officers, who, for grave reasons, courts may consider ought to be entrusted with them, and still less to take away that power. Under the new organization of the judiciary, and of the office of sheriff, by the constitution of 1845, the district judge was certainly right in directing the sheriff to make the sale of the property of the succession.*

The application for a mandamus is dismissed, with costs.

SUCCESSION OF WHIPPLE.

The Supreme Court has no general supervising power and control over courts of inferior jurisdiction. The power it is authorized to exercise through writs of mandamus and prohibition, is limited to cases in which its exercise is incidental to, and in furtherance of, its appellate jurisdiction.

A writ of prohibition will not be directed to a District Court of New Orleans to forbid its assuming jurisdiction in the matter of a succession, on the application of one who had been appointed a curator of the same succession by another District Court of the city, where the question of jurisdiction has not been raised or decided by the former tribunal. The question as to which court has jurisdiction depends, under the stat. of 30 April, 1846, § 13, upon the time of filing the petition for the curatorship, and one court has as much authority as the other to determine it, so far as its own proceedings are concerned. The jurisdiction of the Supreme Court being appellate only, and the question of jurisdiction not having been raised in the court to which the prohibition is prayed to be directed, cannot be determined on an application for a prohibition.

A PPLICATION for a prohibition to the Third District Court of New Orleans, Kennedy, J.

Budd, Redmond and Cohen, for the application.

Mott and Carter, contra.

The judgment of the court was pronounced by

SLIDELL, J. Under the constitution and act of 30 April, 1846, all the district courts of New Orleans are clothed with jurisdiction in matters of succession. See Constitution, arts. 75 and 78. Acts of 1846, p. 32. The 13th section of this act declares, "that all petitions filed for the curatorship or administration of estates or for executorship of wills, the exact time of filing said petitions shall be endorsed, and in the court in which petition was first filed, as shall appear by the endorsement thereon, all of said petitions shall be transferred and decided on." [Sic in published stat. R.]

Jonanneau has applied to this court for a writ of prohibition to the Third District Court of New Orleans. The grounds presented are that, on the 12th Jan-

^{*}See stat. of 10th March, 1847, ch. 79, relative to judicial sales, and the supplementary act, as it is termed, of 7 April of the same year, ch. 96.

SUCCESSION

WHIPPLE.

uary, 1847, he filed in the Second District Court of New Orleans a petition, applying for the curatorship of the succession of Whipple, upon which the usual order of advertisement was made, and he was eventually appointed and qualified as curator by that court. That one Folger, on the 12th January, 1847, but upon a petition filed, as he alleges, at a later hour, applied for the curatorship of the same succession, in the Third District Court of New Orleans, and having been also appointed curator by this latter court, has obtained therein an order for the sale of certain property of the succession. He also avers that he obtained in the Second District Court a rule on the adverse curator, Folger, to show cause why the proceedings in the Third District Court should not be transferred to the Second District Court, and that thereupon an order of transfer was made by the Second District Court. This order was made without any concurrence, or action thereon whatever of the Third District Court. He alleges that the appointment made by the Third District Court, and all the proceedings in that court, are null and void, and prays that a writ of prohibition may issue, forbidding said Third District Court from further entertaining any jurisdiction in relation to the administration of the estate of said Whipple, inhibiting said Folger from assuming the functions of curator of said estate, and directing the sheriff to forbear proceeding any further with the intended sale of the property of said estate. The clerk's certificate of filing, endorsed on the petition in the Second District Court, exhibits the hour of the day on which it was filed. The endorsement on the petition filed in the Third District Court, signed by the clerk, states the day of filing, but not the hour, and a memorandum also written on the petition, but not officially signed, states the hour of filing. It further appears that Folger has taken an appeal from the decree of the Second District Court; but the Third District Court continued to exercise jurisdiction over the succession, and has ordered a sale by the sheriff.

Thus each court continues to exercise its jurisdiction, and each, under the statute, having an independent organization and jurisdiction, the one is without authority to control the other; for it must be observed, that the statute has not provided which court, in case of controversy, shall decide the disputed question. This state of things may present a very proper case for legislative action. Our province, however, is to interpret the constitution and laws as we find them, and to decide accordingly.

Whether the Third District Court has, or has not, lawful jurisdiction in the matter of this succession, is a question dependent, under the statute of 1846, upon the fact of the time of filing the petition for the curatorship in that tribunal, and that question the Third District Court has, under the statute, as full authority to determine, quoad the proceedings before it, as the Second District Court has as The question has never been raised in the to the proceedings in its forum. The jurisdiction of this court, under the constitution, is Third District Court. appellate only, except in cases specially provided. We have not a general supervising power and control over courts of inferior jurisdiction. Our supervising power, through the writs of mandamus and prohibition, is limited to those cases where its exercise is incidental to and in furtherance of our appellate jurisdiction. We cannot thus create a cause. The question of jurisdiction having never been raised before the Third District Court, nor decided by it, we are not authorized to hear and determine the question originally, nor would it be proper for the applicant to assume in advance that, if the question of jurisdiction was raised in hat court, it would be decided adversely or erroneously.

BUCCESSION WHIPPLE.

The applicant for a prohibition is not entirely without remedy before the Third District Court itself, and, at all events, he has not presented a case within the constitutional jurisdiction of this tribunal. It is obvious that where two courts are thus proceeding, very embarrassing and anomalous results may follow, before the subject can be properly brought before the appellate tribunal. Petitions might be filed in the five District Courts of New Orleans on the same day, in the matter of the same succession; five conflicting mandates might be sent to the sheriff, their common officer, and the same question might be determined different ways; an impropriety, says Blackstone, which no wise government can or ought to endure. The writ of prohibition would arrest such a mischief in England, for there it is the king's prerogative writ, and the king's superior courts of Westminster have, in such cases, a superintendancy over all inferior courts of what nature soever, and may prohibit and control them. The necessity of some provision with regard to the collision of the District Courts of New Orleans, will doubtless commend itself to the attention of the proper department of the government. Application for prohibition dismissed, with costs.

SHEPHERD v. Young et al.

One who has cut wood on the land of an adjoining proprietor, through ignorance of the line of separation of the two estates, a part of which was removed and used by him, and the remainder taken possession of by the owner, being presumed to have acted in good faith, will be responsible only for the value of the wood used by him.

Where the owner of an undivided half of a tract of land authorizes a third person to make bricks on it, the latter will not be liable to the other joint owner in damages for a trespass.

PPEAL from the District Court of Madison, Curry, J.

Amonett and Shannon, for the appellant, cited Civ. Code, art. 2294. 10 La.

117, 204. 14 La. 280.

Snyder and H. W. Dunlap, for the defendants, cited Civ. Code, arts. 21, 1960. 1 Story's Equity, ch. 5, p. 155 et seq.

The judgment of the court was pronounced by

Rost, J. The plaintiff claiming damages from the defendants for unlawfully entering upon his land, cutting cord-wood, and making a kiln of bricks thereon, and carrying away the same, obtained an injunction to stay further waste. The defendants filed a general denial, and alleged that, if they had entered upon the plaintiff's land, they were not aware of it at the time; that the wood was cut through mistake; that they had authority from Dunlap, the joint owner of the land, to make bricks thereon; that the plaintiff appropriated the wood cut, as well as the bricks to his own use; and that they are entitled to damages in reconvention. The court below dissolved the injunction, and gave judgment in favor of the defendants for \$65 90. From this judgment the plaintiff has

It is proved that Dunlap, being the owner of one undivided half of the lands authorized the defendants to make the kiln of bricks, part of which the plaintiff has taken and converted to his own use. It is also shown that the defendants cut, without authority, a large quantity of cord-wood, a portion of which was removed by them. The remainder was taken possession of and sold by the plaintiff. The evidence in relation to the defendants' knowledge of the precise

SHEPHERD

situation of the division line between their land and the plaintiff's, is conflicting; but the fact sworn to by the parish surveyor, who has since traced that line, that the defendants had erected a building and a blacksmith shop, which he found to be almost entirely upon the plaintiff's land, satisfies us that the defendants did not accurately know the limits of their possessions; and their subsequent offer to indemnify the plaintiff for the wood, and to refer the matter to any two proper persons he might select, creates in their favor the presumption of good faith.

The plaintiff is entitled to damages for the wood carried away; the defendants, on the other hand, must be compensated for the bricks converted by the plaintiff to his use. The amount allowed by the judge of the first instance, was no doubt the balance arrived at by him on their respective claims; and as its correctness rests exclusively on questions of fact and the degree of credit to which the witnesses are entitled, we cannot interfere with it. We consider, however, that the injunction should have been perpetuated in part, and in that respect the judgment must be amended.

It is therefore ordered that the judgment in this case be amended, by perpetuating the injunction so far as it inhibits the defendants from committing waste on the plaintiff's land, by cutting down or carrying away timber or both; and that the judgment as amended be affirmed, the defendants and appellees paying the costs of this appeal.

DUNLAP v. SIMS.

A sale of property under execution, on a twelve-months' credit, neither satisfies the judgment, nor novates the debt.

In issuing execution on a twelve-months' bond given for the price of property sold under a fi.

fa., it is not required that the writ should be issued against the principal and surety in the
bond, nor that it should be stated, in the body of the writ, that it was issued for the amount
of a twelve-months' bond entered into by the principal and surety for the purchase of the
property sold. It is sufficient that the writ direct the sheriff to seize and sell the property
of the parties to the bond, and that the clerk endorse on it that it was issued on a twelvemonths' bond, and that the property is to be sold for whatever it will bring in cash. C. P.
719, 720, 721. The style of the original suit should be preserved in the writ.

Where an injunction has been obtained to arrest an execution, but the want of the notice of seizure required by art. 654 of the Code of Practice is not made one of the grounds of injunction, and no evidence in relation to it appears in the record, the officer charged with the execution of the order of seizure will be presumed to have done his duty.

A PPEAL from the District Court of Madison, Curry, J.

A Sims recovered a judgment against Gray, on a joint note executed by Day and Gray, given for the purchase of a tract of land. Dunlap purchased the land at sheriff's sale, on twelve months' credit, and entered into bond, as required by the statute in such cases. Sims had an execution issued on his judgment against Gray, as stated in the opinion of the court infra, under which the sheriff seized the land and advertised it for sale, and the plaintiff enjoined the proceedings. From a judgment dissolving the injunction with damages, the plaintiff has apdealed.

Shannon, for the appellant. The judgment of Sims v. Gray, was satisfied by the levy, or seizure and sale of N. Gray's property to the full amount of the

DUNLAP Sims.

judgment, interest and costs. See 2 Lord Raymond's Rep. 1072. 1 Salk. Rep. 322. 4 Massachusetts Rep. 403. 7 Johnson's Rep. 428. 12 John. Rep. 3. Yerger's Rep. 298-9. 1 Howard's Miss. Rep. 67-69. 2 How. Rep. 852-3. 4 How. Rep. 350-1. 5 How. 574. 6 How. 513. The same decisions have 4 How. Rep. 350-1. 5 How. 574. 6 How. 513. The same decisions have been made in most of the States of the Union.

The case of Williams v. Brent, in 7 Mart. N. S. 205 to 222, seems to be the foundation on which all subsequent decisions have been made—that a sale of property on twelve-months' credit does not satisfy or novate the original judgment. The reasons given in the decisions in the common law States, well apply in this State. Article 719 of the Code of Practice requires, in the case of a forfeited twelve-months' bond, the clerk to issue an execution or fi. fa., as on final judg-The clerk should have issued the execution in favor of Sims against Dunlap and Lilly, the surety on the bond, for the amount of the twelve-months' bond. interest and costs, and have stated in the body of said execution, that the same is the amount of a twelve months' bond entered into by said Dunlap and Lilly, for the purchase of certain land, sold to satisfy a judgment of Sims v. Gray, which bond had not been paid. Then the payment of that amount would be a complete bar against any other execution on the twelve-months' bond. Issued as it has been, it would not prevent an execution from issuing on the bond. It has always been the policy of the law to require as much certainty in writs issuing from the court as is practicable. Can the sheriff proceed to sell the land of plaintiff, without giving him notice of the seizure as required by art. 654 of the Code of Practice? Under the prayer for general relief, the court is bound to notice every legal objection. See 12 Rob. Rep. 205.

Stockton, Steele and Thomas, for the defendant.

The judgment of the court was pronounced by

KING, J. F. Sims, the defendant in this action, obtained a judgment against N. Gray, and, in virtue of a fieri facias issued thereon, certain lands described in that judgment were seized, which, failing to produce two-thirds of their appraised value on the first exposure, were sold on a credit of twelve months, and adjudicated to H. W. Dunlap, the plaintiff, who gave his bond with surety, for the price, with five per cent interest. Several months after the maturity of the bond, Sims caused an execution to issue thereon, directing the sheriff to make its amount, with interest and costs, by seizing property of the principal and surety in the bond. Dunlap, the plaintiff, enjoined the writ, on the ground that he was no party to the judgment under which it issued, and that his property was illegally seized to satisfy it. The injunction was dissolved in the court below, with fifteen per cent damages and five per cent interest on the amount of the judgment enjoined, and the plaintiff has appealed. He contends that the judgment of F. Sims against N. Gray, was satisfied, by the seizure and sale of property to an amount sufficient to cover the debt, interest and costs, for which a twelve-months' bond was given.

No principle is better settled in our law, than that a sale of property under execution, on a credit of twelve months, neither satisfies the judgment nor novates the debt. The numerous authorities to which we have been referred from other States, where a different rule prevails, are wholly inapplicable here. Mart. N. S. 205. 9 La. 92.

It is next contended that the clerk should have issued the execution in favor of F. Sims, against Dunlap and Lilly, the parties to the bond, and should have stated, in the body of the writ, that it was the amount of a twelve-months' bond entered into by Dunlap and Lilly, for the purchase of certain land, &c. No such recital in the body of the writ, as that contended for, is required by law. The writ directed the sheriff to seize and sell the property of Dunlap and Lilly, the parties to the bond; and on it the clerk endorsed that it was issued upon a twelve-months' bond, and that the property seized under it should be sold for whatever it would bring in cash, which is in strict accordance with the requirements

DUNIAP U. Sims.

of the Code of Practice. See arts. 719, 720, 721. The style of the original suit was correctly preserved in the writ. This follows as a consequence from the well recognized principle to which we have adverted, that a sale on twelvemenths' credit operates no novation of the debt. The execution which issues on a twelve-months' bond, is to effect a sale for the purpose of satisfying the judgment.

The objection that the plaintiff was not served with the notice of seizure required by the 654th article of the Code of Practice, cannot be considered on this appeal. It was not made a ground of injunction by the plaintiff, and no evidence in relation to it appears in the record. In the absence of such testimony, the officer must be presumed to have done his duty.

The plaintiff has no just ground of complaint against the damages assessed by the lower court. The injunction was evidently obtained to protract the payment of a debt due, which the plaintiff in execution was proceeding legally to collect.

Judgment affirmed.

WHITE et al. v. HENDERSON.

A contract to pay compound interest is lawful, if made after the interest has accrued.

C. C. 1934.

A PPEAL from the District Court of Carroll, Curry, J. Staey and Sparrow, for the plaintiffs. Stockton, Steele, and Thomas, for the appellant. The judgment of the was pronounced by

EUSTIS, C. J. This suit is brought on three promissory notes, made by the defendant to the order of the plaintiffs. The defendant pleads that they were given in error; that the consideration of them was corrupt, illegal and usurious, being for usurious and compound interest, and for commissions not really due; that, at the time he made them, he believed he owed the plaintiffs the amount, but that the fact is otherwise, the plaintiffs owing him \$6,000, which he claims in reconvention. The plaintiffs are merchants in New Orleans, and the mercantile establishments of the defendant were in Mississippi. The transactions between the parties were mercantile, and extended back a long series of years.

There was judgment in favor of the plaintiffs, and the defendant has appealed.

The notes were given for the balance of the account of the plaintiffs against the partnership of John Henderson & Company, of which the defendant was a member. On settlement of the accounts, and in discharge of the balance due, on the 27th of February, 1838, notes of that firm were given to the plaintiffs, which were reduced by payments to the sum of \$13,701 36, on the 7th of April, 1840; for which the defendant gave his firm's note, payable at different terms, one of which was paid, the other three are those sued on. At the same time, the unpaid notes of John Henderson & Co. were given up to himby the plaintiffs.

These notes the defendant retains, and has not offered to return, and he seeks to avoid the payment of his own notes by opening the liquidated accounts of himself, the firms of John Henderson & Co., and Henderson, Jenkins, & Co., of which he was a partner, with the plaintiffs, and the house of Maunsel White

WHITE v.
HENDERSON.

to which they succeeded, which accounts, between the years 1834 and 1840, show, it is contended, that the notes sued on were made up exclusively of interest compounded and illegal commissions. Transcripts from the plaintiffs' books were produced at the instance of the defendant, and made evidence.

By article 1934 of the Civil Code, a contract to pay compound inierest is lawful, if made after the interest has accrued; and there is no evidence that the commissions charged were a cover for an usurious loan, or for the exaction of a higher rate of interest than it was lawful to stipulate. Dunbar v. Gould, 16 Johnson's Reports, 374. Daquin v. Coiran, 3 La. 394. Flower v. Millaudon, 19 La. 139.

The allegation of the defendant that the notes sued on were given in error is unsupported by evidence, and repugnant to every probability dependant on his possession, position and conduct. The parties were merchants engaged in the cotton trade; the accounts between them were communicated at certain periods, and, independent of the ratification implied by his acquiescence in their correctness, we have two liquidations of the amount due by notes, on which time was granted by the plaintiffs. The defendant, with the notes of John Henderson & Company in his pocket, and having the benefit of them against all the parties to them, which the plaintiffs gave up to him in exchange for his own, asks the court to determine that he gave the latter in error of his rights, and in ignorance of what the accounts, which had been regularly furnished to him, made manifest. His appeal for relief against this error would have been strengthened by a disposition on his part to repair it, by returning, or offering to return, that which was received in error, restoring to the plaintiffs the notes of John Henderson & Co., and re-integrating them in their rights, as they stood before the error of receiving the notes was committed. Judgment affirmed.

Armor, Executrix, v. Downes.

Where several notes, payable at successive periods, and secured by the same mortgage, have all matured, the holder of those which matured the last may obtain an order for the seizure and sale of the property, without proving that the other notes have been paid. If unpaid, the fact should be shown, when the holders may claim to participate in the proceeds of the mortgaged property.

A PPEAL from the District Court of Madison, Curry, J.

Shaw and Lawrence, for the plaintiff. Pepper and Amonett, for the defendant. The judgment of the court was pronounced by

Kine, J. The defendant executed four promissory notes, payable to James Armor at different dates, and gave a special mortgage, by authentic act, to secure their payment. The executrix of Armor being in possession of the two notes thus secured, which last matured, obtained an order of seizure and sale of the hypothecated property, from which the defendant has appealed.

The appellant contends that the judgment was improperly rendered upon two of the notes. That the property can only be seized and sold to satisfy the whole debt which it was mortgaged to secure, on the principal that the mortgage is indivisible, and that the holders of the different notes are entitled to participate in the distribution of the proceeds of the hypothecated property. In support of that position, he invokes the 586th article of the Code of Practice, and the decision in the case of Pepper v. Dunlap, 16 La. 163. The former provides that, "when the seizing creditor has a privilege or special mortgage on the property seized for a debt of which all the instalments are not yet due, he may demand that the property be sold for the whole of the debt, provided it be on such terms of credit as are granted to the debtor by the original contract." In the latter it was held that, when the seizing creditor only sues for such instalments of a debt, secured by special mortgage, as are due, the property mortgaged is to be sold for the whole of the debt, on the terms of credit granted by the original contract, and that this may be claimed by the creditor without showing that he is the owner of the subsequent instalments, it being sufficient to mention the latter in the petition. See also 10 Rob. 49. The principle here recognized, however correct, we deem inapplicable to the circumstances of the present case. Here all the instalments became due long before the institution of the present proceedings. If the two notes which first matured be still unpaid, the fact should have been shown affirmatively, in order to bring the case within the operation of the rule established in the case of Pepper v. Dunlap; otherwise a decree might be rendered for the sale of property, to satisfy a debt which had already been extinguished. The fact of their non-payment is not alleged in the petition, nor has it been made otherwise to appear. If the notes which first matured be unpaid the holders may still protect their rights, and claim to participate in the proceeds of the mortgaged property.

Judgment affirmed.

BENTON v. ROBERTS.

A deposit, made with a merchant, of a sum of money tendered in payment to a creditor, will not discharge the debt, nor place the money at the risk of the creditor. C. P. 412 et seq.

A creditor is not bound to accept a tender of a sum less than the whole amount due to him.

The amount of a judgment obtained in a court of the first instance, from which a suspensive appeal was still pending, cannot be compensated against a twelve-months' bond already due.

Where a debt was attached by a third person, but the attachment subsequently set aside upon the execution of a bond by the defendant in attachment, the bond stands in lieu of the property attached, and, after the release which it operates, the pendency of the suit cannot be urged by the debtor as a reason for withholding any part of the debt.

A PPEAL from the District Court of Carroll, Curry, J. J. Dunlap and Sparrow, for the appellant. Prentiss and Finney, for the defendant. The judgment of the court was pronounced by

King, J. The plaintiff enjoined, in this action, an execution issued against him on a twelve-months' bond, on the following grounds: 1st, That before the writ issued, he tendered to the defendant \$5,583 34, which, it is alleged, was the only sum then remaining due. 2d, That he had paid the defendant \$4,000, about the time when the twelve-months' bond matured. 3d, That he had ob-

BENTON V. ROBERTS. tained a judgment against Roberts, the plaintiff in execution, for \$1,770 14, with five per cent interest thereon, from the 7th of July, 1843, until paid, which he was authorized to compensate against the bond. 4th, That the twelve-months' bond on which the execution was issued had been attached, at the suit of Lewis Selby, for \$1,551, with five per cent interest from February 12th, 1844, of which the plaintiff was duly notified, and that he was authorized to retain that sum to abide the results of the attachment suit. The injunction was dissolved in the court below, with ten per cent damages, and the plaintiff has appealed.

I. It is admitted that the alleged tender was made to Roberts, the judgment creditor, and that the sum was subsequently deposited with a merchant. The effect of a tender and deposit in this form, even if it had been of the entire amount due, would neither have been to operate a discharge of the debt, nor to place the money at the risk of the creditor. Code of Prac. art. 412 et seq. But the tender, in the present instance, was of a sum less than that due, which Roberts was not bound to accept.

II. The sum of \$4,000, alleged to have been paid, was received by the sheriff after the writ came into his hands, and was duly credited thereon.

III. The plaintiff had obtained a judgment against Roberts for the sum stated in the petition, which, at the date of the writ, was pending on a suspensive appeal before the Supreme Court. While thus pending the debt was not exigible, and could not be compensated against a twelve-months' bond which was due, and consequently could have formed no ground for an injunction.

IV. The attachment of Selby had been set aside by Roberts, upon his giving the bond required by law. This bond stood in lieu of the property attached, and, after the release which it operated, the pending of that suit could no longer be urged as a reason for withholding any part of the debt. Code of Prac. art, 259. 18 La. 58.

It has been urged that, notwithstanding the payments admitted to have been made, and that the bond bears ten per cent interest, the judge below has condemned the plaintiffs to pay the whole amount of the bond, and ten per cent additional interest, besides damages. We do not so understand the judgment. It is perhaps obscurely worded. We understand, however, that it condemns the plaintiff to pay the amount of the bond, with ten per cent interest, which it bears on its face, after deducting therefrom two credits, amounting together to \$4,000, to take effect at specified dates; and that it further condemns the plaintiff and his sureties in the injunction bond, in solido, to pay ten per cent damages on the amount of principal and interest due, after deducting the credits recited in the judgment. We think the evidence fully supports the judgment. The object of the plaintiff in obtaining the injunction was manifestly delay, and he was properly amerced in damages.

Judgment affirmed.

THE STATE v. GILBERT.

Where a court organized under the stat. of 1 June, 1546, for the trial of slaves charged with capital offences, fails to convict the accused of the crime with which he is charged, it may, under the 9th section of that act, punish him for any inferior offence established by the evdence, without sending him before the tribunal specially appointed for the trial of minor offences; but unanimity in the court is as essential to decree the milder punishment, as to

pronounce the sentence of death. When the court is not unanimous, there is a mis-trial; but such mis-trial will be no bar to a second trial for the same offence.

The confessions of a slave accused of a crime, made under the influence of threats or violence, are inadmissible in evidence to establish his guilt. STATE v.

A PPEAL from a court organized for the trial of the defendant in the parish of East Feliciana.

Elmore, Attorney General, for the State.

Saunders and King, for the appellant. A second trial was illegal. Act of 1 June, 1846, s. 9. Confessions, not voluntary, are inadmissible in evidence. 2 Starkie on Evid. p. 48. Roscoe's Crim. Ev. p. 28. Greenleaf on Ev. p. 263.

The judgment of the court was pronounced by

King, J. The defendant, who is a slave, was tried by a court composed of two justices of the peace and ten owners of slaves, under the provisions of the act of 1846, for an attempt to commit a rape on the person of a white woman, a crime punishable by death. The court failed to agree upon a verdicton the first trial, and a second trial was had, when the defendant was convicted, and the court, in the exercise of the power granted by law, sentenced him to imprisonment in the penitentiary for life. From this judgment the present appeal has been taken.

Two grounds are relied on for a reversal of the sentence of the inferior tribunal: 1st. That the first trial was a bar to all further proceedings for the same offence, under the peculiar provisions of the statute of 1846. 2d. That the conviction of the accused was produced by giving in evidence his confessions extorted by violence.

I. In support of the first ground it is contended that, the 9th section of the act of 1846 (Acts, p. 115,) virtually forbids a second trial, by authorising the jury, if they fail to convict or acquit the accused of the crime charged, to decree corporal punishment, which discretion is substituted in lieu of a second trial; and that a failure to exercise this power is a bar to all further proceedings, the contingency of a mis-trial being unprovided for by the act.

We cannot yield our assent to this interpretation of the statute. The 9th section referred to is in these words: "All the members of the court established by this act, shall have a voice in determining the guilt or innocence of the accused; but a unanimous concurrence shall be required to convict or acquit. In case, however, such court shall not convict or acquit the accused of an offence punishable with death, it shall have the power to decree the infliction of such corporal punishment, as it may consider deserved by the prisoner."

This statute provides two distinct tribunals, differently composed, for the trial of offences committed by slaves—the one for the trial of such as are capital, and the other for the trial of those which are not capital. The 9th section, above quoted, relates to the tribunal for the trial of capital cases. We understand the object of the second branch of the section to be, only to empower the court, in the event of not convicting the accused of a capital crime, to mitigate the severity of the law, and, in lieu of the sentence of death, to decree such corporal punishment as they may deem commensurate with the gravity of his offence. On a failure to convict of the capital charge, they are vested with the same power of punishing the accused for such inferior offence as may be established by the evidence, without sending him before the tribunal specially constituted for the trial of minor crimes; but unanimity of the court is as essential to decree the corporal punishment, as to pronounce the sentence of death.

STATE T.

When this unanimity does not occur, there is a failure of trial; and we find nothing in this grant of discretionary power, nor in other parts of the act, which, in that event, forbids a second investigation of the charge. The general rule of law which permits a second examination upon the occurrence of a mistrial remains untouched by the statute, and applies to prosecutions like the present.

On the trial a witness was offered on the part of the prosecution, to prove confessions made by the accused while undergoing corporal punishment. admissibility of these confessions was objected to, the objections were overruled, and the opinion of the court was excepted to. No rule is better understood than that which excludes from evidence the confessions of a person accused of a crime, to establish his own guilt, when made under the influence of threats or violence. A conviction upon such evidence is abhorrent to the principles of that humane system of laws from which we derive most of our rules of criminal proceedings, and cannot be countenanced. It is objected that the confessions given in evidence are not set forth in the bill of exceptions, and that this court is, therefore, not informed whether they were of a character to influence the jury. It is true that the bill of exceptions is loosely drawn; it distinctly states, however, that confessions, extorted by violence, were given in evidence. If the tendency of those confessions was to criminate the accused, they were clearly inadmissible; and, if they were offered for any other purpose, they should have been equally excluded, on the ground of irrelevancy. In either event, they should not have been received.

It is therefore ordered that the judgment of the inferior court be reversed, that the verdict be set aside, and the cause remanded for a new trial, with instructions to the inferior court not to receive the confessions of the accused given under the influence of threats or violence.

BOOKOUT v. ANDERSON.

The plaintiff in a petitory action must recover upon the strength of his own title.

Where a partnership has been dissolved and one of the partners has died, a surviving partner, engaged in liquidating its affairs, cannot release the right of recourse of the partnership, as accommodation acceptors, upon a third person, so as to render the latter competent as a witness.

Third persons, creditors of a purchaser holding under a title complete by the sale and delivery of the property, cannot be affected by secret equities between the vendor and purchaser.

PPEAL from the District Court of Madison, Curry, J.

A T. N. Pierce, Shannon and Stacy, for the plaintiff and intervenors. Henderson, for the defendant. Bemiss, Thomas and Snyder, for the appellant, Shelton. The judgment of the court was pronounced by

SLIDELL, J. This is a petitory action to recover certain slaves of the defendant, who asserted ownership by purchase of the plaintiff in Mississippi. Paxton and others intervened in the suit, claiming the slaves under a deed of trust, executed by Bookout in Mississippi, for the security of Tiernan, Cuddy & Co. Pending the suit, Shelton and one Robert Anderson, joint mortgagees

BOOKOUT U. ANDERSON.

of the defendant, purchased the slaves at judicial sale upon the foreclosure of their mortgage. They were made parties by the intervenors, who charged that the mortgage was fraudulent. The defendant, Samuel Anderson, having become bankrupt, the case was dismissed as to him, and was tried between the plaintiff, the intervenors and Shelton. There was judgment for the plaintiff, and Shelton now brings the case before us on appeal.

We shall first consider the claims of the intervenors. The deeds of trust under which they claim were executed between Bookout and Harvy Houghton of the first part, H. & A. Paxton of the second, and Tiernan, Cuddy & Co. of the third part. Their object and consideration were as follows: Tiernan, Cuddy & Co., commission merchants at New Orleans, had given Bookout & Houghton a credit to draw from time to time on their house for a certain amount, and accordingly, on the 9th of February, 1836, certain bills were drawn by Bookout, in favor and endorsed by Houghton, upon Tiernan, Cuddy & Co., who accepted them; these bills were payable in January, 1837. The first deed was executed in contemplation of the drawing of these bills. The second was executed on the day of their acceptance, and conveys certain lands in Mississippi and the slaves in question to the trustees, in trust to secure and save harmless the house of Tiernan, Cuddy & Co. from all damage and responsibility that may result by virtue of the acceptance, as also to ensure the prompt and punctual payment of the bills, at their respective maturities, to that firm, together with commissions, costs and charges. There is the usual proviso that the title thus conveyed and the trust created shall determine and be void, if the grantors shall pay the house the bills at their maturity, with all costs and charges; and that, in case of nonpayment of any of the bills, the trustees may, at the request of Tiernan, Cuddy & Co., sell such portions of the property as they may think proper on thirty days advertisement, and apply the proceeds to the payment of such of the bills as may become due and remain unpaid, and then, from time to time, sell the residue to meet the bills as they may fall due and remain unpaid.

These bills, as we have said, matured in 1837. Whether they were negotiated or not, whether they have been paid or not, in short what has become of them, has not been proved. Tiernan, Cuddy & Co. stopped payment in 1836; their affairs fell into such confusion as to make it improbable that they ever paid their acceptances; and the bills, at the time of the trial of this cause in 1845, if negotiated and outstanding in the hands of third persons, must, in the absence of evidence, be deemed to be prescribed. The intervenors have not even alleged in their petition that Tiernan, Cuddy & Co. had ever paid, or even been called upon to pay, the bills. Under such a state of pleadings and evidence we may well treat the claim of the intervenors as not existing, and dismiss it entirely from our consideration as though they, and the cestuis qui trust, whom they represent, had never had any connection with this controversy. Anderson has been dismissed from the cause, his assignee in bankruptcy has not been made a party, and the controversy is thus narrowed down to a consideration of the rights of Shelton.

Standing as plaintiff in a petitory action Bookout must recover upon the strength of his own title, and not upon the weakness of his adversary's.

Before proceeding to the main question it is proper to examine the bill of exceptions taken to the admission of the deposition of *Houghton*, a witness for the plaintiff and intervenors. This deposition, taken some years since under commission, had been admitted at a former trial, was excepted to on the ground

BOOKOUT v. ANDERSON.

of interest, and on appeal the former Supreme Court sustained the exception. No attempt has been made to take the testimony of Houghton anew, nor has the impossibility of doing so been shown. The attempt however has been made, at the second trial, to cure the objection of interest, by showing that before his deposition was taken, Tiernan, one of the house of Tiernan, Cuddy & Co., on the suggestion of the counsel of the plaintiff and intervenors that a release was indispensable to make him a competent witness, had addressed a letter to Houghton releasing him. The counsel is the witness who gives this new testimony. He states that he delivered the letter to Houghton, before his testimony was taken. It is clear that the release thus given was utterly ineffi cient in law. When it was given the firm had been dissolved; Tiernan was the mere liquidating partner, and one of the partners had died. Tiernan was without authority to discharge the right of recourse of his firm, as acceptors for the accommodation of Houghton, for such, as we have seen from the recital of the deed of trust, and the averments of the petition, was his real position, although only endorser on the accepted drafts. Moreover, Houghton is proved to have had an interest in the price of the slaves which were the subject of the agreement between Anderson & Houghton, and must be considered therefore as having an interest in their recovery. The testimony of this witness was therefore improperly received.

The plaintiffs claim is in the nature of a petitory action. He alleges himself to be the legal owner of the slaves, and contends that what passed between him and Anderson in the State of Mississippi, was a mere 'negotiation' for the sale of the slaves and a certain plantation on which they then were, and that, pending the negotiation, Anderson was allowed to have possession, it being understood that no title or right of property was to vest in Anderson, until after the performance of the condition precedent of payment, when plaintiff was to make him a deed for the land and slaves; and that there has been no performance on Anderson's part.

The testimony on this point is loose and vague; but, if it be considered as putting the original transaction on that footing, the subsequent conduct of the parties can hardly be considered otherwise than as an abandonment of the condition precedent, at least as against third persons. The agreement, or negotiation, as the plaintiff terms it, was for the lands and slaves at a total price of \$65,000. Bookout subsequently executed absolute deeds for the lands which were recorded, and contained acknowledgments of cash payments of \$50,000, the witnesses to these deeds proving now, however, that the money was not really paid at the time of their execution. Besides, there are in evidence various receipts dated in Mississippi and signed by Bookout, acknowledging considerable sums as received at sundry times "on account of the purchase of lands and negroes lying on Cold Lake," the site of the plantation. In a letter written by the plaintiff to the defendant, he speaks of the plantation as "your plantation" The agreement for purchase took place in the spring of 1838; and, according to the plaintiff's own petition, payment was to have been made in the summer of 1838; yet the petitioner slumbered on his alleged rights, this claim for the property not having been set up till April, 1840. These and other facts in the record exhibit Bookout, as against third persons, in the attitude of a mere creditor for the price of property of which he had made delivery to the purchaser, in a State where it is proved that slaves are chattels, to which title may be made even by verbal contract and delivery. The vendor must be considered as having waived the

condition precedent, if it existed, and trusted to the personal security of the vendee. The secret equities between him and Anderson cannot, under the circumstances of the case, be invoked against third persons.

BOOKOUT e. Anderson.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment in favor of the defendant Shelton, with costs in both courts.

THE UNION BANK OF LOUISIANA v. GUICE, Executor.

Novation, like other contracts, derives its binding force from the intention of the parties.

Where there was no intention to novate a debt, there can be no novation.

Where a mortgage was executed to secure the payment of bank-stock, subscribed for by the mortgagor under the provisions of a bank charter, which provided that each stockholder should be entitled to a loan to the amount of one-half of his stock, and the mortgage stipulated that the property mortgaged should stand hypothecated for any stock-loan so made, the statement in the act of one-half of the amount of the stock, as the maximum to be advanced, is sufficiently definite. Nor will such a mortgage be affected by any change in the evidence of the advances made; the fact that they were made and have not been satisfied, being sufficient to give it effect.

Where mortgages have been executed by the stockholders under their interpretation of the provisions of a bank charter, the court will be governed by the construction put upon it by the manner in which they have executed it, whatever might be its opinion, had the questions been brought up originally, on the refusal of the stockholders to execute the mortgages in the form actually adopted. C. C. 1951.

In cases of doubt, the interpretation must be against him who has contracted the obligation. C. C- 1952.

Where the directors of a corporation are empowered by its charter to make by-laws, not contrary to law, for the general administration of its affairs, the shareholders may be bound by
provisions and rules beyond those actually contained in the charter.

A PPEAL from the District Court of Concordia, Curry. J. Stacy, Sparrow and Denis, for the plaintiffs. Frost, Prentiss and Finney, for the appellant. The judgment of the court was pronounced by

Rost, J.* The legislature loaned to the plaintiffs the bonds of the State, for \$7,000,000, and took as security for their reimbursement, a pledge of mortgage obligations subscribed by the respective stockholders, for amounts equal to those of the stock they held. It was provided by the charter of the bank that, after the sale of the state bonds, each stockholder should be entitled to a loan equal in amount to one-half of his stock. The acts of mortgage stipulated that the property affected for the security of the stock, was also to stand hypothecated for the stock loans, and that, in case of non-payment of such portions of the loan as might be required by the regulations of the bank, the stockholders should incur for those loans, the liabilities provided by the 24th section of the charter, in case of non-payment of loans on mortgage.

The defendant is the executor of one of the stockholders who failed to pay her instalments at the time fixed, and he resists the claim of the bank to be reimbursed the whole amount of the stock loan, with interest at the rate of ten per cent per annum, under the 24th section of the charter, on the following grounds: 1st,

^{*}Eusris, C. J., did not sit on the trial of this case, being interested in it.

Union Bins

That the debt has been novated and the mortgage extinguished. 2d, That the mortgage is null under article 3277 of the Civil Code, because the specific sum for which it was given, is not mentioned. 3d, That the charter does not require the stockholders to give mortgages to secure the stock loans. 4th, That the whole debt is not due; the instalments of the stock loans are fixed by the charter, and the demand of the whole debt did not put the defendant in default. 5th, That the 24th section of the charter, authorizing the bank to charge interest at the rate of ten per cent, applies to ordinary mortgage loans, not to stock loans. 6th, That the claim is prescribed. The court below gave judgment in favor of the plaintiffs, and the defendant appealed.

There is nothing in the objection that the debt was novated. Novation, like other contracts, derives its binding force from the intention of the parties to make it. Here no such intention existed; the executor acknowledged the debt, and promised, in his fiduciary capacity, to pay arrears according to the regulations of the bank. Articles 984 and 985 of the Code of Practice, expressly authorized him to do so. The act of pledge given by him, in 1843, clearly shows that it never was in the contemplation of the parties to novate the debt. We view his written promise as a mere acknowledgment of it. The authorities cited in opposition to this view, are not applicable to this case. There the party acting in a fiduciary capacity, were sued personally, for having exceeded their powers; here the executor has not exceeded his powers, and the plaintiffs do not seek to make him personally liable.

The mortgage had not been given to secure a pre-existing obligation, and was not extinguished by the delivery of the bond of the testator to the executor. It had been taken by the bank, under article 3259 of the CivilCode, in the manner usual with merchants, to secure future advances. Those mortgages are not affected by any change in the evidence of the advances made; the facts that they were made and have not been satisfied, are sufficient to give them effect, provided the maximum to be advanced be stipulated in the act. Here the maximum was stated to be one-half of the amount of the stock; the sum was sufficiently definite.

We do not perceive how this claim could have been prescribed.

The other grounds of defence imply that the stockholders did not, at the beginning, give a correct interpretation to the charter, and contracted, in their acts of mortgage, obligations which it did not contemplate. What might have been our opinion in relation to some of the points submitted, if the questions they in volve had been brought before us originally, on the refusal of the stockholders to give the mortgages in their present form, it is unnecessary to say. As the stockholders bound themselves of their own free will, we must hold them to be bound. The charter is a contract, and if the intent of the parties to it be doubtful, the construction put upon it by the manner in which it has been executed by both parties, or by one with the express or implied assent of the other, furnishes the safest rule for its interpretation; and, in cases of doubt, the interpretation must be against him who has contracted the obligation. Civil Code, arts. 1951, 1952.

The form of the acts of mortgage, and the various stipulations they contain, must have been prescribed by some regulation of the board, passed under the authority given by the 21st section of the charter.* Regulations of that kind may

[&]quot;The 21st section of the charter of the bank, (stat. of 2 April, 1832), is in these words:
"The deliberations of the board of directors of the said corporation shall have the same force and effect as the deliberations of the stockholders. The board of directors shall make

"The effect of the power to make UNION BANK hind the corporators beyond the charter. by-laws, is that the shareholders are bound by a set of provisions and rules beyond those actually contained in the charter." Wordsworth, on Joint-stock Companies, p. 152, (29 Law Library). See also 2 Rob. 209. Moreover, the mortgages giving effect to the obligations created by the charter, as the stockholders understood it, have been given in pledge to the State to secure the reimbursement of its bonds; and any action of courts of justice having the tendency to diminish or impair those obligations, would enable the stockholders to commit a fraud. Judgment affirmed.

GUICE.

ELLS et al. c. Sims et al.

To entitle a vendor of lands to a privilege against third persons, not preved to have had actual notice, the act of sale must be registered in the book of mortgages kept by the parish judge. A mere extract from the act of sale, not designating the property sold, nor even its nature, whether lands, slaves or moveables, is insufficient; nor can such an imperfect registry be aided by the fact that, the notarial sale was recorded in the book of conveyances kept by the parish judge. C. C. 3238, 3241, 3349, 3350, 3351, 3353, 3356.

A conventional mortgage may be executed by an act under private signature. C. C. 3257,

Where a promissory note recites that it was executed for a sum due for work done by the payee on lands therein described belonging to the maker, and that the latter consents that the former shall have "a privilege and mortgage for securing the payment of said sum," the written acceptance of the mortgagee, subscribed to the instrument, is unnecessary. Per Curiam: The acceptance of the note by the payee was an acceptance of the mortgage which it stipulated, and, by the delivery of the note, the entire contract became complete between the debtor and creditor.

It is not necessary, under art. 3331 of the Civil Code, that it should appear affirmatively upon the registry of mortgages, or be proved aliunde, that a private writing, presented to the register of mortgages for record, was presented by the creditor himself.

Where lands subjected to mortgage are described as situated on a particular river, in a certain parish, mentioning the names of the proprietors of the adjoining lands, it is a sufficient statement of the nature and situation of the property. The omission to state the township. range and section, and the quantity of acres in the tract, is not material.

The object of the registry of mortgages is to give public notice, with reasonable certainty; and a distinction may fairly be made, in the description of the thing mortgaged, between urban and rural estates, and greater minuteness and accuracy of detail be properly required in the former than in the latter case.

PPEAL from the District Court of Concordia, Curry, J. The facts of A this case are fully stated in the opinion of the court infrd.

Rowley, Frost and Sanders, for the appellants.

Stacy and Sparrow, for the defendants. 1st. The mortgage of plaintiffs is void for uncertainty, because the notes do not state precisely the nature and situation of the lands intended to be mortgaged, mentioning neither the quantity,

regulations and ordinances for the general administration of the affairs of the bank, which they may alter or add to as the interest of the corporation shall require; and they shall likewise establish rules for conducting the affairs of the said bank, which they may, in like manner, alter or add to, as may be necessary for the service of the bank: provided, the said regulations, ordinances and rules shall not be contrary to law.

township, range nor section. Civil Code, arts. 3273, 3275. Neither do they state in favor of uchom the mortgage was executed, except by inference. Civil Code, art. 3357. Neither does it appear, except by inference, that it was intended that the mortgage should be upon the land on which the work was done.

2d. The mere execution of notes, with a stipulation in them of a right of mortgage, is not sufficient to give one. There should be a formal act of mortgage executed by the debtor, and accepted by the mortgagee. Civil Code, arts, 3257, 3272. The register of mortgages had no authority to record these notes on his register as mortgages, as they were not signed by both parties: Civil

3d. The act containing the vendors privilege from Sims & Brown to the Preslers, was sufficiently recorded to give notice to the world. In the index to the mortgage book was the following reference: "Sims & Brown to Amelia Presler, mortgage clause, page 158," and the clause referred to was recorded on that page of the mortgage record. This was enough to have put any person upon inquiry, which would have led to the necessary information.

4th. The plaintiffs cannot avail themselves of the want of recording the act

of sale from the Presiers to Sims & Brown, in which the vendor's privilege was retained for the price, because: 1st, as between the parties, there can be no doubt that privilege existed; 2d, at the time the notes were executed, or previous thereto, plaintiffs had never applied to the parish judge to ascertain by his certificate what privileges or mortgages existed on the property; and 3d, had such application been made, the same certificate would have been given, as that furnished by him to the sheriff, and read at the sheriff's sale. They would then have had actual knowledge of the fact, which is equivalent to registry. Planter's Bank of Georgia v. Allard, 8 Mart. N. S. p. 140. Bell v. How et al, Ibid. 246. They were bound to obtain this certificate before receiving their mortgage, (Civil Code, art. 3328,) and, not having done so, they relied alone on the good faith of the mortgagor, and their only remedy is an action against him for damages. Civil Code, art. 3329. The maxim of caveat emptor, applies. Sims could only invest them with such rights as he held at the time; they failed to take the legal means to ascertain what those rights were; and they received the mortgage, subject to all the previous encumbrances upon the property, as against him, in the same manner as if they had purchased from him a quit claim to the property; and qui non habit, ad alium non transferre potest.

The judgment of the court was pronounced by

SLIDELL, J. The heirs of Presler, defendants in this case, sold a tract of land to Sime & Brown, for the sum of \$16,000, for which notes were taken. In the notarial act of sale no mortgage was stipulated, but the plaintiffs claim the legal privilege of the vendor. This act was duly recorded as a sale in the office of the parish judge, in the notarial book of conveyance kept by him; but the only registry hamed in the mortgage books then kept, consists in the following entries. In the index of this mortgage book was the following:

"Sims & Brown to Amelia Presler, mortgage clause, page 158."

In the body of the mortgage book, at the corresponding page, was made an entry in the following words:

"Sims & Brown to Amelia Presler et al., who declared and said that, for the consideration of \$16,000, to them secured to be paid by the three joint and several promissory notes of John C. Sims and Joseph Brown, the former of the said parish and State, and the latter residing in Wilkinson county, State aforesaid, the said three notes payable to the order of the said Amelia Presler and the said children of Simon Presler, deceased; the first for the sum of five thousand three hundred and thirty-three dollars and thirty three and one third cents, of even date herewith, and payable on the first day of August, 1841; the second for the same amount and of the same date, and payable on the first day of August, 1842; and the third and last of said notes for the same sum (\$5,333 331), and of the date aforesaid, payable on the first day of August, 1843; the

mid notes are made payable at the Merchants Bank, New Orleans, and are by me, the notary, paraphed ne varietur, in order to identify them with this act.

"Recorded, 12 Feb'y., 1841.

"Attest, JAMES DUNLAP, "Parish Judge."

It is shown that a book exclusively for the record of mortgages was first opened in the parish judge's office, in the year 1837. Sims became the purchaser of Brown's moiety of the lands, at a probate sale of Brown's succession, in the year, 1841. In April, 1843, Sims executed in favor of Ells, Manger, McGloffin and Sutherland, respectively, his notes at one day's date, for \$724 22, 731 72, \$892 21, and \$723 39. A statement of one will exhibit the character of the residue. That in favor of Sims is in these words:

"\$724 22. State of Louisiana. Parish of Concordia. April 18th, 1843. One day after date, I promise to pay to E. Ells, or order, \$724 22, being for work done on my land, situate on the Mississippi river, in said parish of Concordia, bounded by lands of E. P. King above and below, and back by lands of the United States, which land is improved by said levée. I hereby acknowledge, agree and consent, that the said has a privilege and mortgage, for the securing the payment of said sum of money.

John C. Sims."

Each of the notes was registered in full on the mortgage book in the parish of Concordia, in July, 1843, the parish judge having known and recognized the signature of the maker. The defendants *Presler*, subsequently seized the moiety of the land originally purchased by *Sims*, upon proceedings instituted upon the notes given for the price. On the day of the sale, the plaintiffs' gave warning of their mortgage rights, of the invalidity of the *Presler* mortgage, and of their intention to bring suit. Under this notice, the defendants *Presler*, purchased at the judicial sale, for the sum of \$100.

We will first consider the objections raised by the plaintiffs to the vendor's privilege, asserted by the defendants.

For the validity of the Presler claim of privilege as against the plaintiffs, against whom actual hotice is not proved, it was necessary that it should be registered in the mortgage book kept by the parish judge. The registry as there made was a mere extract from the act of sale, not designating in any manner the property sold, and from which not even the nature of the property, whether land, slaves, or moveables, could be ascertained. It was clearly insufficient, and is not aided by the fact that the notarial sale was recorded in the book of conveyances. See Civil Code, arts. 3349, 3350, 3351, 3353, 3356, 3238, 3241; and also the case Falconer, 4 Robinson, p. 5.

It is in vain to argue from the testimony of the parish judge, who states that, if the plaintiffs had applied to him for a certificate before they contracted with Sims, he would have certified the mortgage or privilege as existing on the land in favor of the vendors. The plaintiffs were not bound to obtain a provious certificate; and although, if they had chosen to contract by notarial act, it would have been the duty of the notary to obtain a certificate, still the law permitted them to contract with Sims by an act under private signature. Civil Code, art. 3331.

It is contended by the appellees that the plhintiffs should have obtained a formal set of mortgage, and that the notes above recited do not constitute a contract of mortgage. A conventional mortgage is a contract by which a person binds the whole of his property, or a portion of it only, in favor of another, to secure

ELLS

ELLS o. Sims. the execution of some engagement, but without divesting himself of the possession. And such a contract may be made under private signature. Civil Code, arts. 3257, 3331. The cormal written acceptance of the mortgagee subscribed to this instrument, was not necessary. The acceptance of the note by the payee was an acceptance of the mortgage which it stipulated, and by the delivery of the note the entire contract became complete between the debtor and the creditor.

We do not consider it necessary, under article 3331, that it shall appear affinnatively upon the registry, or be proved aliunde, that the creditor himself presented the private writing to the register.

It is said that the property is not sufficiently described; that the quantity, range, township and section, should have been stated. The land is described as situate on the Mississippi river, in the parish of Concordia; boundaries are stated, and the expression "my land," especially in the absence of any evidence showing the ownership of other land by Sims, is fairly comprehensive of the entire tract. The object of registration is public notice, with reasonable certainty. A distinction may be fairly made between urban and rural estates, and greater minuteness and accuracy of detail might properly be required in the former than in the latter case. The question is whether, under the circumstances, any one contracting with Sims, or in any wise trusting him, or interested as a creditor, would have been misled or kept in the dark by the omission to state the township, range and section, and the quantity of acres in Sims' tract. We think not; and are of opinion that in this case there has been a fair compliance with the requisition of law, that the mortgage and its registry shall "state precisely the nature and situation" of the property.

Upon the whole, we are of opinion that the mortgage of the plaintiffs should be enforced, and that the vendors' privilege is ineffective against them; nor does this case present the hardship which sometimes results from the inattention of parties and of public officers, as the labor of the plaintiffs has been devoted to the improvement of the defendants' land.

It is therefore decreed that the judgment of the court below, so far as it rejected the rights of mortgage claimed by the plaintiffs, be reversed; and it is further decreed that the said plaintiffs are, and they are hereby, recognized as creditors, concurrently between themselves, by first mortgage upon the property in the petition described, for the sums following, to wit: the said Edward Ells, for the sum of \$630 50; the said Daniel Manger, for the sum of \$731 72; the said William McGloffin, for the sum of \$692 21; and the said John Sutherland, for the sum of 723 39; with interest on said sums respectively from judicial demand, till paid; and that the said property be sold to pay concurrently, and by first privilege, said sums due to said plaintiffs, interest as aforesaid, one half of the costs heretofore incurred in the court below, also the costs of sale in execution of this decree, and the costs of this appeal.

Jones et al v. Hunter et al.

An amended answer, offered to be filed by third persons, who had, pending the suit, purchased, at a judicial sale made by order of another court, the title of the defendant to the property in contest in a petitory action, and who had been substituted in place of the original defendant, in which they set up the title so acquired by them, cannot be excluded as changing the

character of the suit, by setting up a title under judicial proceedings, the validity of which cannot be tested in the suit in which their answer is offered.

The testimony of a single witness that, he knew a person as a married woman for a few months before her death, in a neighborhood into which she had lately removed a stranger from another State, is insufficient to prove her marriage. Per Curiam: Her status cannot be proved by the general reputation of that neighborhood; and we are not prepared to say that, where the proof of legitimacy is introduced for the purpose of acquiring property of great value, a single witness is sufficient to prove a marriage, by reputation.

Adaly acknowledged natural child inherits the estate of her father, in default of legitimate relations or a surviving wife.

Property claimed in an action cannot be alienated, pending the action, to the prejudice of the party claiming it. C.C. 2428.

One who has caused himself to be substituted in the place of the original defendant in a suit, who was his warrantor, debars himself of the right to obtain a judgment in warranty against the latter.

A PPEAL from the District Court of Concordin, Curry, J. Thomas and J. Dunlap, for the plaintiffs. Stockton, Steele and Grymes, for the appellants. Stacy and Sparrow, for the intervenor, Susannah Jones. The judgment of the court was pronounced by

Rost, J. This case has already been before the Supreme Court, and the facts, as far as they were then disclosed, are fully stated in the opinion of the court, in 6 Robinson, p. 235. The first appeal was taken from a judgment rendered in favor of Susannah Jones on the verdiet of a jury. The court recognized her as the natural child, duly acknowledged, of John Jones, and observed that her right to recover as an irregular heir, adversely to the other claimants, depended upon the determination of facts peculiarly within the province of the jury, whose verdict, on such questions, should always be maintained, unless manifestly erroneous. The case was remanded on account of errors in the charge of the judge to the jury.

After the mandate of the Supreme Court was filed in the District Court, all Collier's interest in the property was sold under execution, and purchased by Amis and Featherston, who intervened in the suit. Subsequently, on their application, after suggesting to the court the bankruptcy of Collier, and the insolvency and death of Hunter and King, it was ordered that they, the said Amis and Featherston, be permitted to assume the position of those parties; and, the judge states that, being then in court, they did assume that position, and waive any citation or notice in relation thereto. Before the trial of the cause, these parties asked leave to file an amended answer, which was refused by the court, on the ground that the amended answer set up, in Amis and Featherston, a right acquired since the preceding term of the court, by virtue of a probate sale of the property in controversy, the validity of which proceedings could not be tested in this suit, and that said amendment changed the character of the suit.

We think the court erred in refusing to admit the amended answer, and as all the evidence in support of it is annexed to the bill of exceptions, we will consider both the answer and the evidence as being properly before us. We do not perceive that they change the character of the suit; and the facts of the case show, beyond the possibility of a doubt, the real nature of the proceedings had in the Court of Probates of the parish of Madison.

Amis and Featherston took other bills of exceptions, which the opinion we have formed makes it unnecessary to notice.

The case comes before us on the appeal of Featherston and Amis from the judgment rendered on the second verdict in favor of Susannah Jones, and, as the

JOHES 9, HURTER Jones v. Huszenappeal was granted in open court, we consider that all the parties to the suit had notice of it, and are entitled to be heard.

After two unimpeached verdicts, rendered by men who knew the parties and witnesses, and whose partialities, if they had any, must have been in favor of the legitimacy, we concur with the former court, that any interference, on our part, would be ill-advised, unless the evidence should force upon us the conclusion that manifest injustice had been done.

Mrs. Overacre, the main witness of the defendants, has testified that she knew Hannuh Rhodes, the mother of John Jones and his sister; that the said Hannah was her sister, and was lawfully married to Charles Jones, the father of John Jones and Mrs. Bass, under whom the defendants claim, near the north fork of the Holston river, in the State of Tennessee, previous to the year 1790; she swears that she was present at the marriage. Her evidence is positive; but two successive juries have refused to believe it; and, as there are in her deposition circumstances throwing reasonable doubts upon her veracity, we are not prepared to say that they have exceeded the discretion vested in them.

Henry Flower, whose testimony bears the stamp of truth, states that he had known John Jones and his sister, in the neighborhood of Natchez, in 1792 or 1793, at which time they were both small children. He also knew their father and mother, and lived after that time thirteen or fourteen years within a mile of the house of Charles Jones. The witness siates that Charles Jones and Hannah Rhodes treated each other as husband and wife; that they were reputed to be such, and their children passed for legitimate, forced heirs; that Hannah Rhodes died in 1792 or 1793, after which event Charles Jones lived, at the same place, with the widow Smith, as man and wife, and had eight or nine children by her.

The survivors of those children are the plaintiffs in this suit. There is no doubt as to their existence, and the cohabitation, whatever be its character, of their father and this widow. Yet Mrs. Overacre, residing in the immediate neighborhood during that cohabitation and the birth of the children, when interrogated in relation to this episode in the life of her pretended brother-in-law, is as positive in her denial of all knowledge of the widow Smith and of her children, as in her affirmance of the marriage of her sister. That portion of her testimony cannot be true; she is an unfair and partial witness, whom the jury might well refuse to believe.

Disregarding her evidence, the testimony of Flower extends over too short a period of time to establish the marriage by general reputation. He states that he knew the parties, in the neighborhood of Natchez, in 1792 or 1793, and that Hannah Rhodes died in 1792 or 1793. He knew her but a few months before her death; and, as she had lately arrived from Tennessee, a stranger to all but Mrs. Overacre, her status cannot be proved by the general reputation of that neighborhood. We are not prepared to say that where the proof of legitimacy is introduced for the purpose of acquiring property of great value, we would consider one single witness sufficient to prove marriage by reputation.

Circumstances are proved militating for, and others against, the probability of the marriage; but after a careful perusal of all the evidence, we cannot say that there is manifest error in the verdict of the jury, so far as it affects the defendants.

The evidence adduced by the plaintiffs in proof of their legitimacy, is still less satisfactory; it has produced no conviction on our minds; and supposing it to be true, it is very questionable whether the plaintiffs would have any rights,

the district of country where the marriage is said to have been performed by a baptist preacher, being under the dominion of Spain at the time.

The witness Leland, who swears that a marriage was celebrated by a baptist preacher between Charles Jones and the widow Smith. in the year 1799, is evidently one sided, and has rendered himself obnoxious to the same charge as Mrs. Overacre; although, at the age of 86 his memory is precise, beyond belief, as to all facts which may be of advantage to the plaintiffs, he has never heard of Hannah Rhodes, and never heard the name of John Jones mentioned. In many of his answers, he evades the questions put to him, and does not answer at all the questions as to the time when Charles Jones and the widow Smith went to live together. The jury may have inferred from the testimony of Henry Flower that the cohabitation commenced soon after the death of Hannah Rhodes, so that, supposing the testimony of Leland to be true, the cohabitation had lasted five or six years at the time of the marriage, and it is not proved that the plaintiffs or their ancestors, were born after the year 1799.

The witness Sarah Cochran, does not swear to the fact of the marriage; but the reasons she gives to make it probable, that three priests were residing in Natchez at the time, and that they would not have permitted a man and woman to live together without being married, is untrue, and renders her testimony of no value. It is an historical fact that there were but four priests in the whole valley of the Mississippi at that time, and three of them never had their residence at Natchez, at the same time.

The testimony of Flower, instead of supporting the pretensions of the plaintiffs, renders, in our opinion, the marriage improbable.

We cannot say that the jury erred, in considering that no marriage had been proved between Charles Jones and either Hannah Rhodes or the widow Smith. They appear to have had sufficient reasons to give faith to the declarations of John Jones, made at a time not suspicious, to his friend Groves, that legitimacy was a relation unknown in his family. His own daughter is no exception to the rule; but, as he has acknowledged her, she is entitled to his inheritance in default of legitimate relations or a surviving wife, unless the intervenors, Amis and Featherston, can withhold it from her. A statement of some of the facts of the case is necessary to a proper undestanding of their claim.

In 1834, one Thomas Bernard sued the curator of John Jones, who suffered a judgment to go against him by default for the sum of \$1,481 37, with eight per cent interest. Judgment was entered at the June term, 1837; but was only signed in June, 1843. In 1834, Mrs. Bass sold her hereditary rights to John Briscoe, and, in January, 1835, Briscoe and others, who appeared to have acquired an interest in the purchase, sold to Woodhouse & Hunter the plantation and slaves forming the whole property of the succession. In 1836, the curator having died, Thompson L. King was appointed in his place, and subsequently purchased the interest of Woodhouse in the plantation and slaves.

In 1844, Amis and Featherston, to make, as they supposed, assurance doubly sure, and divest plaintiffs, defendants, and intervenors of any title they might have in the property of the succession, purchased the judgment rendered in favor of Bernard, with the view to cause the property of John Jones, then in their possession, to be sold under it; but as they could not aver in their own names that the property still belonged to the succession of Jones, because they had it in possession as their own, and had received the fruits of it for years, they resorted to a shallow disguise to accomplish their object. They transferred the judg-

JONES V. HUNTER.

ment to William Amonett, one of their counsel: and whilst three distinct note of heirs were present or represented, all claiming the succession of John Jones. James Ira Amonett, another counsel of Amis & Featherston, falsely representing that succession as vacant, caused himself to be appointed curator during the recess of the District Court, and induced the Court of Probates to go through the solemn farce of appointing an attorney of absent heirs. The curator acknowledged as justly due, a claim about which he could have no knowledge, and, instead of proceeding to reduce to possession the property of the succession, and to administer it as, by law, he was bound to do, he suffered William Amonett to take a judgment against him, and to cause to be sold, en masse, unden it, not the right, title and interest which the succession might still have in the property, but the land and slaves themselves, surrendered by Featherston & Amis, were sold as the property of the succession. Featherston & Amis stood by during the sale, and, instead of protesting against it, they became the highest and last bidders, and the whole property was adjudicated to them. We do not perceive how, after the adjudication, they could be permitted to set up any other title than that which it conferred upon them; their surrender and subsequent purchase of the property, amounted to an acknowledgment that they were previously knavish possessors, and they were properly made to account for the rent of the land and hire of the slaves during their possession.

Immediately after the purchase by Amis & Featherston, the two Amonetts appeared in court as their counsel of record, and moved to amend the pleadings, so as to lot in the new title which they had enabled their clients to acquire. The court refused the application, and that refusal gave rise to the bill of exceptions which we have already noticed.

The strange idea seems to prevail in some minds, that nothing else is necessary to defeat the just rights of plaintiffs in petitory actions and in actions of revendication, than to make, or procure, pending the action, a transfer of the title to the property claimed. Art. 2428 of the Civil Code expressly provides that, property thus situated cannot be alienated to the prejudice of the claimant's right; and we are not left in doubt as to the meaning of that provision, for it is taken from the law 13th, tit. 7th, of the 3d Partida, which was itself taken from the dispositions of the roman law, found in the chapter De Litigiosis in the Justinian Code, lib. 8, tit. 37.

The rule laid down in our Code, is one of the fundamental principles of the civil law, and numerous commentators have defined the extent of its application. Any transfer of the thing in dispute, made either directly by the party from whom it is claimed, or indirectly procured through his agency, is null, against the claimant, with few exceptions not applicable to this controversy.

The Partidas conclude this subject by an admonition to the depositaries of power that, their most important concernment is to counteract and frustrate the fraudulent devices of the wicked. This command of the spanish law stands unrepealed, and we feel, on this occasion, the necessity, as well as the obligation, of enforcing it.

The sale of the property was evidently procured by Amis & Featherston, for the purpose of changing the title; the whole affair was a scheme of spoliation and fraud, under the forms of legality; the succession was not vacant, and the heirs should have been made parties to any proceedings had in relation to the property. James Ira Amonett was all the time the counsel of Amis & Featherston, not the curator of the succession of Jones; that succession was then in the

JONES. O. HUNTER.

possession of his clients, who claimed it in its entirety, as assignees of the only heir. If they acquired the rights of the heir, they also incurred her obligations, one of which was to pay the judgment in favor of Bernard; but they purchased that claim, and it was extinguished by confusion; they could not revive it before they were existed, and their attempt to do so can be productive of no result. Susannah Jones was not a party to the judgment of the Court of Probates ordering the sale, and she comes under the rule of law sententia inter alios lata aliis non prejudicat. Neither she, nor the succession of Jones, were represented in that suit.

Amis & Featherston having, at their own request, taken the place of their immediate warrantor and of his warrantor, have debarred themselves of the right to obtain the judgment in warranty prayed for on the appeal.

The judgment appealed from has done justice between the parties.

Judgment affirmed.

Morris et al. v. Covington, Executor.

An appeal will not be dismissed on the ground that the appeal bond is not payable to the appelloe, where the name of the person in whose favor it was actually made was inserted through a clerical error. Such an error, will not discharge the surety.

The heirs of the wife are entitled to one half of property purchased by the husband during the existence of the community, though not paid for till after the death of the wife, subject to the payment of one half of the community debts.

Abaving purchased at judicial sale property sold as belonging to the succession of B, assumed, as part of the price, the payment of a note, secured by mortgage on the property. Pending an action by the heirs of the surviving wife of B, claiming one half of the property, on the ground that the whole belonged to the community of acquets formerly existing between the spouses, an attorney at law, practising in the court in which the suit was pending, purchased the mortgage and note: Held, that the purchase, being by a public officer connected with the court, was a nullity, C. C. 2492.

A sale made under a judgment rendered in an action in which there was no defendant, is a nullity. The nullity of such a sale, is not required to be pronounced judicially.

Where the payee of a note, secured by mortgage, executed for a community debt, receives from the maker crops, made on the community property, more than sufficient to discharge the debt, but, instead of applying their proceeds to its payment, pays them over to the maker, and gives him personally credit for the amount of the note, it is a novation of the debt, and will discharge the community.

Where a lot of ground purchased during the existence of the community of acquets is incorrectly described in the conveyance, but, after the dissolution of the community by the death of the wife, a new conveyance is executed to the husband for the property with a correct description, the title thus acquired will enure to the benefit of the community.

A possessor in good faith is entitled to be paid for useful improvements made by him on the property.

A PPEAL from the District Court of Madison, Curry, J. Snyder, Stacy and Sparrow, for the appellants, cited 7 La. 222. 1 Rob. 149.

Amonett, pro se. Thomas, on the same side. Pepper, for the intervenor Fisk. T. N. Pierce, for the intervenor White.

The judgment of the court was pronounced by

Rost. J. This case is a striking instance of the extent to which bad faith and ignorance can mystify truth, and involve in confusion and doubt the plainest questions of common right.

Monnie V. Covinctor. George Deahl and Ferriby Smith were married, in April, 1834. In October of the same year, Deahl purchased from James Graham a plantation and slaves, for the sum of \$30,000, which the act of sale states was paid at the time of the sale. It is shown, however, that James Graham received in lieu of money three promissory notes of \$10,000 each, drawn to the order of Charles S. Lee, and endorsed by him and other persons. Deahl, to secure the endorsers, executed in their favor a mortgage on the plantation and slaves, which was duly recorded. The wife of Deahl died in 1836, before any part of the purchase money had been paid. No inventory was made, and her succession never was administered upon. Deahl remained in possession of the whole property as before, received the proceeds of the crops, and paid the two first notes given to James Graham. In June, 1841, the whole property which he possessed was soized and sold by the marshal, under execution, and adjudicated to R. Slaughter, who assumed to pay the encumbrances existing upon it at the time, in part payment of his bid.

Those encumbrances appear to have been: first, a sum of \$11,636 68 cents, a balance due on account of the purchase, and covered by the mortgage given to the endorsers of the notes; second, the sum of \$6,000, being the amount of a special mortgage in favor of Burke, Watt & Co., consented to by Deahl in the year 1840.

Slaughter died, in October, 1841, leaving the original defendant, Covington, his testamentary executor. The plaintiffs have instituted this action against him, alleging that they are the heirs at law of Ferriby Smith; that they have accepted her succession under benefit of inventory; and that they are entitled to recover one undivided half of the property, existing at the time of her death in community with her husband George Deahl, and now forming part of the succession of Slaughter, the said property consisting of four tracts of land and twenty-seven slaves. The executor, Covington, having been removed from office, William Amonett was appointed dative testamentary executor, and the suit was continued against him.

The defendant generally denies the allegations of the petition, avers title under the marshal's sale; the existence of the mortgage for \$30,000 on the property; and also that the community owes George Deahl over \$31,000, one half of which the plaintiffs are bound to reimburse. He finally alleges that, in case of eviction, he is entitled to recover the value of his improvements, which he assesses at \$10,000. There is also a call in warranty against George Deahl and Francis I. Thompson, the creditor at whose suit the property was sold by the marshal.

Alvarez Fisk, having become the assignee of the mortgage debt mentioned as belonging to Burke, Watt & Co., sued the dative executor of Slaughter in the Court of Probates, and obtained a judgment under which all the slaves in his possession as executor, but two, were adjudicated to him, the said Fisk, who removed them to the State of Mississippi. He subsequently intervened in this but for the preservation of his rights.

William Amonett and one Benjamin F. White purchased the unpaid note of \$10,000, given by Deahl to Graham, and obtained from Miller, the first endorser on that note, a transfer of the mortgage given to secure the endorsement, and still affecting the property in the possession of Slaughter. Amonett and White obtained in the Court of Probates, a judgment against Amonett, as dative executor of Slaughter, on this note, with privilege and preference on the pro-

perty in his hands. Under this judgment the land was sold at probate sale, in 1844, and adjudicated to *Thomas W. Amonett*, for little more than one fourth of its apprised value in the inventory of *Slaughter*. This purchaser intervened for the preservation of his rights.

Morris v. Covington.

We have only gone into the labyrinth of interventions, amended petitions and answers, bills of exception, motions and agreements, which fill the record, so far as it was necessary to the view we have taken of the rights of the parties. The unnecessary confusion created by all this chicanery, is unprecedented. It became so intolerable in the court below that the judge, unable, as he supposed, to arrest the evil in any other manner, at last cried out in despair, to the incessant applicants for intervention: "You cannot come in, the case is full;" and, not recovering to the last his acknowledged powers of discrimination, gave judgment in favor of the defendant, and dismissed all the intervenors with costs.

The plaintiffs appealed, and the intervenors have asked that the judgment be amended in their favor. A motion to dismiss has been made on the ground that the appeal bond was made in favor of a person other than the defendant; the bond is in favor of the defendant and of the intervenors. The insertion of the name of *Covington*, for that of *Slaughter*, was a clerical error, which would not discharge the surety. The motion must be overruled.

The judgment appealed from is clearly wrong. The plaintiffs having proved that they are the heirs of Ferriby Smith, the title to one undivided half of the land and slaves purchased during the community, vested in them at her death. Slaughter only acquired by the marshal's sale the right, title and interest of Deahl in the property, which was one undivided half of that portion of it which belonged to the community; the plaintiffs continued to be the owners of the other half, subject to the payment of one half of the community debts.

The purchase by Amonett & White of the note of \$10,000, and of the mortgage by which it was secured, after these proceedings had been commenced. was the purchase of a law suit. Those claims were involved in this litigation; the extent of the liability of Slaughter under his assumption to pay the mortgage, depended upon the event of this suit; if the plaintiffs succeeded, his succession was only bound for one half of it, and the rights of the holders of the note and mortgage were, in relation to that succession, litigious rights. Amonett, exercising his profession in the court under the jurisdiction of which these rights fell, could not purchase them, and acquired no title to them. Civil Code, art. 2422. The purchase took place before his appointment as dative executor; but he was executor when the judgment was rendered, and the facts that there was no defendant in the suit, and that he confessed a judgment in his own favor, when he had a valid defence to make for half of the claim, are conclusive against him. White, who joined with him in the perpetration of this fraud, is in no better situation. The probate sale to Thomas W. Amonett is an absolute nullity, and the succession of Ferriby Smith is entitled to recover, as damages, from Amonett & White, one half of the rents and profits due since the adjudication, at the rate of \$800 a year.

The claim of Fisk cannot be viewed as a community debt. Glendy Burke, a partner of the firm of Burke, Watt & Co., testifies that, in 1840 and 1841. after the date of the notes held by Fisk, his firm received from Deahl crops of cotton more than sufficient to pay them; and the circumstance that, instead of applying their proceeds to the payment of the debt, they saw fit to pay them over to Deahl, and to give him personally credit for the notes, clearly amounts to

Monnis e. Covincton. a novation, by which the community would have been discharged, if it was ever liable, a fact not made certain.

It is proved that only fifteen of the slaves purchased by Fisk belong to the community. These he must return, in order that a partition may be effected between him and the plaintiffs. He must moreover account to the succession of Ferriby Smith, at the rate of \$350 a year, since the date of his purchase, for one half of the assessed value of the hire of said slaves.

The four lots of land sold by Graham to Deahl, in 1834, are described in the act of sale as being nos. 53, 54, 55, and 56, in township no. 15, of range no. 13 east. It appears that there was no lot bearing no. 56 on the plat of survey of that township, and that the lot intended to be conveyed was no. 52. After the death of Ferriby Smith, Graham, by a notarial act passed between him and Deahl, recognized the error, and conveyed to the latter no. 52, in execution of the previous contract, and for the consideration therein stated. This act intended to give effect to the original sale by correcting an error in the description of the property sold, did not take lot no. 52 out of the community. The circumstance that Graham acquired a perfect title to that lot, after 1834, cannot affect the rights of the succession of Ferriby Smith; the title when acquired, inured to its benefit.

Slaughter appears to have purchased the property in good faith, and is entitled to be paid for the useful improvements made by him. We will allow, as an ample compensation for those improvements, the crops of 1842 and 1843, received by his executor after the institution of this suit.

The succession of Ferriby Smith, is entitled to one undivided half of lots nos. 52, 53, 54 and 55, and of the two slaves, Doctor Gilbert and Hannah, in the possession of the succession of Slaughter. It is also entitled to one undivided half of fifteen of the slaves in the possession of Fisk, and to the damages due by Fisk, Amonett and White; but, as it is proved that the community which existed between Deahl and his wife is largely indebted, those assets must be sold to pay those debts; and, as the joint owners of the land and slaves have not asked a division in kind, the decree of the court will be that the property be sold to effect the partition.

The plaintiffs allege themselves to be beneficiary heirs. On this allegation they are not entitled to the possession of the property, and, before their residuary rights can be ascertained, the succession of Ferriby Smith must be regularly administered.

For the reasons assigned it is ordered, that the judgment be reversed; that the succession of Ferriby Smith recover from William Amonett and Benjamin F. White, in solido, the sum of four hundred dollars a year, from the 3d of July, 1844, until paid, and from Alvarez Fisk, the sum of \$350 a year, from the 5th of August 1843, until paid. It is further ordered that William Amonett, dative testamentary executor of Robert Slaughter, surrender in execution to the sheriff, lots nos. 52, 53, 54 and 55, in township no. 15, of range no. 13 east, in the land district north of Red River, and that a writ of distringas issue if necessary against the executor personally to enforce this decree. It is further ordered that Alvarez Fisk surrender in execution to the sheriff, the fifteen slaves whose names follow: Peter, Albert, Julia, Catherine, Lucinda, Lucy, Abram, Fanny, Leach, Sally, Peter, an infant, Bob, little Maria and her child; and that a writ of distringas issue if necessary to enforce this decree. It is further ordered, that the sheriff proceed to advertise and sell the property surrendered, in the manner

MORRIS.

pointed out by law in cases of partition; that one half of the nett proceeds of the sale be paid over to the succession of Ferriby Smith; that one half of the nett proceeds of the property surrendered by the succession of Slaughter, be paid over to his executor; and that one half of the nett proceeds of the slaves surrendered by Fisk, after deducting therefrom whatever he may owe the succession of Ferriby Smith under this decree, be paid over to him. It is further ordered, that the improvements made by Robert Slaughter on the land, be compensated with the crops of 1842 and 1843, received by his executor. It is further ordered, that the rights of the succession of Slaughter, against the succession of George Deahl, and also against Francis 1. Thompson, by reason of their warranty, be reserved. It is further ordered that, in order to carry this decree into effect, this case be remanded, withdirection to the District Court to appoint an administrator to the succession of Ferriby Smith according to law. It is further ordered, that the administrator thus appointed represent the succession in the execution of this decree; and that, after payment in due course of administration of one half of the debts of the community, which existed be tween George Deahl and Farriby Smith, he be made to account to the plaintiffs, in equal shares, for any balance in his hands.

It is further ordered, that the interventions of Thomas W. Amonett, and of Rogers, be dismissed at their costs; and that one half of the costs in both courts be paid, in solido, by William Amonett and Benjamin F. White, the other half to be paid in equal shares by Alvarez Fisk, the succession of Slaughter, and the successions of Ferriby Smith. It is finally ordered, that the rights of the succession of Ferriby Smith to the slaves, Doctor Gilbert, and Hannah, be reserved.

AMONETT et al. v. FISK.

A transferree of a mortgage executed to secure the endorsers of a note, cannot proceed against the mortgaged property in the hands of a third person, where there is no proof that the endorsers had paid any part of the note, nor that the succession of the mortgagor was insolvent.

A PPEAL from the District Court of Madison, Curry, J.

Amonett for the appellants. Pepper, for the defendant. The judgment of the court was pronounced by

Rost, J. This case originates in that of Morris v. Covington, just determined. The plaintiffs seek to compel the defendant to return the slaves which he received from the succession of Slaughter, in satisfaction of the claim transferred to him by Burke, Watt & Co., in order to make them liable to the mortgage given by Deahl to his endorsers. We have said in the former case, that Amonett had acquired no title to any portion of this mortgage. The claim as to the other plaintiff, is premature. Nothing shows that the assets remaining in the hands of the executor of Slaughter, are not sufficient to pay this claim. The plaintiffs' action was properly dismissed.

Judgment affirmed.

RICHARDS et al. v. PRESLER.

In the absence of any proof of the residence of the parties to a note, and of any specification of the place of payment, the legality of the rate of interest stipulated in the note must be determined by the laws of the State in which it was dated.

Eight percent a year is the highest rate of interest allowed by the laws of Mississippi, except in case of notes, or other written contracts, signed by the debtor, for the bonā fide loan of money, when ten per cent may be stipulated; and in these cases, the note or writing must express that it is for money loaned. Stat. of Miss. of 25 June, 1822.

By the laws of Mississippi, in case of an usurious contract, the principal only can be recovered. Stat. 25 June, 1822.

By the stat. of 19 Feb'y, 1844, no stipulation for conventional interest at a higher rate than eight per cent a year can be made, under the penalty of forfeiting the whole amount of interest.

A PPEAL from the District Court of Concordia, Curry, J. Stacy and Sparrow, for the plaintiffs. T. P. Farrar, for the defendant, cited stat. of Miss. of 25 June, 1822, and Coxe v. Rowly, 12 Rob. 273.

The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon three promissory notes drawn by the defendant and others, in solido, in favor of the plaintiffs, at twelve, twenty-four, and thirty-six months after date. They are dated at Fort Adams, in Mississippi, 11 February, 1841; no place of payment is specified, and they stipulate interest at ten per cent after maturity. The defence rests upon a plea of usury, under the statute of Mississippi.

At the trial of the cause, the notes were offered in evidence, and the Mississippi statute of 1822, regulating the subject of interest. It was admitted that Fort Adams was in the State of Mississippi, and that the defendant, at the institution of the suit, was living in Louisiana. But it is not proved that, at the time of making the contract, either of the parties lived out of Mississippi, or that the place of performance was to be out of that State.

Under the statute of Mississippi, we consider the agreement to pay ten per cent, usurious; and, we are of opinion that, under the state of facts above presented, the law of Mississippi must govern the contract, and determine its legal effect. Eight per cent per annum is the highest rate permitted by the statute, except in case of notes or other written contracts, signed by the debtor, for the bond fide loan of money, in which case ten per cent may be agreed on. We have not been aided with authority from the decisions of that State, and the text of the statute is our only guide. As we understand its language, the note or writing must, in such cases, express that it is for money loaned. The present contracts do not fall, therefore, within the exception. Under the statute, the principal only can be recovered, in case of a usurious contract.

But the plaintiffs contend that, having brought suit in a court of this State, they are entitled to interest from judicial demand according to the law of the forum; that such interest appertains to the remedy, and constitutes no part of the contract. We deem the question immaterial in this case, which law ought to be applied; for both are against the plaintiffs. If we look to the statute of Mississippi, no interest whatever can be allowed; if we treat the matter as remedial, then the rule of the domestic forum, which allows interest on lawful contracts for the pay;

ment of money from judicial demand, cannot be extended to a contract tainted with usury, without violating the declared policy of our own statute. Upon usurious contracts made in our own State, the act of 1844, enacted before the institution of this suit, imposes the for feiture of the *entire* interest so contracted. An usurious foreign contract should not be more favorably considered in our courts than a domestic one.

It is therefore decreed, that the judgment of the court, so far only as it allows interest from judicial demand, be reversed, and that, in other respects, the said judgment be affirmed, the plaintiffs paying the costs of this appeal.

RICHARDS U. PRESLER.

SPLANE, Curator, v. MITCHELTREE.

One aware that another had purchased land from a third person, and that the purchaser was in possession, but had failed to have his title recorded in the parish in which the land was situated, from whatever source such knowledge may have been derived, can acquire no title to the property to the prejudice of the purchaser.

PPEAL from the District Court of St. Martin, Boyce, J.

A R. N., and A. N. Ogden, for the appellant, contended that the judgment of the lower court was erroneous, plaintiffs being clearly entitled to judgment for one-half of the land.

Simon and Morphy, for the defendant. In cases of mortgages, it has been decided that, whatever might have been the effect of a want of registry of the contract, in pursuance of which the plaintiff proceeded to do the work undertaken by him, to defeat his claim of privilege, &c. the defendant cannot profit by the alleged defect of recording, where knowledge of the existence of the privilege had been brought home to the latter, from its being noticed in the act of sale from the vendors to him. Carker v. Walden, 6 Mart. N. S. 713. It is now a settled rule, that a purchaser, with a knowledge of an existing mortgage, cannot awail himself of the want of registry. Planters' Bank of Georgia v. Allard, 8 Mart. N. S. 136, and the authorities therein cited. See also 6 Robinson, 88, case of Rachal v. Normand et al.

In cases of sales: An act sous seing privé, accompanied by possession, has effect against third persons. Case of Roulin v. Sabatier et al., Syndics. 6 Mart. N. S. 429. Notice to a third party, who purchases at a sale, of prior title, is sufficient to hold the property, although the title may not be regularly recorded, if such notice be given at or before the sale. Bell v. Horn et al., 8 Mart. N. S. 243. Purchasers of property, who collude with the vendor in the sale of it, with the view to defraud the true owner, cannot avail themselves of the omission to record the act of partnership under which the property is claimed. Millaudon v. Sylvester et al., 8 La. 262.

This case appears, from the position taken on the appeal by the plaintiff's counsel, to resolve itself into a question of costs in this court; but we respectfully submit whether, if the lower court has, through error, allowed the defendant more land than he has shown a title to, which title was specially pleaded in his answer, it was not the duty of the plaintiff to move for a new trial below, to correct the error, thus shewing that he did not persist in his original demand for the whole land. Code of Practice, arts. 546, 547, 557, 558.

The judgment of the court was pronounced by

King, J. This is a petitory action, instituted by the plaintiff, as curator of the succession of *Maxwell*, to recover a tract of land, to which he alleges that the defendant asserts title. The defendant, in his answer, pleads the general issue, and avers that he is the owner of the land in controversy, in virtue of a valid conveyance from W. D. Campbell, by act under private signature, duly registered, under which he took immediate possession, which he has held without

SPLAND E. MITCHELTERE,

interruption ever since. He further alleges that Maxwell, well knowing his title, colluded with his vendor, Campbell, and procured a transfer from the latter to himself of the land in contest, with the view of cheating and defrauding the defendant. A judgment was rendered in favor of the defendant in the court below, and the plaintiff has appealed.

It is shown by the evidence, that Campbell, who was the owner of a quarter section of land situated in the parish of St. Martin, by an act under private signature, conveyed the east half of the tract to the defendant, who, immediately after the purchase, took possession of the land thus acquired, which possession he has held without interruption since that time. The act of sale was not proved and recorded in the parish of St. Martin until the 31st of July, 1841. Maxwell, who was aware of the ownership and possession of the defendant, and that the title of the latter had not been duly registered, took a conveyance from Campbell, the defendant's vendor, of the entire quarter section, by an authentic act, which he caused to be recorded in the parish of St. Martin, on the 16th of July, 1841, prior to the registry of the defendant's title in that parish. About the time that this sale was made to him, he stated to one of the witnesses, that he had the advantage of the defendant; that the latter had neglected to have his sale recorded in the proper parish; and that he (Maxwell) would start the next morning before day-light to St. Martin, to have the sale from Campbell to himself recorded. The testimony of this witness is corroborated by that of others, and leaves no doubt that Maxwell was, at the time of the conveyance to himself, fully informed of the defendant's ownership and possession of one-half of the land in question, Possessing this knowledge, whether derived from the public records or from other sources, he could scquire no title to the prejudice of the defendant. But the bad faith of Maxwell affected his title only to that half of the quarter section of land which was acquired by the defendant; for the remaining half, the conveyance to him was valid, and to that extent he was entitled to recover. The judgment of the lower court, rejecting the plaintiff's claim for the west half of the quarter section of land in controversy, is erroneous.

It is therefore ordered that, the judgment of the District Court be avoided and reversed. It is further decreed that, the succession of William Maxwell, deceased, be the owner of the west half of the lot, or north-west quarter of the section numbered thirty-six, in township number eleven, south, of range number eleven, east, and that the defendant be quieted in his title and possession of the east half of said lot or quarter section. It is further ordered that the defendant pay the costs of both courts.

Scorr et al. v. Rusk.

A party who resides out of the State may appeal at any time within two years from the date of the judgment.

A sale omnium bonorum is not a contract in the usual course of business, and, when it is assailed, parties claiming under it are bound to establish its reality by proper evidence.

Where a surviving wife takes possession of property of the matrimonial community, after the death of her husband, uses it as her own, and attempts to conceal and withhold it from the succession of her husband, she will render herself liable thereby for one half of the debts of the community.

A PPEAL from the District Court of Madison, Curry. J. Pepper, for the appellants, to establish the responsibility of the wife for one half of the community debts, cited the Civil Code, art. 2382. Flood v. Shamburg, 3 Mart. N. S. 622. Chapman v. Kimball, 6 Rob. 94. Lynch v. Benton, 12 Rob. 113.

A. Pierse, for the defendant.

The judgment of the court was pronounced by

Rost, J. The motion to dismiss made in this case must be overruled; the plaintiffs reside out of the State, and appealed within two years from the date of the judgment.

The plaintiffs seek to render the defendant responsible for the amount of a written obligation given by her late husband for goods furnished to the community, on the ground that she has intermeddled in the affairs of the community, and taken possession of all the property thereto belonging, without having caused an inventory to be made. The answer is a general denial. The court below gave judgment in favor of the defendant, and the plaintiffs appealed.

It is in proof that James B. Rusk, on the 2d day of December, 1837, was the owner of two houses and lots, four slaves, a stock of goods, furniture and other personal property, all of which he, on that day, pretended to convey by public act to one Charles M. Burland, his brother-in-law, for the sum of \$24,500, for which amount Burland gave to Rusk four promissory notes for \$6,125 each, the first payable on the 1st day of January, 1842, and the others annually thereafter; to secure the payment of which notes a mortgage was retained on all of said property.

From the time this sale took place, Rusk and the defendant lived in the dwelling house, and controlled the property embraced in the act of sale, until the death of Rusk, which took place on the 1st April, 1839, and the defendant continued in possession afterwards.

In the meantime, however, the defendant and C. M. Burland, her brother, made a conveyance of all the above mentioned real property and slaves, and one section of new land, which had been entered in the name of Burland after his purchase from Rusk, to one H. P. Morancy, in full consideration for which they acknowledged the receipt of \$2,073. In this deed, they warranted the property free from all encumbrances, and afterwards Morancy re-conveyed to the defendant all said property, except the section of land which he retained, and one slave, who was conveyed to Burland.

In this re-transfer, it is stated that the sale to Morancy was intended to operate merely as a mortgage, to secure a debt due to him by James B. Rusk, for \$1,573, and \$500 more, which he had paid to raise a mortgage on the property. It is further recited in this act, "that C. M. Burland had previously made a deed of gift of all said property, including the section of land, to the defendant; but, in as much as Burland was always the rightfut owner of this land," defendant relinquished to him the balance of the price to be paid by Morancy, which in all amounted to \$3,500. It is also in proof that the notes given by Burland to Rusk had not been presented for payment at the time this case was tried in the court below, though some of them were due at that time.

A sale omnium bonorum is not a contract in the usual course of business, and when it is assailed, parties claiming under it are bound to establish its reality by proper evidence. This has not been attempted in this case. On the contrary, the evidence shows that, after the sale, the defendant and her husband continued to enjoy the property as before, till he died, and that she has continued

SCOTT v. Rusk. Scorr v. Russ. to enjoy it ever since. Burland, the brother, who, it is pretended, gave it to her, lived at her house, and had no means; and the fact that the property was transferred to her free from encumbrances, necessarily implies the destruction of the notes stated to have been given by Burland to Rusk, and not due at the time of the death of the latter.

We had hoped that the stern rebuke which transactions such as this uniformly receive from this court, would, ere this, have satisfied parties and their counsel, that they were not a profitable source of litigation. We deplore the ruin brought upon a woman in this case by her advisers, but we have not the means of saving her; we believe the contracts adduced in evidence to be barefaced simulations, and it is our duty to say so. The property therein described has never ceased to form part of the acquéts and gains, and the defendant, by retaining and using it as her own, without having caused any inventory to be made, and by attempting to conceal it and withhold it from the succession of her husband, has made herself liable for one-half of the community dobts. The claim of the plaintiffs for the other half, must be exercised against the heirs or legal representatives of the husband.

It is therefore ordered that the judgment be reversed, and that there be judgment in favor of the plaintiffs, against the defendant, for the sum of \$432.21, with legal interest thereon from the 13th day of November, 1841, till paid, and costs in both courts. It is further ordered that the rights of the plaintiffs against the heirs and legal representatives of James B. Rusk, for the remainder of their claim, be reserved.

SUCCESSION OF BRISCOE.

Where an illegitimate child, not acknowledged by either parent, dies without issue, his estate will devolve upon his surviving wife, not separated from bed and board. C. C. 911, 918.

In the appointment of an administrator, the beneficiary heir, of age, and present in the State,

must be preferred to every other person. C. C. 1035. Where there is but one beneficiary heir, this right of preference entitles him to the exclusive administration of the succession.

A PPEAL from the District Court of Madison, Selby, J. R. C. Downes, for the appellant, cited Civil Code, arts. 911, 918, to show the heirship of the appellant, and arts. 1035, 1114, to establish her exclusive right to the administration, as sole beneficiary heir.

Pepper and Bemis, on the same side.

Thomas, contra.

The judgment of the court was pronounced by

King, J. Samuel Briscoe claimed the administration of the succession of John Briscoe, alleging that he was a half brother of the deceased. His application was opposed by Martha J. Briscoe, the surviving widow of the deceased, who asserted that she was the beneficiary heir of her husband, and, as such, entitled to the exclusive administration, which she claimed. The court below appointed both of the applicants jointly, and Martha J. Briscoe has appealed.

It appears from the evidence that John Briscoe was an illegitimate child; that he was legally married to the appellant, from whom he was not separated from bed and board, and that he died without issue. There is no proof that he was

acknowledged by his father or mother. Samuel Briscoe, who is the legitimate son of the common father, is not the heir of his illegitimate brother, nor does he claim in his petition to stand in that relation to him. The succession of the deceased then devolved by law on his widow, who has accepted it with the henefit of inventory, and claimed to be put in possession. Civil Code, arts. 911, 918. In the appointment of administrators, the beneficiary heir of age and present in the State, is preferred to every other person. Civil Code, art. 1035. The judge below appears to have considered that the appellant presented no superior claim, and that he was authorized to appoint two persons to the administration. We think he erred. The right conferred by law on the beneficiary heir is a preference, which, when claimed, excludes all others from paticipating in the administration. The appellant, as the sole beneficiary heir of the deceased, is entitled to the exclusive administration of his succession.

BUCCESSION OF BRISCOE.

It is therefore ordered that so much of the judgment of the District Court as confers upon Samuel Briscoe the appointment of a joint administrator of the succession of the late John Briscoe deceased, be avoided and reversed. It is further ordered that so much of said judgment as confers upon Martha J. Briscoe the appointment of administratrix of said succession, be affirmed, and that she have the exclusive administration thereof; the appellee paying the costs of both courts.

FREEMAN v. SAVAGE et al.

Plaintiff sold property to defendant for a certain price, on credit, taking an endorsed note for the amount. A creditor of the latter having seized the property under a f. fa., plaintiff enjoined the proceedings, claiming to be the owner, under a deed from defendant to him by which the property was reconveyed for the amount of the note; but the injunction was dissolved, the reconveyance being considered as simulated. In an action by the plaintiff, against the endorsers on the original note: Held, that whether the reconveyance was executed in good faith, or was simulated to defeat the rights of the seizing creditor, plaintiff cannot be permitted to treat it as other than genuine, and that, considered as such, it extinguished the note.

A PPEAL from the District Court of Carroll, Wilson, J.

T. J. Lacy and Bemiss, for the appellant.

Selby, for the defendants. Thomas, on the same side, contended that the note sued on was extinguished by the plaintiff's re-purchase of the property, for the price of which it was executed.

The judgment of the court was pronounced by

SLIDELL, J. This suit is brought against the maker and endorsers of a promissory note for \$2400, dated December 21st, 1840, and payable 1st February, 1842. Savage, the maker, was dismissed upon a plea to the jurisdiction, and the suit was tried against the endorsers, who had judgment in their favor in the court below. The plaintiff has appealed.

This note was paraphed ne varietur, as is usual in case of mortgage notes, and it satisfactorily appears from the evidence before us that its consideration was a sale of certain slaves by Freeman to Savage. In the year 1843, a judgment creditor of Savage, one Wade, seized the slaves under execution, when

FREEMAR.

Freeman arrested the judicial sale by injunction, alleging, under oath, that he was the lawful owner of the slaves. He prayed for a decree recognizing him as the lawful owner of the slaves, and demanded their release from execution, and restoration to him. To sustain his claim as owner, thus alleged under oath, Freeman offered in evidence, at the trial of the injunction, a document executed by Savage in Freeman's favor, purporting to bear date the 10th March, 1841, by which for and in consideration of \$2400, the exact amount of the note upon which this suit is brought, certain slaves therein described are sold and declared to be delivered by Savage to Freeman.

Whether this instrument re-conveying the slaves was really executed in good faith, and at the time of its date, by Preeman to Savage, and a real delivery of the negroes was then made, as therein declared, or whether, on the other hand, the sworn petition in the injunction suit was false, and the document thus offered to sustain it, was a mere simulation, contrived and executed to defeat the rights of Wade, are questions which the plaintiff cannot be permitted to raise. We must therefore consider the document as true, and as exhibiting, what it purports to establish, a sale and delivery to Freeman of the negroes, the original sale of which was the consideration of the note upon which this suit was brought. Thus, according to the plaintiff's own showing, there was a retrocession extinguishing the note. We wish not to be understood as saying that we believe this instrument was really executed as it purports to be. We express no opinion on that question. We have considered it in the only light in which the plaintiff can be permitted to treat it, as genuine and true. That it was ineffectual in the suit against Wade, is no reason why the plaintiff in this cause should be permitted to question its genuineness or truth. What he has thus said and done, the policy of the law will not allow him to gainsay or deny.

Judgment affirmed.

SCOTT v. NIBLETT.

Decision in Spencer v. Knowland, ante p. 222, affirmed.

A PPEAL from the District Court of Madison, Selby, J. Thomas and Snyder, for the plaintiff, cited Spencer v. Knowland, ante p. 222, as decisive of this case. Garland and Pepper, for the appellant.

The judgment of the court was pronounced by

SLIDELL, J. An order of seizure and sale was obtained upon a judgment in favor of Niblett against Scott in the United States Court, in the State of Mississippi. The judgment did not express on its face that it bore interest, but the plaintiff, in the executory proceeding, exhibited with the record an authenticated copy of a statute of Mississippi, passed several years before the rendition of the judgment, which allowed interest on judgments at eight per cent. This rate was accordingly allowed by the order of seizure and sale.

We think the order of seizure improperly issued in this respect. See the case of Spencer v. Knowland, ante p. 222. If the creditor had asked us to maintain the order of seizure and sale as to the capital sum, abandoning the interest, it might then have become necessary to examine the points made as to the char-

acter of the judgment, and the authentication of the transcript. There being no such application, we confirm the judgment of the court below rendering the injunction perpetual.

SCOTT S. NIBLETT.

As some doubt might arise from the phraseology of the injunction thus rendered perpetual and the proceedings in the cause, as to the force and effect of the judgment appealed from, we think proper to say, in affirming it, that we consider it simply as determining that the order of seizure and sale in question illegally issued, and that it does not form res judicata as to the force and effect of the judgment rendered in Mississippi.

Judgment affirmed.

DEVALL v. BOATNER.

An intervenor is not entitled to make his warrantor a party to the action. C. P. 389, et seq.

PPEAL from the District Court of East Baton Rouge, Johnson, J. This A was an action to recover from the defendant the amount of two notes, executed by her for the price of slaves sold to her by the plaintiff. The defence was the danger of eviction, from a claim to the slaves set up by a third person. The tutor of the minor heirs of Mary Peirce, late wife of one Constantine Peirce, intervened, alleging that Mary Peirce inherited the slaves from one Sarah Rowel, her aunt; that she continued in possession of them until her possession was divested, by a sale made under an order of seizure and sale, obtained on a mortgage given to secure the amount of a bond executed in favor of the City Bank of New Orleans: that the bond and mortgage were null and void, having been executed by the said Mary Peirce, as surety for her husband, from fear of her husband, to the knowledge of the officers of the bank; that the slaves were purchased by one Reid, with a knowledge of the facts just stated; and that the plaintiff purchased the slaves at a sale made by the syndic of the creditors of Reid, also well knowing said facts, and afterwards sold them to the defendant. The intervention concludes with a prayer that the said sales may be declared null, and the slaves adjudged to be the property of the minors represented by the intervenor. The plaintiff, in answer to the intervention, alleged that the order of seizure and sale in favor of the City Bnak was resjudicata, and had divested all the interest of Mary Peirce, and that the validity of the judgment cannot be enquired into collaterally in this action. The defendant adopted the allegations of the intervenor, alleging their truth. The intervenor, by an amended petition, prayed that the City Bank of New Orleans might be made a party to the suit, in order that judgment might be rendered annulling the order of seizure and sale obtained by the bank. The judge refused to allow the amended petition to be filed, and, by consent, the case is brought up on appeal from that refusal.

Elam, for the plaintiff. The intervenor had no right to call in a third party, to aid him to assert his rights against the original parties to the suit. Code of Practice, art. 389 to 394. Nor for the purpose of obtaining judgment against such party. If this could be allowed to the intervenor, the City Bank could claim the same right, and thus the cause might be indefinitely delayed, when the law requires an intervenor to be always ready, because he has always his remedy by a separate action. C. P. art. 391. If the mortgage of the City Bank was tainted with fraud, it was voidable, not void. Civil Code, art. 1875;

DEVALL 9. BOATHER. and the obligation having been carried into effect by a judgment rendered by a court of competent jurisdiction, not appealed from and unreversed, a sale made in pursuance thereof vested a valid title in the purchaser. 5 Mart. N. S. 214. 14 La. 440. 1 Robinson, 94. The law under which the bond and mortgage was executed to the bank, removed every legal disability from Mary Pierce. Act of 1827, secs. 22, 23, page 114; act of 1831, sec. 8, page 36. The intervenor's remedy, if any he has, is by a direct action against the bank; the question of fraud, between the bank and the intervenor, cannot be examined in this action. If examined and found true, the title to the slaves could not be effected thereby; the judgment under which they were sold is a conclusive bar against Mary Pierce and her heirs. 11 Mart. 607. 5 Mart. N. S. 664. 14 La. 233. 19 La. 328. 10 Peters, 469.

Lawson, Boatner, Merrick and Muse, for the appellants. The intervenor, having been allowed to appear in the suit, was entitled to all the rights of one of the original parties, and the amendment should have been allowed. An interve-

nor has a right to amend. Succession of Baum, 11 Rob. 323.

The judgment of the court was pronounced by

EUSTIS, C. J. It being agreed by counsel, that this court decide on the correctness of the order of the District Court, in refusing to grant leave to the intervenor to make the City Bank of New Orleans a party to this suit, by reason of the said consent given, and in virtue of articles 389 et seq. of the Code of Practice, it is considered by the court that the District Court did not err in refusing the prayer of the intervenors.

The judgment appealed from is therefore affirmed, the intervenors paying the costs of this appeal, and the the case is remanded for further proceedings.

POLICE JURY OF EAST FELICIANA v. TAYLOR et al.

Defendants sued as principal and surety on a bond, by which they bound themselves to keep a bridge in repair for a certain time, moved the court for a new trial, on the ground that they had discovered, since the trial, a written compromise, which had been signed by the plaintiffs and the principal in the bond, settling the matters in dispute between the parties: Held, that a new trial should not be allowed, as the instrument could not have existed without the defendants' knowledge, and should have been pleaded in their answer.

Defendant, having built a bridge by contract, on the refusal of plaintiffs to receive it on the ground of its not having been erected in conformity to the agreement, executed a bond by which he bound himself to keep it in a good condition for a certain time, before the expiration of which it was destroyed by a freshet. The witnesses examined on the trial, thought that the freshet was not an irresistible force: Held, that the bond was conclusive evidence that the bridge was defective, and that defendant had not complied with his contract, and that the loss ought to fall on the party in fault at the time the bridge was destroyed. C. C. 1927, § 4.

A PPEAL from the District Court of East Feliciana. Johnson, J. The material facts in the case, are stated in the opinion delivered by Rost, J., infra. A judgment having been rendered against the defendants, they moved the court for a new trial: "First, because the verdict was contrary to law and evidence: Secondly, because, since the trial, the defendant Taylor had discovered that, about the 15th of November, 1843, he had entered into a compromise or agreement with a committee of the Police Jury, acting by their authority in the matter, by which they agreed to pay him \$400, as a compensation for building said bridge, and which was accepted by Taylor, and signed by the parties, and was annexed. The defendants further aver that, after accepting the propositions made to him, the defendant Taylor forwarded the same to the Police Jury,

who supposed they had retained it, and refused to abide by their own proposition after it was accepted; that he continued under that impression until after the trial, when his attention was called to the matter by one of the police jury."

The statements in this motion were sworn to by Taylor, who further deposed, that the agreement has been returned to him by one Pettiss, who stated to him that the Police Jury declined to abide by it. The compromise referred to is in these words:

ed to him the parish for buildnear John

"We the undersigned committee, appointed by the Police Jury of the parish of East Feliciana, La., to make a final settlement with Isaac Taylor for building the ("Comite Bridge") bridge across the Comite by said Taylor, near John Carr's, do agree to allow said Taylor the sum of four hundred dollars, and that the same be, and is to be, a privilege claim upon-said parish, for said amount; and I, the said Isaac Taylor, agree to said settlement, provided said sum be allowed me as aforesaid and considered a privilege claim.

November 16th, 1843.

I accept the proposal.

WM. SANDEL, Committee.

ISAAC 'TAYLOR."

A new trial having been refused, the defendants appealed.

Z. S. Lyons, for the plaintiffs. The bond was not a warranty, but an obligation on the part of Taylor, to repair the known and visible defects of the bridge, which had already condemned it, on condition that it should be received in its then condition. C.C. arts. 1951. 1952. As a man binds himself so is he bound. The motion for a new trial was properly overruled. Under the pleadings, the paper alleged to have been found could not have been received in evidence. 4 Mart. 512, 7 La. 84. 10 La. 155. 7 Rob. 56. The paper is nothing more than an imperfect agreement to compromise, in the possession of Taylor, and consequently his acceptance not communicated to plaintiffs. Fraud on the part of plaintiffs is neither alleged nor proven. There is no error, either in fact or in law, to invalidate the transaction. A party who alleges an error must prove the error. 6 Mart. N. S. 206. Even error in law will not protect the obligee, if the contract entered into is to prevent litigation. C. C. art. 1840. no. 2. 5 La. 513.

Lawson and Merrick, for the appellants. The resolution of the Police Jury and the bond should be construed only as warranty of the workmanship, and, at the most, against the ordinary stages of high water, and not against such a flood as that of 1843, which was unprecedented in its height. The contractor is bound to warrant only against the badness of the materials and workmanship. Civil Code, arts. 2730 to 2733. Fremont v. Harris, 9 Rob. 23. 1 Pothier, Obl. no. 163. Code Nap. art. 1792. Pothier, Contr. de Louage, nos. 425, 426. The lessee is not bound for fortuitous events. C. C. art. 2687. But the Napoléon Code has a provision, that the lessee may charge himself with them by an express stipulation. The commentators say that this clause may be either against fortuitous events, or against fortuitous events, foreseen and unforeseen; that where there is an express stipulation against fortuitous events, foreseen or unforeseen, it then covers accidents of every kind. Troplong, Louage, nos. 755, 756. In the case under consideration, there is no express warranty against fortuitous events at all; and the fair intendment of the warranty is as to the workmanship and materials, and not against floods greater than were ever previously known, and which could not have been anticipated or foreseen. The motive of Taylor for executing the bond, was the belief that he was bound in warranty, when in fact he was not. Therefore, there was no valid consent given, and the bond is a mere nullity. La. Code, art. 1818. Berard's Heirs v. Berard, 2 La. 1. Barrow v. Cazeux, 5 La. 72.

The judgment of the court was pronounced by

Rost, J. On the 12th day of September, 1840, the defendants gave their

bond to the plaintiffs for the sum of \$900, conditioned as follows:

POLICE JURY 0. TAYLOR.

"Whereas the above bound Isaac Taylor, has this day received a draft on the parish treasurer of the aforesaid parish, for the sum of \$600, which draft was given by order of the police jury of the aforesaid parish, for and in consideration of the said Isaac Taylor's having built a bridge over the Comite, near the plantation of John Carr, which bridge was reported unfavorably of by the bridge committee appointed for the purpose, which bridge the said Taylor agrees to warrant for the term of five years, from the 1st day of February, 1840.

"Now the condition of the above bond is such that, should the said Taylor keep the aforesaid bridge in a good and safe condition, and the abutments thereto in a good condition, for the term of five years, and leave the same in a good and passable condition to the public use, then this obligation to be void, else to remain in full force and virtue."

In 1842, the bridge was damaged by a freshet, and Taylor, having been put in default, partially repaired the damage. In 1843, another freshet carried away the bridge, and Taylor, having refused to rebuild it, was again put in default, and the plaintiffs instituted this action on the bond, praying, at the same time, that the warrant of \$600 given him on the parish treasurer, and still unpaid, might be returned and cancelled. The defendants answered by a general denial, averred that the bond had been given by them in error, that the bridge had been built according to contract, and that it was destroyed by irresistible force, against which they did not warrant. The cause was tried before a jury, who gave a special verdict in favor of the plaintiffs for the amount of the warrant, and that the same be given up and cancelled. Judgment was rendered accordingly, and the defendants, having failed in their application for a new trial, took the present appeal.

The motion for a new trial was properly overruled. The contract, stated to have been found after the verdict was rendered, could not exist without the defendants' knowledge, and should have been pleaded in the answer.

We cannot go into the enquiry whether the bond sued upon was given in error; there is no evidence of that fact in the record. As the defendants bound themselves, they must remain bound; and the bond is conclusive evidence that the bridge was defective, and that the defendant Taylor had not complied with his contract.

Whether the freshet, by which the bridge was carried away, was an irresistible force, is a matter of conjecture. The witnesses think that it was not, and that the bridge might have been built so as to withstand it. Freshets seem to be of frequent occurrence on that river, and the experience of the witnesses gives much weight to their testimony.

This is a hard case, whichever way it may be decided. The jury appear to have considered that the loss ought to fall on the party in fault at the time the bridge was destroyed; and in this they made a correct application of the law to the facts before them. Civil Code, art. 1927, no. 4. Judgment affirmed.

ELAM v. CARRUTH.

Where the act of an agent, done without the authority of the principal, is ratified, the ratification cannot be divided, and applied to one part of the act and excluded from the other. It is entire or nothing.

A PPEAL from the District Court of St. Helena, Jones, J. Elam, plaintiff, pro se. A. Hennen and T. G. Morgan, on the same side. Baylies, for the defendant. Merrick, for the intervenor and appellant.

The judgment of the court was pronounced by

Eustis, C. J. This is an action on a promissory note for \$453 22, drawn by the defendant to the order of T. G. Davidson, and by him endorsed in blank. The defence is that, the note was given to the plaintiff to satisfy a judgment which Berthoud held against him, the defendant; that the plaintiff, who was at the time Berthoud's attorney at law, agreed to enter satisfaction on the judgment, which was not done, and that defendant has since paid said judgment. In this suit, Berthoud, the owner of the judgment against the defendant, in satisfaction of which the note is said to have been given, intervenes, and prays that he may have judgment, in the stead of Elam, for the amount of the note against the defendant.

The judge of the District Court considered that one-half the note belonged to the ptaintiff in his own right, gave judgment to that effect, and the intervener has appealed. The judge considered that the other half of the note belonged to the intervener, and had been, by his agent, remitted to the defendant, who has not appealed, but appeared in this court.

It is obvious that, by claiming the note as belonging to him, Berthoud ratified its reception by his attorney, the present plaintiff. The discharge of the judgment given by Elam to the defendant, was, therefore, valid. When the act of an agent, done without the authority of the principal, is ratified, the ratification cannot be divided and applied to one part of the act and excluded from the other, it is entire or nothing.

It is equally clear that the offer of Bailey, Berthoud's agent, for Elam's compensation, did not relate exclusively to his professional services; nor did Elam agree to make his compensation dependent on the event of any suit, or to take any part of the property in litigation. The letter of Bailey was an offer on his part, and the district judge may well have considered it a safe guide for a compensation, ex equo et bono, for a troublesome and complicated law suit, in which the labor and time of the plaintiff had been expended, and have allowed him the sum of \$226 61, and interest from the time of the termination of the litigation. The intervenor says this allowance is excessive. We do not understand that the fact of the services is drawn in question, and have no evidence before us of The excess of the charge. On the contrary, a subsequent letter from the agent of the intervenor to the plaintiff, fortifies the justice of his claim, which we see no good reason to prevent him from recovering from the succession of Carruth, in the form of the present judgment, particularly as the defendant has made no plea or objection as to the division of the debt. We determine this case independently of the validity of any agreement which Elam is supposed to have made for his fee, because no such agreement is proved.

MEAN O. CARRUTH.

The judgment of the District Court is therefore affirmed, so far as relates to the judgment in favor of the plaintiff against the defendant, the succession of J. J. Carruth; and it is further ordered that the intervenor, Nicholas Berthoud, recover from said succession the sum of two hundred and twenty-six dellars sixty-one cents, with five per cent interest per annum from the 26th of August, 1841, with costs; and that the said succession pay the costs of this appeal.

MONTGOMERY, Executor, v. MYERS.

Where in an action against a drawer of a bill of exchange endorsed in blank, plaintiff sues as executor, proof of his being executor is unnecessary, though specially denied. Per Curiame The bill being payable to bearer, whether the plaintiff chose to style himself executor, or to sue in his own name, was immaterial. The only effect of the allegation would be to estophim from denying it, and to bind him by any defence which the drawer could set up against the succession he pretended to represent.

A PPEAL from the District Court of East Feliciana, Johnson, J. Z. S. Lyons, for the appellant. Muse and Merrick, for the defendant. The judgment of the court was pronounced by

SLIDKLL, J. This suit is brought by Montgomery, styling himself executor of Nott, upon a bill of exchange drawn by the defendant to his own order, and by him endorsed in blank, upon, and accepted by Bullitt, Shipp & Co., and duly protested at maturity for non-payment. The defendant, in his answer, denied specially the alleged capacity of Montgomery, as executor of Nott; the plaintiff did not prove such executorship; and upon this ground he was non-suited in the court below.

We think it was not necessary to enable the plaintiff to recover, that he should prove that allegation. If the note had been specially endorsed to Nott, such proof might have been necessary; but here the bill was endorsed in blank, and became thereby payable to bearer; and whether the bearer chose to style himself executor of Nott, or to sue in his own name, was immaterial. The only effect of this allegation was that, if the defendant could prove the existence of a valid defence as against Nott or his succession, the plaintiff would have been estopped by his own assertion that he represented Nott's succession, and bound by such defence.

As to the merits, the record presents a case so confused and anomalous, that it is very difficult to apply to it the familiar principles which govern contracts of this nature. Each party chims a final judgment in his favor. The court is unanimous, that the defendant is not entitled to judgment in his favor. He speaks vaguely in his answer and brief of an equitable defence, growing out of a certain shipment of cotton to the drawees, but has utterly failed to establish any defence of that kind. He has rested his cause upon the omission of the plaintiff to answer certain interrogatories, which, being taken as confessed, show a state of facts which is partially contradicted by other evidence in the cause.

There is a difference of opinion with the court as to the right of plaintiff to final judgment in his favor; and, under the circumstances, we have concluded to remand the case for a new trial, with leave to the plaintiff to answer the interrogatories propounded.

It is therefore decreed that the judgment of the court below be reversed, and MONTGOMERY the order pro confesso be set aside, and that this cause be remanded for a newtrial and for further proceedings according to law, with leave to the plaintiff to answer the interrogatories propounded by the defendant; the costs of this appeal to be paid by the defendants.

Johnson v. Short.

In an action for the settlement of a partnership, plaintiff cannot proceed by attachment, where, from the nature of the business, it is impossible that he can swear with certainty to the amount which will be found due to him on a final settlement.

PPEAL from the District Court of West Feliciana, Wcems, Parish Judge, A presiding. A. Walker, for the plaintiff, contended that an attachment cannot be dissolved after appeal, where no steps were taken to obtain a dissolution in the court of the first instance. Code of Practice, art. 258.

S. W. Downs, for the appellant. The attachment must be dissolved. See Levy v. Levy, 11 La. 581. Brinegar v. Griffin, ante p. 154.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiff and defendant were formerly associated in a partnership for keeping a hotel at Pascagoula, in the State of Mississippi. This suit was brought for the liquidation and settlement of the partnership affairs. It was instituted by attachment, upon affidavit of an indebtedness of "upwards of \$10,000." There was no personal citation. The cause was tried contradictorily with a curator ad hoc, for whose appointment no order of court appears in the record. There was judgment for the plaintiff for \$2015, as the balance due to him by the defendant upon the final settlement of the partnership accounts. After judgment became final and was signed, the defendant made a personal appearance by petition for appeal.

Of the various errors upon the face of the record assigned by the defendant, it is only necessary to notice one. He contends that a suit for the settlement and liquidation of this partnership could not be instituted and prosecuted by attachment. This subject was considered in the recent case of Brinegar v. Griffin, ante p. 154, and our opinion was there expressed. The attachment was illegally issued, and as it formed the only basis for the jurisdiction of the court, there being no personal citation, the whole proceedings were void.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the suit be dismissed, the plaintiff paying costs in both courts.

WHITE et al. c. CHANEY.

A Court of Probates has jurisdiction of an action to compel a tutor to account, instituted at any time before his discharge. The court will have jurisdiction, though it be alleged in the petition that the tutor, in collusion with the under-tutor, had been permitted to resign the seforship without rendering any account.

WRITE ... CHANEY.

PPEAL from the Court of Probates of East Baton Rouge, Tessier J. The plaintiffs represent that, in the year 1831, the defendant was appointed their tutor by the Probate Court of East Baton Rouge: that he took charge of the estate inherited by them, amounting to about \$4,000, which he administered, but has rendered no account thereof: That, on the 24th April, 1841, the defendant, in collusion, with one White, who had till that time acted as their under tutor, but who had then permanently removed with his property to the State of Misnissippi, being only temporarily in this State, instituted certain summary procoodings in said court, whereby Chancy resigned his tutorship without rendering any account, and qualified as under-tutor, and said White, in his turn, reaigned his trust as under-tutor, and was permitted to assume that of tutor: That the records of the court furnish no proof of White's having been permitted to take possession of their estate: That the defendant suffered him to leave the State, without taking any cteps to cause him to render an account, as tutor: That the pretended judicial proceedings, on the 24th April, 1841, cannot prejudice their recourse against the defendant, as their tutor: That they should be declared null and void, and Chaney, as tutor, compelled to pay to them the whole amount of the estate, with the fruits and revenues thereof, and the interest for which he is legally liable. The petition concludes with a prayer that the defendant may be condemned to account, and pay over the balance due by him as tutor, with interest, &c.

The defendant excepted to the jurisdiction of the court, on the ground of his discharge from the tutorship by a judgment of the court rendered on the 24th April, 1641, averring that the court had no power to compel him to render any account of the tutorship. The record does not show that any evidence was offered on either side. The exception was sustained, and the petition dismissed. The plaintiffs appealed.

Elam, for the appellants. The exception does not allege that the plaintiffs were legally represented in the proceedings by which the defendant was discharged from his tutorship, hence the judgment was not binding on them. In the case of Marchand et al. v. Gracie, 2 La. 147, a similar question was presented, and the Supreme Court held that "an executor who presents his accounts and prays for a discharge, must cause the heirs to be cited. In the case before the court, the tutor was discharged without being required to account. The Code of Practice, art. 997, declares that, "the judges of the courts of probate who have appointed and confirmed tutors, alone have the power of compelling them to account, and pay over what they may be found to owe."

If the court decided correctly in the case of Stafford et al. v. Villain et al.

If the court decided correctly in the case of Stafford et al. v. Villain et al. 10 La. 319, that "tutors, under an order of the court of probates must, and without it may, exhibit an account of their administration, and the court may make certain orders thereon, but nothing authorises it to homologate such accounts, so as to render them conclusive and binding on the minor; for the law gives the latter the right, until the expiration of a certain delay after he becomes of age, to examine and contest all the accounts of his tutor," certainly no exparte judgment of the probate court could discharge the tutor from its juris-

diction.

G. S. Lacey, for the defendant. It is contended on the part of plaintiff: 1st, That the exception was not sustained by proof; and, 2d, that had it been proven, it ought not to have prevailed. The exception was proved, by the admissions in the petition "that Chaney had resigned the trust, and that White had been appointed tutor." The averment that this was done through fraud and collusion, does not deny that the discharge was granted. The exception or discharge was established by the records of the court of probates, of which the court was bound to take judicial cognizance, being its own records and judgments. The exception should have been sustained: 1st. Because the Probate Court was without authority to call upon defendant, after he had been discharged from the tutorship, to render an account. He had ceased to be an officer or

WHITE P.

person, over whom its limited jurisdiction could extend. Art. 924 of the Code of Practice does not authorize a suit to be brought in the Probate Court, after the expiration of the administration of the curator, or other administrator. It only authorizes the court to retain its jurisdiction, in such suits as may be brought therein during the time of the administration. 2d. Because the Court of Probates had no authority to call for a rendition of accounts, until its first judgment was set aside, either by an appeal, or by an action of nullity. It has been decided by this court, in 1 Rob. p. 113, "that the court can in no case discharge the tutor, while the law makes him responsible to his pupil; and that he has after his majority, a certain delay to examine and contest the account." Yet if the court does, notwithstanding the law, enter a judgment of absolute discharge, it is not, ipso facto, null and void; and though illegal, it will be held to be good, until reversed, either on appeal, or by action of nullity. Fraud, collusion, or illegality, may be good grounds to revoke or reverse a judgment, but not to treat it as a nullity. 5 Mart. N. S. 165. 7 La. 223. This was the course adopted, in the case referred to by the plaintiffs, in 10 La. 319.

The judgment of the court was pronounced by

EUSTIS, C. J. It is the opinion of this court that the Court of Probates had jurisdiction to determine and decide on the matters in issue between the plaintiffs and defendant, in their petition and answer set forth.

It is therefore ordered and decreed that the judgment appealed from be reversed, and that the case be remanded for further proceedings; the appelled paying the costs of this appeal.

DUPLANTIER, Tutrix, v. NEWCOMB et al.

In an action egainst the endorser of fa note secured by mortgage, defendant may set up his discharge in consequence of plaintiff's having postponed the mortgage by which the note was secured to another in favor of a third person, without having pleaded it specially, where from previous proceedings in the case, plaintiff was apprised of the defence that would be set up, and the evidence of the facts which discharged the defendant was introduced by the plaintiff himself.

A PPEAL from the District Court of East Baton Rouge, Boyle, J.

Llam, for the defendants, contended that though a party would not be permitted to prove a fact extinguishing an obligation contracted by him, without having specially pleaded it, yet where a plaintiff; in his efforts to establish the contract, introduces evidence which shows its extinction, that evidence must avail the defendant, under the general issue. In Brown v. Saul, 4 Mart. N. S. 437, the court say that, "a total want of legal right in a suitor, in relation to the matters in litigation, ought to be taken into consideration and acted on by courts of justice, at any stage of a cause."

T. G. Morgan, on the same side.

The judgment of the court was pronounced by

Eustis, C. J. This case was before the late Supreme Court, and is reported in 10 Robinson's Rep. p. 104. On the argument of that case, it was urged that the judgment appealed from, so far as it related to the defendant, *Harney*, ought to be reversed, on the ground that he, as the endorser on the notes saed on, was discharged by an act of the plaintiff, in postponing the mortgage by which the notes were secured to that of another creditor, the *Union Bank*; but *Harney* had not appealed, and the objections to his liability were not noticed. The judg-

DUPLANTIER 9. NEWCOMB. ment was reversed, and the case remanded for a new trial. On the trial, the whole case was considered and treated as open, both in relation to Newcomb, the maker of the notes, and Harney, the endorser. There was judgment for the plaintiff; and Harney and the plaintiff have both appealed; and Harney has also appealed from the judgment which was before the Supreme Court as we have before stated, and which he was precluded from questioning, not having been a party to the appeal. Both appeals have been argued before us, and the question of Harney's liability, as endorser of the notes sued on, remains to be considered.

It appears that, on the 9th of February, 1839, the plaintiff did postpone the mortgage, by which the notes endorsed by *Harney*, were secured, in favor of a new one granted to the *Union Bank*, and that this set in law discharged the endorsers on the notes, is not questioned.

The late Supreme Court, in an obiter dictum, intimate that Harney ought to have pleaded his matter of defence specially, and the same argument has been urged by counsel on this appeal. As the matter stands before us, it is clear that the plaintiff was necessarily apprised of the ground of defence upon which Harney relied. It had been presented unsuccessfully on the appeal, and the answer gave the plaintiff totice that the defendant only considered himself as originally bound to the plaintiff on the notes of Newcomb, as surety for the latter-Well knowing this, the evidence of the postponement of the mortgage, to the manifest detriment of the rights of Harney, as surety and endorser on the notes by which it was secured, was offered by the plaintiff, without showing any assent on the part of Harney to the transaction. The release of Harney from his obligations, was thereby established, and no judgment could be rendered against him. Where parties, plaintiffs, have been thoroughly apprised of matters of defence, defendants have not been held to special pleading. Tracy v. Tuyes, 7 Mart. N. S. 354.

It is not necessary to decide the question whether, under the allegations of the answer, evidence of the postponement of the mortgage, to the injury of the rights of Harney, was admissible. If a case of surprise had been made out, or, if the party had been misled by the dictum of the Supreme Court, before mentioned, and had applied to have the cause remanded, the application would have been favorably considered. But called upon to terminate this litigation on its merits, we cannot hold Harney liable for a debt from which the plaintiff had himself proved that he has been in law discharged. The judgment of this court is, therefore, in his favor. We must consider the judgment against Harney, signed on the 22 of June, 1844, from which he has taken an appeal, as vacated by the proceedings of all parties in the subsequent trial of the cause, and therefore declare it void and of no effect, and his appeal from it must therefore fail.

It is therefore decreed that the said judgment be declared to be null and void, and that the appeal taken by said *Harney* be dismissed with costs; and it is further ordered that the judgment against said *Harney*, rendered by the District Court on the 16th of January, 1846, so far as the same relates to said *Harney*, be reversed, and that judgment be rendered in favor of said *Harney* against the plaintiff, with costs of this appeal, and those accruing in the District Court since the remanding of the first appeal.

the afternal marketing all per anni ha has be to be a second grown

Succession of Noblet.

adjoint total, the subjection of the particular to be a subjection of

An administrator is responsible personally for any loss sustained by the succession, from the want, on his part, of that degree of care which a prudent father of a family uses in the management of his own affairs.

A PPEAL from the Court of Probates of Livingston, Watts, J. Baylies, for the appellant, cited 12 Mart. 684. 3 Rob. 287. 4 Mass. 354. Winter and Watterston, contra, cited Arcenaux v. Michel, 6 Mart. N. S. 93. Longbotom v. Babcock, 9 La. 48. DeLorme v. DeLallande, 10 Rob. 477. Lafon's Heirs v. His Executor, 3 Mart. N. S. 707.

The judgment of the court was pronounced by

Rost, J. McRae, who was administrator of a succession, has appealed from a judgment of the Court of Probates, charging him, in the final account of his administration, with the amount of a note of \$916 66, belonging to the succession, and not recovered by him.

It is in evidence that this note was fully secured by mortgage, and that it was left in the hands of a former judge of the Court of Probates, who collected the amount of it, and applied it to his own use. This person has not accounted to the administrator, and no legal proceedings have ever been instituted against him. The administrator alleges that the note was left in the hands of the judge, in his capacity of notary public, to be protested, and that he cannot be made responsible for the breach of trust of that public officer. He further avers that the judge and his sureties had been notoriously insolvent for years, at the time of the conversion, and that legal proceedings against them would have involved the succession in expense unattended with any advantage.

The appellant's own witness shows that the note was entrusted to the probate judge for other purposes than that of protest, and that he was authorized to collect upon it the amount of the fees due him by the succession. The administrator made him his agent for that purpose, and is liable for all 'damage sustained by reason of that ngency. His allegation that the judge and his sureties were notoriously insolvent when this authority was given, satisfies us, that in giving it, he did not use the degree of care which a prudent father of a family uses in the management of his own affairs.

Judgment affirmed.

THE NEW ORLEANS DRAINING COMPANY v. DE LIZARDI et al.

Where a paper signed by a third person, and other acts of his, and hearsay evidence of conversations with him, have been offered in evidence by a party, other statements made by him, though not under oath, and made out of the presence of the party against whom they are offered, are admissible to discredit the writings and statements first introduced.

The action mandati directa embraces all claims of the principal against the agent, whether resulting from the execution of the obligation, or for damages for failing to execute it.

Where litigants withhold the evidence by which the nature of their case would be manifested, every presumption to their disadvantage will be adopted.

New Orleans
Draining
Company
9.
De Lizardi.

Where the bailees of securities, entrusted to them for sale, tortiously pledge them, it is an exercise of dominion which amounts to a conversion.

The measure of damages where a written security has been the subject of a tortious conversion, is, ordinarily, the sum recoverable on that security, though the defendant have sold it for less. In the common law courts the plaintiff is entitled to recover, under this rule, the par value of the security, with interest only to the day of rendering the verdict, the jury alone being competent to assess the damages, and their verdict heing final. In this State, where the damages may be assessed either by the inferior or Supreme Court, interest due on the day of the final judgment is recoverable as part of the damages.

An agent is bound to pay legal interest on any sum belonging to his principal illegally converted to his own use, from the time of its conversion till paid. C. C. 2984.

A PPEAL from the Parish Court of New Orleans, Maurian, J. Soulé and Roselius, for the plaintiffs. L. Janin, Benjamin and Micou, for the appellants.

The judgment of the majority of the court was pronounced by

Rost, J. The petition alleges that, on or about the 9th of August, 1836, the plaintiffs made a contract with M. De Lizardi & Co., of New Orleans, by which the Draining Company bound themselves to consign, for sale, to F. De Lizardi & Co. of London: 1st, Fifty bonds of the State of Louisiana in favor of the said plaintiffs, bearing five per cent interest, each bond being for one thousand dollars. 2d, Three hundred and sixty bonds also for one thousand dollars each, bearing five per cent interest, drawn by the corporation of the city of New Orleans to the order of said plaintiffs. That the said M. De Lizardi & Co. bound themselves to advance to the petitioners in New Orleans, on the consignment of said bonds, in such sums and at such terms as might be required, one hundred thousand dollars, at an interest of five per cent per annum.

That it was also agreed that said bonds should not be sold for less than \$104, for each hundred dollars here; and, if they should not be sold at that rate within six months, the plaintiffs would have the right, within the six months thereafter, to withdraw the bonds, or the unsold portion thereof, on paying the capital advanced. That if they did not, F. De Lizardi & Co. would, after twelve months from the date of the contract, be authorized to sell at their current value, a sufficient number of the bonds to pay their advances.

The petition further states, the manner in which the proceeds of the bonds and the interest due on them were to be paid, and the commissions allowed to F. De Lizardi & Co. It alleges that the bonds were transmitted to F. De Lizardi & Co., according to contract. That, between the years of 1836 and 1839, the said F. De Lizardi & Co., and M. De Lizardi & Co. negotiated and sold said bonds, or the greater part thereof, at a premium of four per cent; but instead of advising the plaintiffs of the sale, fraudulently concealed it from them, and in order more effectually to keep the said plaintiffs in ignorance of the transaction, the said F. De Lizardi made various wilful misrepresentations, and resorted to various manœuvres and subterfuges, to induce the belief that the bonds were still in their hands, undisposed of. That the said M. De Lizardi & Co. aided and abetted in said concealment, and that, amongst other facts, in the beginning of the year 1839, said F. De Lizard: & Co. advised them that all the bonds were still in their hands and could not be sold, but proposed to purchase one hundred and twenty-five of them at eighty cents on the dollar, subject to a commission in their favor of two per cent, and payable on time. That the plaintiffs were induced, by that fraudulent misrepresentation and by their pocuniary distress, to accede to that proposition.

That with a view of preventing the plaintiffs from discovering their illegal and NEW ORLEANS fraudulent conduct, the said F. De Lizardi & Co. insisted on inserting a clause in the contract, that, in case the Company should find an opportunity of selling the remainder of the bonds, a preference, or rather right of refusal to purchase them, should be given to the said F. De Lizardi & Co., on terms equal to those offered by any other party. That, in the subsequent correspondence between the plaintiffs and F. De Lizardi & Co., the latter always represented the remainder of the bonds as still in their possession, and that the late Miguel De Lizardi, the principal partner in the firm of M. De Lizardi & Co., advised, instigated, aided and abetted the said F. De Lizardi & Co. in making said misrepresentations and committing said fraud, and participated in the advantages derived therefrom.

That on the 28th of January, 1841, the plaintiffs, still believing that the bonds remained unsold in the possession of their agents, and being much pressed for money, borrowed from F. De Lizardi & Co. the sum of \$25,000, to be refunded on the 31st December, 1841, at an interest of seven and a half per cent per annum, and one per cent commission. That they were further forced to pledge to the said F. De Lixardi & Co., to secure said loan, fifty of the city bonds, which the lenders represented as being still in their hands; and that, in order to prevent the plaintiffs from detecting the fraudulent deception practised on them, the same right of preference or refusal was again stipulated, at the instance and request of said F. De Lizardi & Co.

That the fiscal concerns of the plaintiffs having become desperate by being unjustly deprived of their means, they were compelled, on the 17th of April, 1843, to sell to the said F. De Lizardi & Co., 219 of the remaining bonds at the price of forty-seven and a half per cent, on certain conditions mentioned in the petition.

That all those transactions, having originated in fraud and deception on the part of F. De Lizardi & Co. and in error on their own, ought to be rescinded and annulled, and all the participators in the fraud be made to pay damages over and above the liability resulting from their agency.

That Miguel De Lizardi died on the 20th of September, 1840, leaving as his heirs pure and simple, the widow Olizabal, his mother, and his two brothers. That Francisco De Lizardi died in March, 1842, leaving as legatees his widow Helena De Cabas, and his minor children, all properly represented in New That the surviving partner of F. De Lizardi & Co. is Alexander Gordon, and that the late firm of M. De Lizardi & Co. is represented by the widow Olizabal and Manuel Julien De Lizardi.

The petition prays that the defendants be ordered to render an account of their agency in the sale and negociations of the bonds; that judgment be rendered against them in solido, for \$440,000, or such other sum as, on a full and fair account and settlement, may appear due to the petitioners, with interest and damages; and that the different contracts and agreements entered into between F. De Lizardi & Co. and the petitioners, subsequently to the 9th of August, 1836, be annulled and set aside. The petitioner concludes with a prayer for general relief.

Alexander Gordon, the only one of the defendants present at the time of the institution of this suit, filed a separate answer, and denied on oath any knowledge whatever of the sale of the bonds, or of any negociation in relation to them, between the Marquis De Casariera and the firm of F. De Lizardi &

DE LIEARDI.

NEW ORLEANS Co., of which he was at that time the managing partner. He denied further, that the plaintiffs had any right of action against him individually.

> The answer of the other defendants admits the agency, and the two purchases by F. De Lizardi & Co. of the 125 and 219 bonds mentioned in the petition, and avers that the 344 bonds all belong exclusively to the widow and children of Francisco De Lizardi, and are now in their possession: That there existed three commercial firms under the names of Lizardi Hermanos, M. De Lizardi & Co. and F. De Lizardi & Co.: The first was established in Paris, and was composed of Miguel De Lizardi as head partner, and Manuel Julien De Lizardi as junior partner: The second was established in New Orleans, and composed of Miguel de Lizardi, as its chief, and of Edmond T., and Placide Forstall, as the other partners: The firm of F. De Lizardi & Co. was established in London, and was composed of Francisco De Lizardi as head partner, and of Alexander Gordon, and Pedro De la Quintano: That an intimate connexion existed between the several firms, which, on this and many other occasions, acted as agents for each other: That as soon as the bonds mentioned in the petition were sent to the London firm, the New Orleans house commenced making the promised advances: That, in the month of April, 1837, Miguel De Lizardi was in Paris; that, not knowing the extent to which advances had been made on the bonds by his house in New Orleans, under the contract of the 9th of August, 1836, and being desirous to re-imburse himself for the advances already made, and provide means for the further advances required by said contract, he took the bonds from the London house for sale in Paris, but could find no purchaser at the limits fixed by the company: That the said firm of M. De Lizardi & Co., being at that time indebted to Lizardi Hermanos, who were also expected to provide the funds to be advanced to the Draining Company, the said Miguel De Lizardi pledged said bonds to the Marquis de Casariera, a capitalist then and still residing in Paris, for a loan made by him to Lizardi Hermanos: That notwithstanding said pledge, they had full power to sell the bonds, and attempted in vain to do so: That to reimburse themselves of their advances, they subsequently purchased the bonds, as stated in the petition: That they have since repaid the loan to Casariera, and, having the 344 bonds in their possession, now assumed the character of plaintiffs in reconvention. They aver that the plaintiffs, by unjustly aspersing their character, and that of their deceased relatives, and throwing doubts on their title to the bonds, have rendered the sale of them disadvantageous, if not impossible. They, therefore, pray for the recision of the contracts of the 23d of January, 1839, and 17th of April, 1843, and the recovery of the price paid, with interest and damages.

It is in evidence, that, in April, 1843, one Felipe Mora came to New Orleans, as agent of his uncle, the Margius de Casariera, and was directed by him to make inquiries in relation to his interests invested in the New Orleans Draining Company. The letter of instructions, bearing date the 25th of February, 1843, contains this passage: " Soy poseedor tambien, mios y de algun otro amigo, de 300 obligaciones de la ciudad de la Nueva Orleans, à favor del Draining Company, de à \$1000 cada una, cuyo capital y intereses son tambien pagadores en Londres."

This letter enclosed also the following certificate:

"We, the undersigned, do hereby certify, that, in the year 1837, we sold to the Marquis de Casariera, of Paris, a certain amount of bonds of the City of New Orleans, issued in favor of the Draining Company, and endorsed by said institution; and we further certify and declare that, we have paid unto the said New ORLEASS Marquis de Casariera, through the medium of his agent in this city (London), the dividends which have been made on the said bonds, until the present time; and that, to the best of our knowledge and belief, the said Marquis de Casariera DE LIEAEDI. is still the owner and proprietor of said bonds, and that he has them at the present time in his power and possession. Witness our hands, this 13th day of February, in the year of our Lord, 1843.

[Signed,] F. DE LIZARDI & Co."

Shortly after his arrival, Mora made inquiries of the house of Lanfear & Co., in relation to those bonds, and was introduced by them to the Mayor of this city, who had him introduced to the President of the Draining Company. Mora has testified that, in that interview, he simply stated to the president of the company, that his uncle possessed 300 of the bonds issued by the city, in its favor. The person who went with him, and who was present at the conversation which took place, states, that Mora told the president of the company, that the Marquis de Casariera was in possession of 300 of the city bonds, issued in their favor, which he had purchased several years before, of the house of F. D. Lizardi & Co."

Early in May, the Draining Company dispatched an agent to Paris, for the purpose of ascertaining from the Marquis de Casariera what amount of bonds had been sold to him, by whom, at what time, at what rate, and, if possible, of procuring legal evidence of those transactions. On the day of his arrival in Paris, that agent called on Casariera, informed him of the object of his visit, and had with him, on that day, and on several subsequent occasions, long conversations in relation to these bonds. Casariera made it a condition, before he would place at the disposal of the company, the evidence that might be in his possession in relation to the disposal of them, that they must bind themselves to apply all sums they might recover, to the redemption of the bonds in his hands. He stated that if they did not, he would join with the Lizardis in the defence, if they made it his interest to do so. The plaintiffs peremptorily refused that proposal, and upon the information received from their agent, instituted the present action.

An exception was taken to the introduction of the testimony of this agent, so far as it related to his conversations with Casariera, on the ground that the acts and sayings of the witness and Casariera were res inter alios acta, not binding on the defendants, and that Casariera was a competent witness in the cause.-That evidence, though originally not admissible, became so in the course of the trial, to discredit the counter letter, and the other acts of Casariera, and the hearsay evidence of conversations with that person, introduced by the defendants themselves. 1st Greenleaf's Evid., no. 462. But we leave it out of view, except so much of it as goes to prove the degree of diligence used by the plaiytiffs in search of the witness Casariera, and the answers given to their interrogatories. 1st Greenleaf's Evid., no. 574.

A commission was sent to Paris, to take the deposition of the Marquis de Casariera; but he positively refused to testify, and frustrated every effort to compel him so to do. On the application of the American Minister, at the court of France, a special order was given by the Minister of Justice, to compel him to testify. On that occasion he absconded from Paris, and went en poste to Boulogne, to avoid yielding obedience to the order of the court. At another DE LIEARDL

New Orthans time, he suffered himself to be fined, rather than appear before the magistrate, The efforts of the American consul, were equally unavailing.

One of the defendants' witnesses states, that he called upon him on their part, and requested him to testify. It has been argued that this witness had been made the dupe of the defendants. Whether he was or not, is not material, under the view we have taken of the rights of the parties.

The cause was tried before a jury, who returned the following verdict:

44 We the jury find a verdict in favor of the plaintiffs in the sum \$60,000, and and are of opinion that the bonds were pledged."

The judgment rendered upon that verdict was, that the contract for the sale of 125 bonds, executed on the 23d of January. 1839, and the contract of the 23d of April, 1843, for the sale of 219 bonds of said city, be annulled, rescinded, set aside, and the bonds returned to the plaintiffs; and that the plaintiffs recover from the defendants the sum of \$60,000, with interest from the judicial demand and costs; reserving to the said defendants the right of off-setting any sum which they may have paid on account of the plaintiffs, since the institution of this suit. From this judgment the defendants have appealed.

It would be alike dangerous and unprofitable to go into the inquiry suggested in argument, that the judgment appealed from is inconsistent with the verdict. as the jury understood it. We have authority to pass upon the facts of the case, and to draw our own conclusion from them. If the jury had expressly acquitted the defendants of fraud, and we came to the conclusion that the verdict was contrary to law and evidence, the case would be remanded for trial before another jury. But they have not done so; the verdict in that respect is special, and limited to the finding of the single fact, that the bonds were pledged. The legal inferences from that and the other facts of the case, not concluded by the verdict, fall within the proper province of the court; and, as the plaintiffs have earnestly asked that this litigation be now terminated, we will take of the rights of the parties, as they are placed before us, the only view under which that desirable object can be accomplished, although, in so doing, we are far from being sure that we are adjudicating upon real facts.

The argument that the defendants came into court to answer the charge of selling the bonds and no other, is not tenable, and has not been insisted upon in the second brief of their counsel. Although the petition alleges specially the sale of the bonds, the prayer is sufficiently general to embrace all dispositions, lawful or unlawful, which may have been made of them, and all claims which the plaintiffs may have against the defendants by reason of their agency. This is the action mandati directa of the roman law. It embraces all claims of the principal against the agent, whether they be for indebtedness resulting from the execution of the mandate, or for damages sustained by the breach or inexecution of it. See Pothier, Contrat du Mandat, no. 61. Story on Bailments, no. 191.

The evidence in relation to the real nature of the transaction which took place between the defendants and Casariera, is so conflicting, and, in part, of so suspicious a character, that the mind gives a reluctant assent to the conclusion to which the jury came, that the bonds had been pledged, and were not sold. We will, however, give the defendants the benefit of the finding of the jury. We will take the facts as stated in argument, that, at a time of great embarrassment, they pledged the bonds to Casariera, in April, 1837, as security for a loan made to Lizardi Hermanos, the amount of which they have not seen

fit to disclose, and upon which they paid an exorbitantly usurious interest du- New ORLEANS ring six years and a half.

Under this view the converse the fill resident providers for any considers.

Under this view, the case presents the following questions for our consideration:

1st. Could the defendants lawfully pledge the bonds; and, if so, were their subsequent dealings with the plaintiffs, such as to render the pledge lawful, during all the time of its continuance? 2d. If the pledge was at the beginning, or subsequently became, unlawful, how did that circumstance affect the subsequent sales of the bonds made by the plaintiffs to the defendants? 3d. If the pledge was unlawful, was it such an application of the property to a purpose unauthorized by the plaintiffs, as constitutes a conversion; and, if it was, what are the damages which the plaintiffs are entitled to recover?

On the first point, it may be conceded that in England, at the present day, a factor who is entrusted with the possession, either of goods or of documentary titles to goods, may deposit the same by way of pledge for advances made to himself, and that such a contract, when entered into in good faith on the part of the pawnee, in binding on the owner of the goods. That right however, does not exist by virtue of the custom of merchants, but was given by the statute 5 and 6 Victoria, ch. 39, passed in 1842, in derogation of commercial use as previously understood. See Russell on Factors and Brokers, pp. 98, 99; vol. 38, Law Library. It is not easily perceived how a contract of pledge, executed in Paris, could come under the statute of Victoria; but had the pledge been made in England, instead of France, even after the enactment of that statute, although it might have been binding on the plaintiffs, to the amount of the loan between them and the defendants, it would, on the part of the latter, have been tortuous and fraudulent. Miguel de Lizardi & Co. had advanced a small sum on account of the \$100,000 promised in the contract; but that sum was refunded, long before the expiration of the year during which the loan was to continue, by the sale of the fifty state bonds mentioned in the contract, and of six of the city bonds. At the expiration of the year the defendants were largely indebted to the plaintiffs, and continued to be so till some time in 1841.

If the sum of \$100,000, which the defendants were bound to advance to the plaintiffs for one year at an interest of five per cent. was not refunded at the stipulated time, the defendants were authorized to sell, at their market value, a sufficient number of bonds to reimburse themselves. They had no claim for reimbursement until the 26th of August, 1837, and, after that time, in case of nonpayment, the sale-of the bonds was their only remedy. It presented no difficulty, as their own brokers have proved that the sale could have been effected, at from 73 to 75 per cent. It would have been much better to make that disposition of them, than to retain them till they fell to 47½ per cent of their par value. The defendants had no color of right either for pledging the bonds, or for suffering that pledge to continue to exist for years afterwards.

We would have been assisted in this inquiry by being informed of the amount borrowed by the defendants on the pledge, and it was incumbent upon them to have shown it; but that fact has been kept concealed from us, although a person, who was at the time an inferior clerk of the Paris house, has, to our surprise, testified to his personal knowledge of all the particulars of the contract of pledge, which the acting partner of F. De Lizardi & Co. has sworn were unknown to him. That witness has been careful not to inform us of the amount borrowed. No trace whatever of the transaction is found in the books of any

NEW ORLEANS Of the three firms. It was kept concealed to the last from the plaintiffs, and the correspondence, which is represented as having passed on the subject, between some of the defendants and Casariera, as well as the counter-letter adduced in evidence of the pledge, are full of indirection and mystery. If litigants withhold the evidence by which the nature of their case would be manifested, we must adopt every presumption to their disadvantage. We must apply to them the favorite maxim of the law, omnia præsumuntur contra spoliatores. See Armory v. Delamirie, 9th Law Library, 115, and notes.

The defendants received the bonds with the condition that they should not dispose of them at a price less than four per cent over their par value. They sold fifty-six at that limit, and shortly after pledged the remainder as their own, and for their exclusive benefit. We would presume that the sum they borrowed on this unlawful pledge was as large as Casariera would lend, if this was not made certain by their own admission that he was to receive, and did receive, during more than six years, in consideration of the loan, the whole amount of the interest stipulated in the bonds.

It is urged, in extenuation of their conduct, that the contract of pledge between them and Casariera left them at liberty to sell the bonds; but that faculty was given to them on the condition only, that the entire sum borrowed should be returned, before any of the bonds were delivered. The fact that Casariera consented, at one time, to return forty-four of them upon the promise of the payment of a portion of the sum borrowed, if true, shows that, on . that occasion, Casariera did not insist upon the strict performance of the contract. He was not bound to do so.

The witness elready mentioned testifies that, the sum borrowed might have been returned at any time, if it had been necessary to do so. We hold common honesty to be one of the necessities of commerce, and we must believe that it was so considered by the defendants. A moral necessity did exist, independently of all chances to sell the bonds. The defendants must have felt every day, every hour, the necessity of relieving themselves from the weight and disgrace of that unfortunate transaction. The facts that they did not do so until after the institution of this suit, and that they paid usurious interest on the loan during six years and a half, leave no doubt on our minds that, it was utterly out of their power to redeem the pledge, and to sell the bonds as opportunities might offer. It is alleged that they withdrew forty-four of them at one time, and would have withdrawn the remainder, if purchasers had been found. That consequence does not follow; those bonds were returned to them on their express promise to pay back a certain sum, the amount of which is, as usual, not disclosed; but we are left in doubt whether this sum was paid, or whether the bonds were returned to Casariera. Indeed the conduct of those parties would justify the belief, that they were in that transaction making evidence for the litigation they must have expected.

To avoid detection they purchased the bonds at long credits, as fast as they could, and reserved, in all their contracts with the plaintiffs, the right to take the bonds unsold at the price that other persons might be willing to give for them. If their embarrassment had continued, and had prevented them from paying Casarrera, he was authorized by the contract to sell the bonds at any price, whilst the defendants themselves had no authority to sell them under four per cent premium. If the defendants had failed, and the contract of pledge was valid, the bonds would have been sacrificed to pay the loan, and the plaintiffs must have lost them.

It is alleged that, as no sale could be effected at the limit, the circumstance of NEW ORLEANS the bonds being placed in the custody of Casariera, instead of remaining in that of F. De Lizardi & Co., has caused the plaintiffs no injury. We are not satisfied that the bonds, or at least a portion of them, could not have been sold DE LIERRI. at the limit, if the attempt had been seriously made. In the letter from F. De Lizardi & Co. to M. De Lizardi & Co., advising the latter of the sale of six of the bonds to Casariera at 104, they say; "The prices can be considered only as indicative of our view of their value, and we regret to say that this market is not yet in a state to enable us to make progress at these rates." When subsequently they withdrew forty-four of the bonds under the expectation of selling them, they still entertained the same view of their value. In opposition to their own contemporaneous declarations, the evidence of their brokers, taken seven or eight years after those transactions, that the bonds were only worth, at that time, from 73 to 75 per cent, is entitled to little weight, and even those brokers are compelled to say, on the cross-examination, that the bonds in controversy were never offered in the London stock market by them, or to their knowledge. However this may be, the legal rights of the plaintiffs were fixed

If the defendants had sold the bonds under the limit, and subsequently taken them back at half price, the argument that no damage had been sustained by the plaintiff, because no sale could be effected at the limit, would apply with equal force. The rule of damages in cases like this is a question of law; and, beyond the rule, special damages are recoverable, if particularly alleged. 17 Pickg. p. 1. 4 Pickg. p. 466. 2 Greenleaf, Ev. no. 649. Sedgwick on Dam. p. 496.

It is one of the most painful duties of judges, to arraign the motives of suitors and to expose the immorality of their transactions; but, in cases like this, the ends of justice cannot be attained without doing so. We feel constrained to say, that the pledging of the bonds, and the subsequent representations of the defendants, are tainted with deception and fraud, and that the two purchases of bonds made by them during the continuance of the pledge, and under the influence of those representations, must be rescinded and set aside.

The extent of the liability of the defendants remains to be considered; and here it is as well to state that, we consider that liability as joint and several, reserving only to the heirs of Francisco de Lizardi and to those of Miguel de Lizardi, the benefit of division among themselves. The warranty which one of them has from the others, is a matter to be settled among themselves.

The contract between the plaintiffs and defendants was a bailment of securities, to be sold in England, by F. de Lizardi & Co. Those securities were sent by them to France, and there tortiously pledged. This exercise of dominion over them, in defiance of the plaintiffs right, is a conversion. 2 Greenleaf's Evid. no. 642. Russell on Fact. and Book., no. 271, 38 Law Library. 4 Term Reports, 260. Reynolds v. Shuber, 5 Cowen 323. 7 Johnson, 254. 10 Johnson, 172.

The measure of damages, when a written security has been the subject of the conversion, is ordinarily the sum recoverable upon that security, though the defendant may have sold it for a less sum. 2 Greenleaf's Evidence, Nos. 276 and 649, and the cases above cited. In the common law courts the plaintiffs are entitled to recover, under this rule, the par value of the security, with interest down to the day of the rendition of the verdict. 17 Pick. p. 1. Sedgwick on Damages, p. 517, 518. The defendants allege that the bonds have

DE LIEARDI.

New Occases been rendered unsaleable by this controversy, and that they have ceased to be available at any price; but, as the defendants themselves, have forced this controversy upon the plaintiffs, they cannot be permitted to profit by their own wrongs. But for those wrongs the bonds would probably now be an available security for their nominal amount, and there is no reason why they should not again become so, when this litigation is ended.

The liability for interest is limited, in other States, to the time of the verdict. because, at common law, the jury is alone competent to assess the damages, and the verdict is final; it is otherwise with us. The damages may be assessed equally well by the court in the first instance, or, as in this case, by the appellate court: and the plain import and reason of the rule, under our forms of practice, is, that all interest recoverable on the day of the final judgment, forms part of them.

The defendants have shown that they have paid Casariera, in consideration of the loan he made them, the whole interest due on the face of the bonds. until the month of October, 1843, at which time they prove that the bonds were returned to them; they allege in their answer that they have them now in their possession, and pray to be allowed to return them, on being refunded the price paid. If the bonds, or part of them, had been tendered by the defendants and accepted by the plaintiffs, that restoration would have gone in mitigation of damages, and have placed the defendants in a much more favorable situation; but this has not been done, and the plaintiffs, instead of asking the restoration of the securities, claim damages for the unauthorized disposition of them. They are entitled to those damages; but equity requires that the interest, which the defendants are liable to pay from the time of the conversion to that of the final judgment, be considered as compensated by that, which, un der other circumstances, might have been recoverable upon the bonds for the same period of time, leaving the bonds in the hands of the defendants free from all interest that has heretofore accrued on them. The defendants must account, as of this day, for the par value of 344 bonds, and also for the sums charged in their accounts for dividends of interest on the 219 bonds purchased by F. De Lizardi & Co., for the interest charged on those sums, and for the commissions allowed them on the sales of those bonds. They must be credited with all sums really advanced to the plaintiffs before the judicial demand, with the interest agreed upon, from the date of those advances to the present time, and with all other commissions charged in their accounts, reserving their right to recover subsequent advances. This will leave, on this day, in favor of the plaintiffs, a balance of \$182,704 19, for which they are entitled to a judgment with legal interest from this date till paid. Civil Code, art. 2984.

It is therefore ordered that the judgment in this case be reversed, and, proceeding to give such a judgment as should have been given in the court below, it is further ordered, that the plaintiffs recover from the defendants in solido, but with the benefit of division between the heirs of Miguel, and Francisco de Lizardi among themselves respectively, the sum of \$182,704 19; with interest at the rate of five per cent per annum from this day till paid, and the costs of the court below; those of this appeal to be paid by the plaintiffs and appellees.

It is further ordered, that the interest that has heretofore accrued on the three hundred and forty-four bonds in the hands of the defendants, be compensated with the interest which they are liable to pay by reason of the conversion of said bonds.

It is further ordered that the contract for the sale of 125 bonds, executed on New ORLEAGE the 23d January, 1839, and the contract of the 23d April, 1843, for the sale of 219 bonds, be annulled, rescinded and set aside.

It is finally ordered that the rights of the defendants, on account of advances made by them to the plaintiffs since the judicial demand, and also for all interest hereafter to accrue on the bonds in their hands, be reserved.

EUSTIS, C. J., dissenting. Not having been able to come to the same conclusion as to the facts which this singular case presents, which my brothren have thought themselves bound to adopt, it is incumbent on me to give the reason for my opinion, which I will comprize in as short a space as possible. The defendants have endeavored to establish that the bonds in question were pledged and not sold to Casariera, and the verdict of the jury, which was in favor of the plaintiffs for \$60,000, is qualified by the opinion, that the bonds were

There are certain facts connected with this defence, which have satisfied me that it has no foundation in truth:

I. We have a formal certificate, under the hand of the London house, F. de Lizardi & Co., attested by two witnesses, that the bonds were sold to Casariera, in the year 1837. It is attempted to weaken the effect of this instrument by limiting it to the six bonds bought by Casariera, but its meaning is too clear. It evidently relates to the bonds in the possession of Casariera, at the time of the certificate. Else why is this clause appended to the certificate-" and we further certify and declare, that we have paid unto the said Marquis de Casariera, through the medium of his agents in this city, the dividends which have made on said bonds, until the present time, and that, to the best of our knowledge and belief, the said Marquis de Casariera is still the owner and proprietor of said bonds, and that he has them at the present time in his power and possession."

II. If the bonds were pledged to Casariera for a loan, even the amount of which we are left to conjecture, its duration, and the one rous terms on which it was said to be contracted, necessarily imply that the lender should have some security for its reimbursement. Whether we test the validity of this pledge by our own laws, or those of France, as we have the means of ascertaining them. the security of Casariera was not worth the paper on which it was written. Against third persons and creditors of the defendants, Casariera could not have retained one of these bonds for an instant The delivery of the bonds, as stated in the counter letter of the 24th April, 1837, and the letter addressed to Casariera of the same date, gave him no privilege on the bonds, nor any means of protecting himself from loss, in the event of a breach of trust, accident, or insolvency of the Lizardis, That a man, such as Casariera is represented to be by the defendants themselves, would have loaned so large a sum, for such a length of time, without security, under the circumstances represented, I cannot believe, and I therefore dissent from the openion of the jury, that the bonds were pledged, and adhere to the opinion of the defendants themselves, given in their certificate of the 13th Feb., 1843, that, in the year 1837, they sold them to Casariera.

III. It has been thought material to aver and place on record, that one of the two partners of the house of F. de Lizardi & Co. of London, and an active member of that firm, had no knowledge whatever of the transactions with CasarieraNEW ORLEANS
DRAINING
COMPANY

O.

DE LIEARDL

IV. It appears that there is no trace of this transaction on the books of either the London or Paris house. What reason can be assigned for this omission?

I have reluctantly come to the conclusion that the whole affair was a stock-jobbing operation between the Lizardis and Casariera, which they dared not avow, and of which the instinct of self preservation induced them to leave no record. Although the Lizardis sold the bonds to Casariera, it by no means follows that he bought them for himself. He was also a banker; he had friends, probably customers at a distance, as the Lizardis had—"Soy poseed or tambien, mios y de algun otro amigo, de 300 obligaciones," says Casariera to his nophew, in his letter of the 25th Feb., 1843.

I think the plaintiffs' case is fully made out. A clearer case of fraud is rarely presented to a court of justice. The conduct of the parties throughout is indefensible, and without palliation or apology.

As to the amount for which the defendants are liable to the plaintiffs, I acquiesce in the opinion of my brethren.

Ivor, Curator, v. SULLIVAN.

Where a defendant, against whom judgment was obtained in his absence and in that of his attorney, makes outh that the evidence in support of his defence was in possession of his attorney, who was to have attended to the case, and that his absence was unexpected and unauthorized, and the truth of the affidavit is unimpeached, he will be entitled to a new trial.

A PPEAL from the District Court of West Feliciana, Boyle, J. Ratliff and Congill, for the appellant, cited Nicholas v. Alsop, 10 La. 409. No counsel appeared for the plaintiff. The judgment of the court was pronounced by

Rost, J. The defendant, being sued by the curator of the succession of Samuel Dalton, deceased, employed counsel, who filed an answer, setting up a large amount of claims in compensation. The defendant and his counsel being both absent when the case was called for trial, it was tried ex parte, and judgment was rendered in favor of the plaintiff for the whole amount claimed. Before the judgment became final, the defendant employed other counsel, and filed a motion for a new trial, supported by an affidavit that, the attorney who filed the answer was in possession of the evidence of the defendant, and was to have attended to the suit; and, secondly, that his absence was unexpected by the defendant and unauthorized by him. The court overruled the application, and the defendant appealed.

As the good faith of the defendant, and the verity of his affidavit, are unimpeached, we consider that he has made out a proper case for relief.

It is therefore ordered that the judgment be reversed, and the case remanded, to be proceeded in according to law; the plaintiff and appellee paying the costs of this appeal.

The state of the s

THE REPORT OF THE PARTY OF THE

PLIQUE v. BELLOME.

Where, on an appeal from an order refusing to set aside a provisional seizure, the question of releasing the property is the sole matter for consideration, and the record contains no information as to the value of the property, the appeal will be dismissed, though the action was on a claim exceeding three hundred dollars. Const. art. 63.

A PPEAL from the Ffth District Court of New Orleans, Buchanan, J. Elwyn, for the plaintiff. Pilié and Le Gardeur, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. Upon a claim for rent exceeding three hundred dollars, a provisional seizure issued in this case, and the return of the writ shows that a few articles of household furniture were seized. The defendant moved the court to set aside the provisional seizure, which application was refused; and from this refusal, the defendant has appealed.

If the whole case were before us, we would deem it our duty to consider the incidents of the cause. But the main cause is not before us, and may never come before us. The sole matter presented, if the present appeal be entertained, would be the question of releasing, or retaining in custody, the property seized. The record affords us no information of the value of the property. If it were utterly lost to the defendant by reason of the seizure, non constat that the defendant would sustain injury to the amount of three hundred dollars.

The framers of the constitution wisely provided a limit to the jurisdiction of this court, that litigants for small matters might not be burdened by onerous costs, or harassed by protracted litigation. This wise policy it is our duty to enforce; and parties who are dissatisfied with the decrees of inferior tribunals must exhibit affirmatively their right to our interference. Constitution, art. 63.

The appeal is therefore dismissed, reserving to the defendant the right of having the order of the court below, refusing to discharge the provisional scizure, considered in any future lawful appeal; the costs of this appeal to be paid by the defendants.

Bosworth v. Beiller et al.

In the event of a difference between the parents as to the marriage of a minor child, the authority of the father prevails (C. C. 234); and he may disinherit the child, for marrying without his consent.

A PPEAL from the District Court of Tensas, Curry, J. The plaintiff alleges that she is the only child of the late Jacob, and Nancy Beiller, and as such the only heir of her father. She avers that the defendants are in possession of all the property of her succession. She prays that she may be decreed to be his heir, may be put in possession of all the property of which he died seized, and that she may recover \$150,000, for damages for rents, fruits, &c. The defendants, after several exceptions, answered by denying that plaintiff was the lawful heir of Jacob Beiller. They averred that Jacob, and Nancy

Bosworth BEILLER

Beiller were never lawfully married; that, even if plaintiff should be considered as the legitimate child of Jacob Beiller, she cannot be declared to be his heir, having been disinherited for an adequate legal cause; that they, the respondents, are the sole legal heirs of the deceased, as well as his constituted heirs, inheriting his estate by representation of their deceased father.

The plaintiff was disinherited by the will of Jacob Beiller, for having, while a minor, married contrary to his wishes and without his consent. The evidence established the assent of the mother to the marriage. The plaintiff's petition was rejected by the court below, and she appealed.

Thomas, for the appellant. The power to disinherit is founded upon two articles of the Code: Art. 114 says, "The marriage of minors, contracted without the consent of their father and mother, cannot, for that cause, be annulled, &c.; but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper." Art. 1613 declares that, "The just causes for which parents may disinherit their children, are ten in number:" Sec. 10. "If the son or daughter, being a minor, marries without the consent of his or her parents." In what sense are the words without the consent, in these articles to be understood? The right of the child to inherit from its parents, is not only the general rule of law, (C. C. arts. I480— 1–2,) but one of natural right; and the power to disinherit, an instrument in the hands of parents, to restrain and punish the disobedience of their children. 2

Domat, pp. 102, 104, 111.

The right to disinherit being in derogation of the general rule, and in violation of the natural right of inheritance, will be strictly construed against the power, and liberally in favor of the natural right. It is not the mere passive ant of consent, but an active opposition to the will of the parent, upon which the right to disinherit must be based. A marriage, to authorize the disinheriting of the minor, must be contracted in opposition to the will of both the father and mother, the parents. Words of more force and clearness, the father and mother, his or her parents, could not have been used to express the idea that a marriage, upon which the power to disinherit could be grounded, must have been contracted (without the consent) in opposition to the will of both the father and mother. But if these articles admitted of a doubt, it would be dissipated by the words of a previous article (99). "The minor of either sex who h attained the competent age to marry, must have received the consent of his father and mother, or of the survivor of them." In every thing connected with the marriage of their children, the Code intended to confer on the mother equal authority and equal rights with the father.

Preston, on the same side. The law considers marriage a civil contract. C. Code, 87. The legal advantages which the wife stipulates for her children are, that they shall inherit the estate of her husband, as prescribed in art. 833 of the Code, unless deprived of it by will; and, in case of a will, that a légitime shall be reserved, as required by article 1480 of the Code. Although the husband may dispose of his property as he pleases during life, yet the law disposes of it after his death to his children, unless for just cause he disinherits them. Code. 1613. He cannot derogate by marriage contract from the law of descents.

Code, 2306.

There must be: 1st. A cause for disinherison. 2d. It must be a just cause. The just causes are ten in number. The cause is the fact. The justness of it is the qualification of the fact. If the child accuse the parent of a capital crime, it is a cause for disinherison; but, to be a just cause, the accusation must be false, for if the child knows the fact that his father has murdered his moththe take, for if the child knows the fact that his father has murdered his mother, and does not accuse him of it, he is guilty of misprision of felony himself. The marriage of the minor without the consent of the parent, is a cause for disinherison; but to be a just cause, the consent must be withheld for good reasons. The only good reasons are, that the marriage may bring: 1. Dishonor on the parent; or 2d, unhappiness upon the child. The great and only just objects of a parent in marrying his children, are to secure their happiness, and to advance the honor of his family. If the marriage of a minor secures its happiness, and does not dishonor the parent, it is unjust for the parent to withheld his convent. withhold his consent; and although marrying without the consent is cause of

BRILLER.

disinherison, it is not a just cause, in such a case. However vicious the disobedience, or wicked the act of the child, in France, the power of disinherison is abolished. Manuel des Successions, par De Langlade, p. 424. In Spain, the power of disinheriting a minor for marrying without the consent of the parent, was given by a Pragmatic Sanction, in 1776. 1st Febrero, 6105, note A. But an action was given to the child to sue for the right to marry without the consent of the parent, if it was unjustly withheld for caprice or an insufficient motive. This led to such crimination and recrimination between parents and children, that the action in advance of the marriage was abolished. But the right of inheriting, according as the cause for which the parent withholds the consent is just or unjust, still remains in Spain: and although the laws of Spain which anciently governed this country are abolished, still, as it is most inequitable that the parent should unjustly withhold his consent to the child's marriage, and then disinherit him for marrying without his consent, there being no law specially applicable to the case, the general provision in the 21 art. of the Code is applicable, and the judge is bound to proceed and decide according to equity. And although the action to obtain the right to marry without the parent's consent is abolished, yet, if withheld without cause, the inheritance may be recovered by petition, or defended, if sued for, because the consent was withheld without cause. In Rome, if a parent disinherited his child without sufficient cause, he might by the action de inofficioso testamento annul the disinheritance, because it was inconsistent with the duty of a parent to his child. Cooper's Justinian, p. 146. Wherever the civil law prevails, if disinherison is allowed at all, it may be annulled, if done, 1st, from caprice; 2d, par fins particulières; 3d, when inconsistent with the duty of the parent. The same rules must govern our law: 1st, because they are equitable; and 2d, because our law express

The cause must not be caprice, nor to effect an improper object of the parent, nor must the disinherison be inconsistent with the duty of a parent to a

child.

J. Dunlap, on the same side.

Benjamin, Micou, Stacy, Sparrow, Prentiss and Finney, for the defendants. The cause assigned by the testator for disinheriting the plaintiff is, that the daughter, being a minor, married without the consent of her father, and against his will. Is this sufficient? or was it necessary that the marriage should have been without the consent of either father or mother, to constitute a just cause of disinherison? It was a just cause within the meaning of the Code, both in its letter and its spirit. The article says: "If the son or daughter, being a mi-nor, marries without the consent of his or her parents." It is clear that the consent of the mother alone, was not the "consent of the parents." The plaintiff therefore married without the consent of her parents. There are several other articles of the Code which relate to this subject, and will make it perfectly clear. Article 99 provides, that "the minor of either sex who has attained the competent age to marry must have received the consent of his father and mother, or the survivor of them; and if they are both dead, the consent of his curator." This article clearly requires the consent of both parents, if they are living. Art. 114 still more strongly explains the meaning of art. 1613; indeed it places the construction we contend for beyond all doubt. This article provides, "that the marriage of minors contracted without the consent of father and mother, cannot for that cause be annulled" &c., "but such want of consent shall be a good cause for the father and mother to disinherit their children thus married, if they think proper." Article 234 provides that, "in case of differences between the parents, the authority of the father prevails." Here then there was a difference between the parents—and we claim that the authority of the father shall prevail. His dissent and prohibition overruled the consent of the mother; in other words, she had no right to consent against his authority. This principle of the superiority of the father's authority over the mother's, is not founded upon the arbitrary enactment of the Code merely; it is a principle of natural law univer-sally acknowledged. Rutherforth, in his Institutes of Natural Law, commenting upon the great work of Grotius, says: "Both the parents have authority over the child, because the duty of maintaining and educating it belongs to both. However, if the commands of the father and of the mother should at any time happen to clash, the father is rather to be obeyed, upon account, says Grotius, of the excellence of his sex." After criticising this reason given by Grotius, he

Beiller.

adds: "But if generation is considered only as the remote cause, and the duty of the parents to bring up the child and to form its manners, is considered as the immediate cause of their authority, then the father's authority will be superior to the mother's, upon account of what may be called the excellence of his sex; for he is in general, with good reason, supposed to be better able than the mother to defend and to instruct it; and in proportion as his abilities are greater, his duty, and with it his authority, must be greater likewise." Rutherforth's Institutes, p. 80-1.

The judgment of the court was pronounced by

Euris, C. J. On the 26th of December, 1842, Jacob Beiller, late of the parish of Concordia, made his last will, by which he disinherited his daughter, the plaintiff. The clause of disinherison is as follows: "Fifth. To my daughter, Elizabeth Beiller, now the wife of Felix Bosworth, I give nothing; but, on the contrary, I expressly and totally disinherit my said child, Elizabeth Beiller, for the reason that, while she was yet a minor, she eloped from my house, my protection, and my authority, and intermarried with the aforesaid Felix Bosworth, without my consent, and in direct opposition to my command and wishes. I therefore, and for that reason, totally, wholly and expressly disinherit her."

The District Court considering that the plaintiff, being the legitimate child of the testator, and having, while under the paternal power, married without the consent of her father, for that cause, was lawfully disinherited by his will, rejected her claim as heir to his estate, and from that judgment she has appealed. By article 1480 of the Civil Code, the testator had the right of disposing of onehalf of his estate to the prejudice of the plaintiff, without assigning any cause. Two objections are urged, on behalf of the appellant, to the validity of this testamentary disposition. The first is that, parents are only permitted to disinherit their children for that cause, when, being minors, they marry in opposition to their joint will. The second is that, in the relation of parent and child, the obligation of protection and the duty of obedience are reciprocal; that the failure to fulfil the first, forfeits every right which is founded on the non-observance of the last. In support of the proposition that the appellant did not marry in opposition to the will of both parents, the fact is established that the marriage was made, not only with the consent, but with the active assistance of the mother, she having accompanied her daughter in her elopement from her father's house with her present husband, on the night of the 11th of August, 1834.

Had the father a right to disinherit his daughter for marrying without his consent, is the question of law which has been discussed at bar, and which we proceed to determine.

The law enjoins the minor to obtain the consent of the mother as well as the father to marriage, and thereby imposes the strong moral obligation of following the mutual advice of parents in this most important act of their lives. But in cases in which the parents do not agree as to the choice of the future companion of a daughter is her marriage, thereby rendered impossible, except under the penalty of disinherison and the pains of disobedience? Does the law place an infant, whose capacity for marriage it recognizes, in this embarrassing and unnatural predicament? We think not, and we think that on the dissent of parents as to the marriage of minors, the paternal power prevails. Independent of the positive provision of our Code (art. 234) that, in case of difference between the parents, in all matters in which they have authority over their children, the authority of the father prevails, a consideration of the nature and extent of the paternal power, as it exists under our jurisprudence excludes, any other conclusion.

By the roman law the rights of the father of a family and of those under his authority, so far as related to their private affairs, were embodied, by a legal fiction, in the person of the father of the family, whose power was absolute.

BOSWORTH O. BRILLER.

The paternal power was one of the main pillars of that wonderful social organization which is the basis of modern civilization, and which gave laws to posterity on which society still rosts for its support. Roman legislation placed the safety and welfare of the child under the agis of paternal affection, and time has borne witness to the profound wisdom of its provision. The consent of the father alone was required for the marriage of the daughter or son.

By the laws of Spain the mother did not participate in the paternal power (l. 2, tit. 17, Partida 4. Institutes of the Law of Spain, 74), and minors who married without the consent of their father were exposed to the penalty of disinherison. Novissima Recop. l. 9. tit. 2, lib. 10.

The Code of 1808, made a material change in the paternal power. The influence of Christianity had elevated the mother from the almost servile condition in which the roman law had originally placed her. Our institutions required that she should be associated in the councils of the husband in relation to the marriage of their minor children, to which the joint consent was accordingly required. The provisions of that Code on this subject are similar to those of the present Civil Code, with this exception, that the paragraph of article 234, cited in argument, which provides that in case of difference between the parents the authority of the father prevails, formed no part of the Code of 1808. Its insertion in the Code of 1825, could have had no other object than to supply the place of the spanish law concerning the paternal power, the repeal of which would have otherwise left a large class of the most important points of our social relations entirely unprovided for. We therefore conclude that, the father has a right to disinherit his minor child, for marrying without his consent.

In this case the marriage took place not only in decided opposition to the wish of the father, but under the most aggravating circumstances of injury and outrage. We are satisfied his consent was witheld from the strongest and most deliberate convictions of duty towards the plaintiff, and a conscientious and affectionate regard for her future welfare and happiness.

But it is contended that the immoral conduct and bearing of the father in his family, deprived him of any right he might have to disinherit the plaintiff. The learned counsel for the plaintiff has urged that the right to disinherit may be forfeited, by misconduct which would justify a decree of destitution of the father from the paternal power. The Code provides (arts. 326, 371) that, no cause of exclusion or removal from the tutorship is applicable to the father, except that of unfaithfulness of his administration and of notoriously bad conduct; and that the minor may be emancipated against the wish of his father and mother, when they ill treat him excessively, refuse him support, or give him corrupt examples. Admitting, for argument sake, this view of the law to be correct, there is only one fact sufficiently well established in the conduct of the father, which requires from us any consideration, the charges of the plaintiff, as to other misconduct, not being proved.

It is stated in the testimony of a witness that, in the summer of 1833, Beiller committed an outrage upon the person of his wife, by giving her blows on the head with a large stick, which caused a profuse bleeding. The account of the origin of the quarrel between them, given by Beiller himself to the witness BOSWORTH 9. BRILLER. aggravates the injury rather than extenuates it. With the exception of this act, it does not appear that his conduct in his family was bad, still less notoriously so, nor that it furnished a corrupt example to his child. Beiller was a hardworking, energetic man, of strong impulses and violent passions, far from being amiable in his domestic relations, but it is not pretended that he ever was unkind to his daughter. After the quarrel of 1833, for any thing before us to the contrary, the parties lived in peace up to the denouement of August, 1834. They had been married for nearly thirty years; the husband was advanced in life and very deaf, and we should not be authorized to decree a separation of bed and board after such a reconciliation, great as the outrage is said to have been. Nor would we feel ourselves at liberty to break up this family, by withdrawing from the care and protection of the father, and committing to others, his favorite child. Under all the disadvantages to which, under the paternal roof, she was exposed, as magistrates and fathers we should consider her happiness and future welfare better assured under the protection of the rugged affection of her father, with all his infirmities, than under the mercenary tutolage of strangers, or the custody of her pearest relatives.

The case before us is not one in which, for the interest of the party most concerned and of society itself, we should feel ourselves justified in depriving the father of the just prerogatives of the paternal power. No authority has been cited, nor reason given, which would authorize such an interference, under the very difficult and embarrassing considerations which the facts of this case present. The judicial power which takes from the father the custody of the child, is to be exercised with the greatest delicacy, and only in cases in which its exercise is indispensable for the protection of the rights, interests and future welfare of the minor, or the cause of sound morals and the established order of society, which are almost identical with the former. For those cases the Code has provided. Toullier thus gives his view of the sense of the terms notoriously bad conduct: the expressions commented upon are gens d'une inconduite notoire. Code Nap. act 444. "Expressions qu'il ne faut pas seulement entendre du défaut d'ordre dans les affaires, comme si un homme avait fait faillite, s'il avait été soumis à un conseil judiciaire, mais encore d'un dérèglement de mœurs notoire ; comme si un homme avait subi à la police quelque condemnation pour des actions scandaleuses, s'il vivait dans un libertinage notoire: par example si, vivant avec sa concubine, il s'était reconnu le père de ses enfans. On ne pourrait laisser des mineurs, et surtout des filles, sons la garde d'un homme ainsi noté." Vol. 2, § 1164. Article 371, concerning the causes for which minors may be emancipated against the will of their fathers and mothers, does not extend the operation of article 326, nor is it applicable in its terms to the same subject.

In stating our objections to the application of the argument of the learned counsel to the facts of this case, we must not be understood as deciding the principle that the misconduct, on the part of the father, which would authorize his destitution from the tutorship, would necessarily destroy the preregatives of the paternal power, which are independent of the tutorship. Toullier considers the paternal power as personal, and the rights resulting from it as separate from the tutorship, and unaffected by it. Vol. 2, § 1170. It is a question on which we would not wish to be considered as expressing any opinion. It is of great moment, and can only be decided after the most thorough investigation.

But in conclusion let us suppose that, at the time this marriage was under consideration, a court had been applied to for the purpose of withdrawing the minor from the paternal power, for the causes presented by the counsel. A court would not be satisfied with any thing but the most unquestionable proof of the facts on which its action was to be based. If true, they must be well known, and how does it happen that, in this case, they are left to depend for their establishment on the testimony of a single witness? The notoriety as to certain matters which we have left out of view, because we did not consider them to be proved, this witness alone speaks of. Would not a court, before proceeding to perform one of the highest acts of judicial power, have required the charge of notoriously bad conduct and corrupt example to be supported by other evidence, and not to be dependent on the opinion of a single witness? What reason can be given that this testimony stands alone? Why were not his neighbours, his associates, brought forward to establish the fact of the notoriety of Beiller's bad conduct, and the corrupting influence of his example. Many witnesses, neighbours, intimate friends, were examined, but not one of them testified in support of these allegations, which, had they been true, some of them must have known. Had the facts been as represented, they would have been proved, and not left to rest on the testimony of a single witness. The neighbours, heads of families, friends of the deceased, whose testimony on the example afforded by the conduct of the father, and whether the paternal dwelling was or not disgraced by the mode of life charged on the deceased, would have been couclusive on the court; but with the evidence before us, we are satisfied that no court would take the responsibility of removing the child from the protection of the paternal power, and on it we cannot reverse the judgment appealed from as centrary to evidence.

We therefore conclude that the testator by his conduct had not forfeited the right of disinheriting his child, a minor, for marrying without his consent.

We agree with the district judge in dismissing the plaintiff's demand. We have not come to this conclusion without the most mature deliberation; and, in so doing we are acting in the best interests of society, in defence and in vindication of the paternal power, of the right which every man has to the fruits of his labor, and carrying out that fundamental principle upon which not only the welfare and happiness of the child reposes, but the power and safety of the State—Honor thy father and mother.

Judgment affirmed.

MORANCY v. FORD.

The United States never so entirely divest themselves of title to public lands, until a patent is issued, as to be precluded from cancelling the sale and setting aside an entry illegally made.

The Register and Receiver of the Land Office are the proper tribunal for determining, whether land claimed by a party is embraced in the prohibition of the provise inserted in the act of Congress of 13 June, 1832, authorizing the inhabitants of Louisiana to enter back lands, and, for that reason, not subject to be entered as a back concession. Their decision is subject to revisal by the Commissioner of the General Land Office, but 'not by the state tribunals.

A PPEAL from the District Court of Madison, Curry, J.

The plaintiff alloges that he is the owner, in possession, of lots of land 1, 2, 3, 4, 5 and 6, of section 26, township 17, range 13 east, in the district of pub-

MORAHCY

lic lands north of Red River, of the value of \$10,000; that he acquired title by purchase from the United States at the Land Office at Ouachita, on the first of December, 1832, and first of February, 1833. That the defendant has and continues publicly, by speech and in writing, to slander his title to said land, and to assert title in himself as pre-emptor, to his damage, &c.

The defendant alleges that he has a good title to the land claimed by the plaintiff, in his own right, and as the representative of the widow and minor heirs of William Clair, deceased, by virtue of an act of Congress passed on the 15th of June, 1832, entitled "An act to authorise the inhabitants of the State of Louisiana to enter the back lands," and of an act supplementary thereto, passed on the 24th of February, 1835. That, at the time of the passage of said acts and prior thereto, the defendant was the owner of lot 7, and the said widow and heirs of lots 4, 5 and 6, in township 17, range 13 east, in the land district north of Red River, fronting on the Mississippi River, under titles derived from the United States. That prior to the passage of said acts, defendant married Ethalie Clair, the widow of the deceased, and natural tutrix of his and her minor children, George G. Clair and William Armstrong Clair, and was duly constituted under tutor to said minors. That prior to the expiration of said acts, (in the spring, or early in the summer of 1835,) and in compliance with, and in conformity to, the provisions thereof, the defendant in his own right as owner of lot 7, and as the representative of said widow and minors, owners of lots 4, 5 and 6, in said township and range, fronting on Mississippi River, "did give the notice required by said act of Congress, and did also tender the money for the purpose of entering the land described in the plaintiff's petition, at the Land Office at Oouchita, within which district said lands were situated." That by the act of Congress aforesaid, he was entitled to a preference in becoming the purchaser of said land, it being his back concession in his own right, and as the representative of the said widow and minor heirs, owners as aforesaid of lots 4, 5, 6 and 7, in said township and range, fronting on the Mississippi River. That this right of preference vested by said act of Congress, and could not be taken from them. That the entries of said land "as set forth in the plaintiff's petition," were made in fraud of their rights, conveyed no title to the plaintiff, and are null and void. That the unlawful entry and detention of said land, has occasioned to the defendant \$1,000 damage, which he claims in reconvention.

The facts established by the evidence in this case are stated in the opinion of the court, infra. There was a judgment in the court below in favor of the plaintiff for the land in controversy, from which the defendant appealed.

Stacy and Sparrow, for the plaintiff. The question whether the land fell within the proviso of the act of 1832, was solely within the jurisdiction of the officers of the land department; the courts of the State had no jurisdiction, and could not inquire into the matter. The power of declaring what are water-courses, &c., is specially vested by law in the Surveyor General; and courts of justice have no jurisdiction to annul his acts, nor any superintending control justice have no jurisdiction to annul his acts, nor any superintending control over them. They have no authority to control the surveys of the General Government, or to determine what are or are not water-courses falling within the meaning of the provise of the act of 1832 (4 La. p. 549. 6 La. p. 12); nor to determine the character of the lands, in opposition to the expressed declarations of the government. 2d Land Laws, p. 928, no. 914.

The Register decided that this land fell within the provise of the act of 1832, and was not subject to the operation of that act. The question now arises, what was the tribunal competent to decide this issue? Undoubtedly the Register and Receiver of the Land Office; and the only evidence upon which they could act was the official returns made to their office by the Surveyor General. Upon appeal, the General Land Office, upon satisfactory evidence of fraud or error in

the survey being shown, would have ordered a resurvey of the land, and that the plats should be made to conform to the resurvey. The decision of the Commissioner of the General Land Office would have been subject to the revision of the Secretary of the Treasury, whose decision would have been final.

Thomas, Dunlap and Shannon, for the defendant.

The judgment of the court was pronounced by

King, J. The plaintiff alleges in his petition that he is the owner and possessor of the lots of land numbered 1, 2, 3, 4, 5 and 6, of section 26, in township 17, range 13 east, in virtue of purchases from the United States, and avers that his title has been slandered by the defendant, who asserts title in himself. He prays to be quieted in his title, and for damages.

The defendant denies the plaintiff's ownership, and avers that, in his own right and as the representative of the widow and heirs of William Clair deceased, he has a good title to the lands claimed by the plaintiff, in virtue of an act of Congress passed on the 15th of June, 1832, entitled "An act to authorise the inhabitants of the State of Louisiana to enter the back lands;" and of an act supplementary thereto, passed on the 24th of February, 1835. He alleges that prior to and at the time of the passage of those acts, he was the owner of the lot no. 7, and that the widow and heirs of Clair were the owners of the lots 4, 5 and 6, in township 17, range 13 east, fronting on the Mississippi river, in the rear of which lie the lands claimed by the plaintiff: that before the expiration of those acts, the defendant, in his own right and as the representative of the widow and heirs of Clair, gave the notice required by the act, of his intention to become the purchaser of the lands claimed by the plaintiff, tendered the price to the proper officers, and did every act necessary to secure and retain the right vested in him and those he represented by the acts of Congress, to become the purchaser by preference: that the entries of the lands claimed by the plaintiff were illegal and void, and conveyed to him no title whatever.

It is shown that the defendant and the heirs of Clair are the owners of the lots of land fronting on the Mississippi river described in their answer, in the rear of and adjacent to which lie a part of the lands in controversy. In March, 1834, the defendant applied at the Land Office in Ouachita, to enter the back concessions of these several lots for himself and the heirs of Clair, under the provisions of the acts of 1832, and was answered by the officers that they were unprovided with a legal plat of the township, and the entry was not permitted. On the 2nd of June, 1835, he made a formal application, through an agent, to enter these back pre-emptions, and tendered the price to the proper officer, and was again refused. The reason assigned for the last refusal was, that the right of pre-emption claimed, extended so far back as to cover good lands bordering on another water-course, and consequently fell within the provise of the act of Congress, which prohibited the entry of lands thus situated, as back concessions. Evidence was received by the Register, which convinced him that the map was inaccurate, but he considered that he was not authorised to disregard the official survey. From this decision, an appeal was taken to the Commissioner of the General Land Office, before whom it is still pending.

In December, 1832, and February, 1833, the plaintiff, Morancy, entered the lots of land described in his petition, and obtained the Receiver's receipt for the price, and the Register's certificate of purchase. These entries were permitted under the belief that the township in which they lie had been previously offered for public sale, a fact which the testimony leaves in doubt, and that they fell

MORANCY V. FORD. MORABOY C. FORD. within the provise of the act of 1832, already referred to. No patents have thus far, issued for these purchases in favor of the plaintiff, and further action in relation to them has probably been suspended, in-consequence of the defendant's appeal. These constitute the respective claims and titles of the parties to the lands in controversy.

It is conceded that the government never so entirely divests itself of title to public land, as to be precluded from cancelling the sale and setting aside the entry made in contravention of its laws, until a patent issues. It is clear then, that the title which the plaintiff asks us to decree to be valid is incomplete and inchoate only, subject to be revised by the government, and to be annulled, if found to have been issued in contravention of any of its laws. The title of the defendant, as presented in this controvery, is equally imperfect. The government, it is true, through its officers, has given to the act of the 15th June, 1832, an interpretation different from that which it received in the case of Thompson. v. Schlater, 13 La. 115. It has been determined that, "when land was offered at public sale, prior to the passage of the act, the individual claiming the back tract, in virtue of the provisions of the act, is to be permitted to file the notice of his claim, and complete his payment thereof at any time prior to the 15th of June, 1835, and that no sales of any such tract, could legally be made after the date of the act, to any other person than the owner of the front tract." In the case of Jourdon and Landry v. Barrett, the Supreme Court of the United States recognised these instructions as furnishing the true construction of the act. 2 Land Laws & Opinions &c., p. 573. 4 Howard's Reports, p. 183. This court will at all times be disposed to yield its own interpretation, and acquiesce in that given by the government of the United States, to the laws of Congress.-Under the construction given by the Commissioner of the Land Office to the act of 1632, the entry made by the plaintiff was illegal and void, if the land was, at the date of his purchases, subject to be entered as a back concession. That however is one of the principal points of controversy between the parties. It has been submitted to the Register and Receiver of the Land Office, who were the appropriate tribunal for determining the fact, whether the land claimed by the defendant fell within the prohibition of the proviso contained in the act of the 15th June, 1832, and were for that reason not subject to be entered as a back concession. The opinion of those officers was adverse to the defendant's claim, and in deciding the question they determined in relation to a matter within their jurisdiction. Their decision is subject to be revised by the Commissioner of the General Land Office, and not by the tribunals of the State; and to that officer an appeal has been taken. Until he determines between the parties and the patent issues from the government, neither will possess such a title as this court can deem to be valid. 4 Howard's Rep. 185. 13 Peter's Rep. 515, 416.

The parties are litigating before us in relation to titles which have not yet emanated from the government, and which may ultimately be refused to both.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that there be judgment against the plaintiff as in case of non suit, and that he pay the costs of both courts.

Wilder The Control of the Control of

Covington r. Gustine.

A PPEAL from the District Court of Concordin, Curry, J. The question presented by this case, was settled by the decision in Morancy v. Ford, ante p. 299. Elam, for the appellant. Stacy and Sparrow, for the defendant.

Briggs et al. v. PHILLIPS.

A paper purporting to be the copy of the record of an act of sale sous seing privé, is inadmissible in evidence to prove title to real estate, where no proof of the verity of the act was exhibited to the recording officer at the time of recording it, and there is no sufficient proof of its being a copy, of the original.

A PPEAL from the District Court of Madison, Curry, J. Stacy and Sparrow, for the plaintiffs. Pepper, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This case, as it stands before us, is a potitory action for a lot of land, described as lot 1, in section 31, township no. 16, range 12 east, containing 140 83-100 acres. The plaintiffs had judgment for 80 acres, judgment being against them for the rest of the lot. The defendant has appealed.

The plaintiffs offered in evidence a document purporting to be a record of a private act of sale from Dunham and wife, the original owners of the land, under whom both parties claim, to one Nevils. Its admission was objected to on the ground that said paper was a copy of a copy, and was not sufficiently proved. No proof of its verity was made or exhibited to the recording officer when it was recorded, nor is there sufficient evidence adduced to show that it was a copy of the original, which it purports to be. The evidence of Barnes on this subject is not sufficient to establish the contents of the original with proper precision, still less that the document exhibited is a copy. The alleged sale from Dunham and wife to Nevils, was never carried into effect by the delivery of possession, and it would be unsafe to adjudge titles to land on evidence of this character.

The judgment of the District Court, so far as the same decrees the plaintiffs to recover eighty acres as an undivided portion of the lot described in the petition, is reversed, and the case is remanded for further proceedings, with directions not to receive in evidence the document offered by the plaintiffs and excepted to by the defendant, on the testimony exhibited in proof of it. The judgment in favor of the defendant for the rest of the land is affirmed, the plaintiff paying the costs of this appeal.

NEW ORLEANS CANAL AND BANKING COMPANY v. BRY et al.

Where a notary by whom a note was protested, states that he made diligent enquiry for the domicil and usual place of residence of the endorser, but does not state that he made any attempt to ascertain at what post office notice of protest should be addressed, the proof is insufficient to show due diligence.

NEW ORLEANS
CANAL AND
BANKING
COMPANY
9.
BBT.

PPEAL from the District Court of Carroll, Curry, J. This is a suit against the drawer and endorsers of a promissory note for \$4,000, dated at Munroe, La., March 15th, 1842, and payable at the office of plaintiffs, at Alexandria, twelve months after date. The defence of the appellant, O. J. Morgan, one of the endorsers, is want of legal notice of demand and non-payment. The evidence on the part of the plaintiffs consisted : 1st, Of the certificate of the notary attached to his protest, in which he states the manner in which he gave nolice to the endorsers, as follows: "Notices in writing of this protest were deposited by me in the post office, at Alexandria, on the 18th day of March, 1843; one addressed to Oliver J. Morgan, at his domicil, near Lake Providence, Parish of Carroll, La.; and one to Jonathan Morgan, at his domicil. near Lake Providence, Parish of Carroll, La." 2d. Of the answers of the notary to interrogatories. In answer to the 2d interrogatory, he says: "I did make diligent enquiry for the domicil of and usual place of residence of the endorsers, Jonathan, and Oliver J. Morgan, by enquiry of persons in the parish of Rapides, who were acquainted with them, and most likely to know; I enquired of Robert Chew and H. M. Hyams, who I knew to be acquainted with them." In answer to the 3d interrogatory, he says: " I was informed, on making such inquiry, that they resided in the parish of Carroll, near Lake Providence." To the 4th interrogatory, he says: "I did, on the 18th day of March, 1843, send the notices in conformity therewith, to said Oliver J. Morgan and Jonathan Morgan, addressed to them, at their domicil, near Lake Providence, parish of Carroll, La., and did deposit the same in the post office, at Alexandria, on the said 18th of March, 1843."

On the part of defendants, the following evidence was offered: 1st, The admission of parties, of record: That O. J. Morgan and J. Morgan live near the Pecan Grove post office, in the parish of Carroll; that O. J. Morgan lives 12 miles from the town of Providence, and within 4 or 5 miles of Pecan Grove. That O. J. Morgan was never known to send to Providence for letters or papers; always mails his letters at Pecan Grove Post Office, &c. 2d, The testimony of J. C. Hollingsworth, deputy postmaster of Providence. He swears, that he was postmaster at Providence at the date of the protest of the note sued on; that letters coming to that office for O. J. Morgan always went to the General Post Office as dead letters; and that O. J. M. has lived at his present residence since 1839, Judgment was given below in favor of the plaintiffs, from which the defendant, O. J. Morgan, has appealed.

Thomas, for the plaintiffs. Notice was given in strict conformity to the second section of the act of the 13th of March, 1827, B. and C.'s Dig. 43. It is only when the residence of an endorser is unknown to the notary, and cannot be ascertained by diligent enquiry, that he is required to address notice to the place where the note was drawn. His enquiries informed him truly of the residence of the endorser, and he addressed his notices to them properly. 10 Rob., 37.

Prentiss and Finney, for the appellant. The notice was not sufficient to bind the appellant as endorser. 1st. It was not directed to any post office whatever. It was directed to "Oliver J.Morgan at his domicil, near Lake Providence, Parish of Carroll, La." There is no such post office as "Lake Providence" in this State. There is a post office at "Providence," the seat of justice of the parish of Carroll. This court is bound to take judicial notice of the post offices established within the State. Note's Executor v. Beard. 16 La. 311.

2d. If the direction amounted to anything, it was a direction to "Providence," or a general direction to the "Parish of Carroll." In the latter case

2d. If the direction amounted to anything, it was a direction to "Providence," or a general direction to the "Parish of Carroll." In the latter case the notice would have gone to "Providence," under the regulation of the Post Office Department, by which, letters addressed to a person in a certain county or parish, without further direction, go to the post office at the seat of justice.

If then the notice in this case had any legal direction at all, it was to "Provi-New Onleass dence," which this court knows officially to be the seat of justice for the "parish Canal AND

of Carroll."

3d. Admitting, for the sake of argument, that the notice was directed to "Providence," in such a manner as to have insured its transmission by mail, was such notice sufficient to bind the appellant? It is admitted on the record that the Providence post office was not the nearest to O. J. Morgan's residence, but that "Pecan Grove post office" was eight miles nearer; that he always mailed his letters at the latter, and never received either letters, or papers at the former; the postmaster himself testifying that such letters as came to Providence to his address were always sent to the General Post Office, as dead letters. The general rule of the commercial law is well settled, that notice to an endorser must be directed to him at the post office nearest his residence. There is an exception where a person is in the habit of receiving his letters and papers at a more remote office, and does not use the nearer one. The act of 13th March, 1827, has not changed the commercial law in this respect. Vide Preston v. Dayson, 7 La. 11. Duncan v. Sparrow, 3 Rob. 164. The general principle has been repeatedly recognized by the Supreme Court of this State. In the case of *The Mechanics' & Traders' Bank v. Compton et al.*, 3 Rob. 4, and also in *Nicholson v. Marders*, 3 Rob. 242, it was decided that, even when a party has been in the habit of receiving his letters at two post offices, notice of protest must be directed to him at the nearest, or it will be bad. Videalso 6 Rob. 73—90. The true rule is laid down again in Priestly v. Bisland, 9 Rob. 528, and still more fully defined in Follain v. Dupré, 11 Rob. 454. It was directly decided in the case of Bicnel v. Tournillion, 6 Rob. 500, that a notice of protest simply directed to an endorser, as in a particular parish, when there are several post offices in the parish, and the one at the seat of justice is not the nearest to his residence, is insufficient. It is clear, then, that notice to the appellant at Providence, was bad, because there was a nearer post office at "Pecan Grove," where he was in the habit of receiving his letters and papers, while he never used the other at all.

4th. It will be urged that the notary was excused from sending notice to the defendant's proper post office, on account of ignorance of his place of residence. We answer: 1st. The notary does not testify that he did not ascertain his true residence, nor that he did not know his nearest post office. 2d. By the notary's own showing, he did not exercise the due diligence required by law, to ascertain the residence of defendant. He testifies that he enquired of Chew and Hyams. Neither of these was a party to the note. The general rule of the commercial law is, that enquiry should be made of the other parties to the bill or note. Story on Bills, §299, with authorities cited in note, &c. 3d. But even if the commercial law were otherwise, our own statute settles the question. The 3d section of the act of tha 13th March, 1827, directs that when, after due diligence, the residence of an endorser or drawer cannot be ascertained, notice shall be sent to the place where the note or bill was drawn. Bullard and Curry's Dig. 43. Now the note in this case was drawn, as appears upon its face, at Munroe, and it does not appear that any notice was sent to the defendant, the notice was bad, because it was not directed to his pearest or usual post office. If he did not know it, then the notice was bad, because it was not sent to the place where the note was drawn, according to the requisition of the 3d section of the

act of 17th March, 1827.

The judgment of the court was delivered by

SLIDELL, J. The appellant, Oliver J. Morgan, was sued as endorser of a promissory note, dated at Monroe, La., and payable at Alexandria. At the date of maturity, and during several years previous, the appellant was living in the parish of Carroll. In that parish there were two post offices, one at Pecan Grove, and one at the town of Providence, the seat of justice of the parish. Morgan's residence was twelve miles from Providence and four miles from Pecan Grove, which lies on the mail route between Alexandria and Providence. It is proved that the appellant did not resort for his letters to the Providence office, but to that at Pecan Grove, and that letters addressed to him at Provi-

CANAL AND
BARKING
COMPANY
9.
BRY.

BRY.

NEW ORLEANS dence were not called for, and were sent, after the legal delay, by the postmas
Castle and ter to Washington, as dead letters.

The notice for the appellant was mailed by the notary at Alexandria, where

Whether under all circumstances it is indispensable to address notice for the endersor for the post office nearest to his residence, or that to which he resorts, or whether under some discumstances a general address to the purish of the party's domicil, there being more than one office in the parish, might not suffice, is a question which is not now nacessary, to consider. ... It is certain, due diligence must be used to uscertain what is the proper office in the parish, to which to uddress the letter. That diligence has not been proved in the present case. The notary made enquiry of two persons about Morgan's domicil; but he does not state that he enquired, or attempted to ascertain, to what post office it was proper to address. The notice was addressed to no particular post office in the parish. The expression is, "at his domicil, near Lake Providence." There is no such town or village as Lake Providence. The town of Previdence being near the lake of that name, and Providence being also the neat of justice of the parish, we must presume, under the address in question, that the letter went to the post office at that town, and consequently that the appellant did, not resu ply attente lin a endon er, to a a recurar pari la some tate e ati evito

The evidence blows that Bry, after protest, executed a mortgage to secure his endorser, but there is no proof that the appellant was a party to the mortgage. It purports to be accepted in his behalf, by a person styling himself his agent, but the agency is not proved.

After the commant ligitation with which the courts of this State have been crowded for years upon questions of notice to endersors, it is strange that it has nover occurred to the officers of banks, and others dealing in negotiable paper, to guard themselves liganist less or difficulty by requiring endorsors, by memorandum over their signatures, or other agreement in writing, to state the mode in which they wish their notices to be addressed. A little diligence thus exercised, would save the time of the courts of justice, and preserve the rights of creditors, which are now so frequently sacrificed.

It is decreed that the judgment appealed from be reversed, and that there be judgment in favor of the appellant, as in case of non suit; the plaintiffs paying the costs in both courts incurred by the proceedings as to this appellant.

unce. It has a series the resonance of the resonance of the total the series of the series that the series of the

ATCHISON et al. v. PARKS, Administrator, et al.

El Francis o Manager of Designation

Plaintiffs executed their notes for part of the price of land purchased from the defendant. The latter bound himself to refund the price, in case of his failure to make a deed for the land prior to a period subsequent to the miturity of the notes. Plaintiffs took possession of the land, and continued to hold undisturbed possession. Defendant was never put in default for failure to execute the deed within the time prescribed. Plaintiffs having enjoined an execution issued on a judgment attained on the notes: Held, that the injunction should be dissolved, with damages.

A PPEAL from the District Court of Carroll, Curry, J. Thomas, Prentiss and Finney, for the appellants. Stockton and Selby, for the defendants. The judgment of the court was pronounced by

Eustis, C. J. This suit grows out of a contract made by the appellants and others for the purchase of a tract of land in the parish of Carroll, on which \$1,000 was paid in cash, and the balance, \$17,000, was payable on credit, to wit: \$5000 on the 1st January, 1837, \$6000 on the 1st January, 1839. Tompkins, the seller, was to return the purchase money, in the event of his failing to make the deed for the land to the appellant and his associates, at any time between the signing of the agreement and the first of January, 1840.

Some of the partners in this purchase with the appellant executed their notes to the order of the vendor, Tompkins, which were accordingly delivered to him. The appellant and his partners took possession of the land, and their possession has never been disturbed, nor is there any eviction alleged, for which the vendor could be responsible under his warranty. Nor has the purchase money been paid, nor was, the defendant, Tompkins, in his life time, nor has his succession since (which is represented by the present defendant, Parks.) ever been put in default for not giving the parties the deed according to the agreement.

The plaintiffs have obtained an injunction against the execution of a indgment rendered on one of the notes given for the purchase money, in favor of the representatives of the succession of *Tompkins* against the parties to the notes, on the 16th July, 1840.

The District Court, on a hearing, dissolved the injunction, with ten per cent general damages against the plaintiffs and their sureties on the injunction bond, and \$100 special damages, being the amount of the expense of defending the suit, incurred and paid by the defendants.

Judgment affirmed.

EDWARDS, Curator, v. FARRAR- and a valley ave

A case will not be continued in order to allow a party to procure the exidence of witnesses absent from the State, where no diligence has been used to obtain their testimony

A person having been objected to on account of his exemption as a school commissioner from liability to serve as a juror, waived his privilege, and was sworn. After the pannel had been formed, on being asked a question by defendant, he stated that he did not like to serve, as he felt interested in the case, and that he did not know the nature of the case when he was objected to. Held: That the juror was properly discharged, and another sworn in his place.

A PPEAL from the District Court of Concordia, Curry, J. R. N., and A. N. Ogden, for the plaintiff. Stockton and Steele, for the appellant. The judgment of the court was pronounced by

Kino, J. The defendant is sued, in this action, as one of the makers of a joint and several promissory note, on which partial payments have been made, and he sets up in defence a failure of consideration. The cause was tried by a jury, who gave a verdict in favor of the plaintiff, for the sum claimed, with interest from judicial demand, and the defendant has appealed.

ATCUISON PARKS. EDWARDS 9. FARRAR. The only questions which arise in this case, are presented in a bill of exceptions taken to the opinion of the judge, refusing an application of the defendant's to continue the cause, in order to procure the testimony of witnesses who were absent from the State, and to his permitting a juror to be withdrawn after he had been sworn, and another to be substituted in his place. The judge, in assigning his reasons, states that the continuance was refused mainly on the ground, that no diligence was shown in procuring the evidence stated in the affidavit, and that the continuance appeared to be asked for solely for delay, as a similar affidavit and motion had been made at a previous term of the court. The provious affidavit referred to by the judge is annexed to the bill of exceptions, from which it appears that nearly a year had elapsed after the continuance, granted for the purpose of procuring the testimony of the witnesses named in the last application, and the record shows no measures taken to procure their depositions. We think that the continuance was properly refused.

As regards the withdrawal of the juror, it appears that a person was called to serve as a talesman, who was a school commissioner, and, in virtue of his office, exempt, by law, from serving on juries. He was objected to by the defendant, but, as he declined to avail himself of his privilege, the judge ordered him to be sworn, which was accordingly done. After the pannel had been formed, the judge states that this juror, "upon being asked a question by the defendant, said he did not like to sit in the case, as he felt interested; that he did not know the nature of the case, when he was interrogated in relation to his right of exemption from serving as a juror and when he was sworn." The judge thereupon discharged the juror and caused another to be sworn in his place, and we think that he was clearly right in doing so, when the juror declared that he felt he had an interest in the suit.

Upon the merits, the verdict of the jury is supported by the evidence.

Judgment affirmed.

MILLER v. ALLISON.

Where the facts of the case leave it doubtful whether the court should interfere with a judgment, overruling a motion to set aside an order directing certain interrogatories to be taken for confessed, the party against whom they have been taken for confessed will be considered as entitled to the benefit of the doubt, and the case will be remanded to give him an opportunity of answering the interrogatories

A PPEAL from the District Court of Concordia, Curry, J.

Stacy and Sparrow, for the plaintiff. J. Dunlap, for the appellant. The judgment of the court was pronounced by

Rost, J. In this case the defendant was ordered to answer interrogatories in open court, but the court did not sit on the day fixed for that purpose, and another was subsequently designated. On that day and the succeeding days the defendant was in court, but was not called upon by the plaintiff to answer the interrogatories, and made no attempt to answer them. At one time he absented himself, with the promise of the plaintiff's counsel that no advantage should be taken of his absence. He returned, but did not answer. Towards the close of the term, the defendant having again absented himself, the plain-

The defendant objected to him on the ground of his exemption.

tiff's counsel moved that the interrogatories be taken for confessed, for want of an answer. The motion was allowed, and the usual order made. On the same day the defendant returned, and his counsel moved to set aside the order. The motion was overruled, and he took a bill of exceptions. Judgment was rendered in favor of the plaintiff, and the defendant appealed:

MILLER V.

We are not sure that this is a case in which we ought to interfere, but we consider the defendant as entitled to the benefit of our doubts, and we will remand the case to give him an opportunity to answer the interrogatories put to him. In doing so, we advise him to make his next appearance in court for that purpose, a matter of record.

It is ordered that the judgment be reversed, and the case remanded for further proceedings, with directions to the judge to set aside the order taking for confessed the interrogatories put to the defendant, and to receive his answers to those interrogatories in open court; the plaintiff and appellee paying the costs of this appeal.

CURTIS, for the use &c. v. WOODMAN et al.

A creditor for work done in constructing a levée under an adjudication made in pursuance of the law on the subject of roads and levées, though entitled to proceed in rem against the land, may recover, in an ordinary action, a judgment for his claim, with a privilege on the land. C. C. 3216.

No notice will be taken on appeal of reservations of all legal exceptions, made in regard to testimony taken out of court.

A PPEAL from the District Court of Madison, Selby, J. Amonett, for the appellant. A. Pierse, for the defendants. The judgment of the court was pronounced by

Rost, J. The plaintiff, suing for the use of *Brown* and *Johnson*, claims from the defendants \$928,62, for 323 rods of levée by him made in front of their land, at the rate of \$2,87 a rod, by virtue of an adjudication made to him under the law concerning roads and levées.

It is in evidence that the levée was made in conformity with the terms of the adjudication, as nearly as the nature of the ground permitted; that it was accepted by the inspector of the district; and that it is in reality worth more than the price of adjudication. The contract appears to have been recorded in due time, and the plaintiff prays for a privilege upon the land, under art. 3216 of the Civil Code.

Woodman, one of the defendants, residing out of the State, the plaintiff caused a curator ad hoc to be appointed to represent him. Downes, the other defendant, did not answer, and a judgment by default was entered against him. The curator ad hoc appointed to Woodman, after making divers exceptions, which it is not necessary to notice, answered that Woodman could not be sued in this manner, denied all the allegations of the plaintiff's petition, and alleged that, on account of various irregularities and an entire failure to comply with the law in the adjudication, the plaintiff could not recover.

The case was tried before a jury, who gave a verdict in favor of the defendants, and the plaintiff has appealed from the judgment rendered thereon.

The plaintiff might, if he chose, have proceeded in rem, but nothing prevented him from resorting to an ordinary suit.

CURTIS R. WOODMAN. The ordinance of the police jury, appointing Groves inspector of roads and lovées in the district where this land is situated, is in evidence; he has also been examined as a witness, and has testified, that he was inspector at the time; that he caused the making of the levée in controversy to be advertised according to law, and that 223 rods of it were adjudicated to the plaintiff at \$2,87 per rod; that the plaintiff complied with his contract, as well as the accidents of the land made it practicable to do: that the levée was accepted by him; and that it is worth more than the price of the adjudication. This evidence was taken out of court, and the defendants reserved all legal exceptions to its introduction. Such reservations we never notice on the appeal. It is contended that the plaintiff has not proved that the inspector had been sworn. Under the evidence that was suffered to go to the jury, it was not necessary to make that proof; moreover, after the verdict was rendered, the oath was found; it is annexed to the affidavit filed in support of the motion for a new trial, and appears to have been taken before one of the defendants, acting at the time as parish judge.

The plaintiff has transferred his claim to the men who executed the work, and law and good conscience alike forbid the defendants to enrich themselves by frustrating the rights of those laborers.

The plaintiff is entitled to a judgment, with interest from judicial demand, and to a privilege upon the land.

The judgment is therefore reversed, and it is ordered that the plaintiff, for the use of Brown and Johnson, recover of the defendants \$928 62, with legal interest from 21st April, 1846, till paid, and a privilege on the land.

THE WAS AND THE PROPERTY OF

Copley v. Fretwell.

The right given by the 13th section of the stat. of 20 March, 1839, to a plaintiff who has applied for a f. fs., to propound interrogatories to third persons, believed to have property or effects under their control belonging to the defendant, or to be indebted to him, can be exercised only while the writ remains in the hands of the sheriff.

A PPEAL by the plaintiff from a judgment of the District Court of Madison, in favor of certain garnishees, Curry, J. H. W. Dunlap, for the appellant. Snyder and Shannon, for the garnishees. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff having obtained judgment against J. G. Fretwell, issued a fieri facias. This writ bears date on the 1st day of January, 1844, and was returnable in seventy days; so that the authority of the sheriff to make any seizure under it, expired on the 12th March, 1844. On this writ, as appears by the return thereof, made on the 24th August, 1844, the sheriff made no seizure whatever. On the 22d May, 1844, the plaintiff obtained leave of court to file a petition, the object of which was to make the present appellees garnishees, pursuant to the act of 1839. Interrogatories were annexed. The citations were served in the following June.

It is quite unnecessary to enquire into the alleged default of the garnishees, and the defectiveness of their answers. The proceedings against them were ab initio null and void. A fieri facias is the basis of this proceeding under the act of 1839; and by the express terms of the statute the property and effects

in the hands of the garnishees, "shall be decreed to be levied as by the sheriff, from the date of the service of the interrogatories on such persons." There could be no levy after the time limited in the writ had expired, and the proceedings against the garnishees are consequently void. See the case of Raboteau v. Valeton, 11 Rob. 220. Simpson v. Allain, 7 Rob. 500. Digat v. Babin, 8 Mart. N. S. 372.

Copley B Prepare

Murray v. Gibson et al.

tion which is a supply a give plant was being the

A note made and payable in another State must be governed by the laws of that State.

'A receipt sous seing price has no date as to third persons, without proof of the time of its exception.

By the laws of Mississippi payment of a promissory note by the maker, before maturity, and prior to the acquisition of the note by a third person, who obtained it without notice of the payment, though the note be not delivered to the maker, is binding on such third person; but a payment, after the acquisition of the note, would create no equity against him.

Where the result of an action in favor of the party by whom a witness was offered, would render the witness liable to the opposite party for a certain sum, but if unfavorable would subject him to a much larger debt to the party by whom he was introduced, his interest is not equal, and his testimony should be disregarded.

Rights acquired by third persons subsequently to an attachment, cannot affect the rights of "the attaching creditor.

A PPEAL from the District Court of Madison, Curry, J.

This is a suit by attachment, instituted by the plaintiff on a promissory acts for \$5,159 .27, executed by defendants on the 25th February, 1830, dated at Hall's Ferry, and payable to the order of George Henderson, at the Union Bank of Mississippi, on the 1st of January, 1841, at Jackson.

statute of Mississippi, of 25 Jan'y, 1822.

Plaintiff acquired possession of the note and his interest therein, by a seizure and sale under an attachment sued out by him against *Henderson*, the payer, on the 23d December, 1840.

Defendants relied, in proof of payment before attachment, with the statement

1st. Upon the testimony of Henderson, the payee, who, in answer to the second interrogatory, said: "I was the holder of the note drawn by defendants in my favor, for \$5,159 27. The defendants made in agreement with me, in November, 1840, to pay certain debts which I owed to the amount of said note, which they did. I gave them a receipt for the same." Henderson further stated that, in the early part of the winter of 1840, he handed the note to J. L. Kinnard, of Orand Guif, with a request that he would exchange it for a draft held against him by Brander, McKenna & Wright, who declined the transaction. Subsequently it was attached by plaintiff.

2d. Upon the receipt of Henderson, which was offered in evidence, and is in the following words:

"Received of Wm. L., and John A. Gibson, five thousand one bundred and fifty-nine dollars and — cents, as a payment on a note drawn by Wm. L., and John A. Gibson, for the same amount, and dated at Hall's Ferry, Febry 25, 1839, and due 1st January, 1841, which note I promise to give to Mr. L. Gibson, as soon as convenient.

MURRAY 9. GIRBON. 3d. Upon the answers of Gibson to interrogatories propounded by plaintiff. In his answers he alleges ignorance, at the time of payment, of the disposition of the note, and states as reason why he did not receive the note at the time of settlement, to wit: that the receipt was given at defendant's own house, and Henderson did not have it with him at the time. He does not state that the note was paid.

Exception is taken by plaintiff to the testimony of Henderson, as incompetent, on the ground of interest.

The 9th section of the act of the legislature of Mississippi of 25th June, 1822, in relation to bills of exchange, promissory notes &c., which was introduced in evidence by defendants, provides that defendants shall have after assignment equally as before, "the benefit of all want of lawful consideration, failure of consideration, payments, discounts and setts off, made, had or possessed against the same, previous to notice of assignment, in the same manner as if the same had been sued on, and prosecuted by the obligee or payee."

There was a judgment in favor of the plaintiff, from which the defendants appealed.

J. Dunlap and Thomas, for the plaintiff. 1. Henderson was incompetent on the ground of interest. The competent witness must not be interested, either directly or indirectly. C. C. art. 2260. A surety, novating the debt of his principal, is not a competent witness to prove the novation. It is said, that Henderson's interest is equally balanced in the case, and that, as such, he is a competent witness between the parties. The facts do not support the position assumed. The note was attached, sold at sheriff's sale, and bought by the plaintiff, for \$100. If the plaintiff fails to recover on the note, Henderson is liable to him upon his legal warranty to return the purchase money, to the amount of \$100. C. P. arts. 711, 712. 3 N. S. 221. On the other hand, if the plaintiff gains the suit, Henderson will be liable to the defendants to refund them the amount of the note, principal, interest, and costs of suit, upon his acknowledgement of payment, whether true or false. The difference of interest, then, felt by Henderson against plaintiff, and in favor of defendants, is as \$100 is to over \$7000. 3 Starkie Ev. 1729. Greenl. Ev. pp. 391, 393, 394, 420.

2. Henderson, by endorsing the note in blank, and sending it to the city, before maturity, to be negotiated in taking up a draft previously drawn by him, gave it a public commercial credit, which he will not be received as a witness to destroy, by showing that, at the time he endorsed, and sent it into the commercial world, it was paid. Greenl. Ev. p. 428, 429, 430, 431, nos. 383, 385, and notes. 10 M. 185. 5 Ibid. N. S. 130. On this point, there is some diversity of opinion. Some authors holding, that the objection should go rather to the credit than the competency of the witness. But it will be seen, by the references, that the weight of authority is decidedly in favor of exclusion. But, if admissible, under the circumstances, is his testimony entitled to the slightest credit? Can any faith be placed in the statements of one who swears, that, in November, 1840, "he receipted the note to the defendants, who agreed to pay the amount to his creditors, which they did; and that in the winter he sent the note to the city to take up a draft;" and that, too, when it is palpably his interest to sustain this view of the matter. The statement furnishes the most incontestible evidence of fraud, or perjury.

3. The receipt of Henderson, as an act sous seing privé, has no date against the plaintiff, unless its real date be proved dehors the instrument, but that on which it was offered in court. B. & S. Dig. p. 12, Act sous [seing privé, no. 6. The right of the plaintiff to an affirmance of the judgment, is unquestioned, except by defendants' plea of payment to the payee, before notice of the plaintiff's right having attached. The note was attached in the hands of Bogart, the garnishee, on the 23d of December, 1840; and from that day the plaintiff dates

his right to it. 8 Mart. 511.

Snyder, Stacy, Sparrow, Prentiss and Finney, for the appellants, Henderson's interest was in direct conflict with his testimony. It was for his interest to sustain the attachment, for he was bound to plaintiff, as warranter, for the

amount bid for said note, in case plaintiff's title under his purchase should prove invalid. He was testifying, then, against his own interest, and his evidence was clearly competent. C. C. arts. 2598, 99. C. Practice, art. 711. Kennard v. Gustine, 9 Rob. 172. McMicken v. Fair, 4 N. S. 172. Shipman & Co. v. Archinard, 19 La. 471. Travis v. January, 3 Rob. 229. 12 La. 289. 4 Mart. 539. 5 lb. T. S. 277. 2 La. 293. 4 La. 201. Even without the testimony of Henderson, the defence of payment is fully made out by the receipt itself, and the answers of the defendant, J. A. Gibson, to plaintiff's interrogatories. But it may be objected, that this payment is not good, because made before the maturity of the note, and without its delivery to the maker. The payment must be tested by the laws of Mississippi, where the note is payable, and where the payment was made. It is clear the satisfaction is good, so far as Henderson was concerned. Were he the plaintiff, his receipt would be conclusive; and by the laws of Mississippi, the defence is equally good against the present holder.

As to the non-delivery of the note, at the time of settlement, it cannot effect the defence. This has been expressly ruled. In the case of Allen v. The Agricultural Bank, 3 Smedes and Marshall, 48, the note was settled by the maker, without its production, and he took a bond of indemnity against it. It afterwards came into the hands of a bona fide assignce. Yet the court held

the payment a good defence under the statute.

If the defence is good against a bona fide assignee by contract, a fortiori, is it good against a mere legal assignee, under judicial sale? Plaintiff acquired under his purchase only the rights of Henderson, and cannot, even under the laws of Louisiana, claim any greater. He is not an assignee of negotiable paper, received before maturity, in the ordinary course of trade, but the mere purchaser of the rights of Henderson, the defendant in the original attachment.

An attaching creditor takes no greater right than those belonging to his debtor. 8 Mart. N. S. 339. 18 La. 321. And it is the same with the purchaser at

sheriff's sale. 7 L. R. 318.

The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon a note made by the defendants, jointly and severally, to the order of George Henderson, dated and payable in Mississippi. The plaintift acquired the note under execution and judicial sale, for the price of \$100, in an attachment suit brought by him against Henderson, the payee. This is the only collection which Murray has been able to make upon his claim against Henderson for \$10,000, due since 14th May, 1838.

The defence is payment, and to establish it the defendants rely upon a receipt, under private signature, purporting to bear date at a time anterior to the levy of the attachment, and also to the maturity of the note, by which *Henderson* acknowledged to have received its amount from the makers, and promised to deliver the note to *L. Gibson*, one of them, "as soon as convenient." The statute of Mississippi concerning bills and notes, was offered in evidence.

The law of that State must control the contract, it being made and payable there. That State places promissory notes and bills upon a very different footing from that which they have under the law merchant and statutes of England, and of most of the States of the Union; and we shall assume, for the purposes of our present inquiry, that, under the statute of Mississippi, a payment made to Henderson by the Gibsons, prior to the acquisition of the note by the plaintiff, even though unaccompanied by a delivery of the note to the makers, would be an effectual bar against the plaintiff, or any other innocent holder, withou notice. The proof of payment rests mainly upon the receipt, the testimony of Henderson, and the answers of one of the makers to interrogatories.

The receipt, being under private signature, has, per se, no date against third persons. To give it effect, it was necessary to prove the time of its execution. Under the laws of Mississippi, a payment made prior to the acquisition of the

MURRAY V. GIBSON. note by the plaintiff, would bind him; but a payment subsequently made, would create no equity. Non constat, by the mere writing under private signature, that it was not subsequently given to defraud the plaintiff. We must look, then, to the proofs aliunde; and here the first inquiry is, what weight is to be given to the testimony of the payee of the note.

It is urged by the defendants that the interest of that witness was equally balanced. That if the plaintiff failed in his action on the note, by reason of the alleged payment, the credit of \$100 (the price of the note at the judicial sale in the attachment suit), acquired by the defendant in execution would be rescinded, and that this was a counterpoise of his liability to the present defendants, under his covenant in the receipt, if they should be condemned in the action to pay the note a second time. But it is obvious that there was not an equal balance. In the one case the witness would lose \$100; in the other, he would become liable for \$5,159 27, with eight per cent interest from maturity, and costs and charges incurred in the defence of this action. The difference is at least as one to seventy. The witness was interested to the amount of this great excess. The judge of the court below appears to have disregarded his testimony, and we are not prepared to say that in this there was error.

The answers of Gibson to interrogatories do not establish the time of the execution of the receipt, nor the fact of payment, and the character of the answers is not, in other respects, such as to aid the defendants' cause.

It is urged that before Murray purchased the note, at the judicial sale in the attachment suit of Murray v. Henderson, he was warned, by the intervention of the Gibsons in that suit, of the defence now set up, and was a purchaser with notice. If payment be not proved, notice that the makers would resist a future action upon the note on that ground, appears to us immaterial. But, besides this, it is not to be said that the rights of Murray rest on the judicial purchase alone; they rest upon the antecedent attachment, of which the judicial sale was the complement, and an equity acquired after the attachment could not operate retroactively upon rights acquired by the attachment.

Upon a careful consideration of the evidence, we are of opinion that the payment has not been proved; there is, on the contrary, just reason to believe what has been so forcibly urged by the counsel, that the receipt was an after thought and contrivance to defeat the plaintiff's recovery.

We concur with the judge below that no valid defence has been established, and consider his decree as having done justice in the cause.

Judgment affirmed.

ERWIN v. LOWRY, Curator.

The law of the forum governs questions of prescription.

The acknowledgment of a debt will interrupt prescription, though such acknowledgment be not made to the debtor.

By the laws of Mississippi, an agreement to postpone the payment of a balance due on a note for a certain period, on the payment of interest on such balance at the rate of ten per cent a year, is usurious, and subjects the party to a forfeiture of all the interest which may have accrued.

A PPEAL from the Court of Probates of Madison, Downes, J. Snyder and Amonett, for the plaintiff. Stacy and Sparrow, for the appellant. The judgment of the court was pronouced by

SLIDELL, J. The plaintiff claims a balance of principal and interest from maturity, due on two promissory notes given by *McNeil*, the drawer, in 1835, for the price, in part, of certain real property situated in this State, and secured by mortgage thereon. The notes matured in January, 1839, and this suit was brought in April, 1844. The first matter to be considered, is a plea of prescription.

It appears that, in the year 1840, this plaintiff obtained in the United States Circuit Court for Louisiana, an order of seizure and sale upon these notes; the plantation was sold under this process; James Erwin became the purchaser, and the writ of seizure and sale was credited with \$15,683 28, as the nett proceeds of the judicial sale. Subsequently, Lowry, as curator of MeNeil's succession, brought suit against James Erwin, to have the nullity of the judicial sale adjudged, and the property restored to the succession, with the fruits and revenues received by the alleged illegal possessor. This suit was sustained, the property was restored to the succession, and James Errom was made liable for the fruits and revenues; upon the amount thereof he was credited, however, with the nett price he had paid at the judicial sale, as having extinguished, pro tanto, the mortgage debt of the succession; and there being thus a small balance in his favor, the decree was that a writ of possession should not issue in favor of the curator till he had paid James Erwin the amount of the balance. See report of the case, 6 Rob. p. 192. This decree Lowry executed, and received possession of the mortgaged property.

The law of the forum governs the question of prescription, and, under our Code, an acknowledgment of the debt interrupts prescription, even though such an acknowledgment be not made to the creditor. Here there was something higher than an ordinary acknowledgment of the existence of the debt in 1840. The credit which James Erwin was allowed in that suit, as for money paid for the benefit of the succession, and the judgment rendered in his favor for the balance of account, necessarily involved the existence of the debt at the time of payment. If the debt had not existed as a binding and legal obligation of the succession, James Erwin could not have been entitled to a credit for a part payment of it, and therefore the allowance of the credit is a judicial declaration that the debt then existed, and that a payment was made upon it. This judgment in Lowry v. Erwin, which Lowry has executed, coupled with the proceedings by order of seizure and sale in the United States Court, by which the mortgaged lands and slaves were actually seized and sold, and passed into the possession of James Erwin, establishes an ample interruption of prescription within five years prior to the institution of the present suit. The case of Harrod v. Voorhies, 16 La. 254, is not analogous. There the order of seizure and sale was invoked, not as a mere interruption of the prescription of five years, but as a judgment barring the prescription of five years, and subjecting the claim to such prescription only, if any, as applies to judgments. The attempt in that case was to enforce by suit, in 1839, a note upon which an order of seizure and sale had been obtained in 1825. The court held that the note did not merge in the judgment, and that the prescription of five years was still applicable; but the court did not hold that the prescription of five years was not interrupted by the order of seizure and sale, nor was that question at all necessary to be conERWIN o. Lowny. ERWIN v. Lowny. sidered. The date of the institution of suit in that case is stated by the reporter as 1829, but that is obviously a misprint, as may be seen by the context.

The next enquiry concerns a defence of usury, set up against the claim of interest as to one of the notes. This note was payable in Mississippi. On the day on which it would have matured, by agreement of the parties, a partial payment was received, and the payment of the balance of the note was postponed for nine months, the balance to bear an interest of ten per cent per annum. The cashier of the bank in Mississippi made an endorsement accordingly upon the note, of the partial payment and agreement for extension. By the laws of Mississippi, which are offered in evidence, this agreement was usurious, and a forfeiture of all interest accrued. See the case of Richards v. Presler, ante p. 264, recently decided. This makes a reduction of the judgment necessary.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the plaintiff recover of the succession of Alexander McNcil, deceased, the sum of \$,3007 86, with interest on the sum of \$1,800 92, part thereof, from the 6th day of July, 1840, till paid, at the rate of eight per cent per annum, and costs incurred in the court below, with mortgage, for the said principal sum and interest and costs, on the property described in the act of sale, whereof a copy is on file, executed before Felix Bosworth, parish judge, on the 28th day of January, 1835, by Henry T. Dawson & Conway B. Nutt, to Alexander McNeil; the costs of this appeal to be paid by the plaintiff,

KEMP, Tutrix, v. Rowly et al.

Where a tutor acknowledges, in an authentic act, the receipt of the amount of notes due to his minor, which were secured by mortgage, and releases the mortgage, the acknowledgment is evidence, so far as third persons are concerned, of the extinguishment of the debt, and, as to them, the release of the mortgage will be valid, though the amount of the notes was never paid, or paid only in part, to the tutor. But parties or privies to the pacts in which the release originated, cannot take advantage of their own wrong, to the injury of the minors.

Where a tutor releases a mortgage held by minors on a plantation and slaves, in a case where the annual interest of the debt was more than sufficient for their wants, and there were no debts to pay, the release being made fraudulently to enable the debtor to effect a loan on the property, and the tutor receives in payment of the minors' claims depreciated bank notes, the debtor will not be allowed, in the absence of proof that the notes or their proceeds actually enured to the benefit of the minors, credit even for the actual value of the notes paid to the tutor. The release of the mortgage is a fraud on the rights of the minors, which none of the parties or privies thereto will be permitted to take advantage of.

Knowledge by an agent of the fraudulent character of a transaction, acquired in the course of his employment, is binding upon his principal.

In an action by a tutor to annul the release of a mortgage in favor of his minors, made in fraud of their rights by a former tutor, the latter is a competent witness for the plaintiff, to prove that no money was received by him in discharge of the debt due to the minors, although its receipt has been acknowledged by him in an authentic act. Per Curiam: The necessity of the case which admits agents as witnesses for their principals, is equally applicable to tutors, when called to establish facts, the knowledge of which rests with them alone.

Actions on behalf of minors for restitution against acts committed in fraud of their rights, are not prescribed by five years.

A PPEAL from the District Court of Concordin, Curry, J. Thomas and O. N. Ogden, for plaintiff. Frost, T. P., & F. H. Farrar, H. A. Bullard, Stacy and Sparrow, for the appelants.

The judgment of the court was pronounced by

Eustis, C. J. This is an action instituted by the tutrix of the two minor children of the late James Kemp, for the restitution of certain hypothecary rights, which had been released by their former tutor, Thomas B. Kemp. James Kemp, who resided in the State of Kentucky, was, with his two sisters, Mrs. Rowly and Mrs. Sprague, the joint owners of the Marengo plantation, situated in the parish of Concordia, and slaves. To effect a partition, the plantation and slaves, after the death of James Kemp, were sold at probate sale, the price payable two-thirds in cash, and one-third, the portion belonging to the minors, in five equal annual instalments, bearing ten per cent interest from date, with special mortgage on the property sold. Rowly, the defendant, husband of one of the proprietors, was the purchaser for \$112,500, and gave his five notes for \$7500 each, with special mortgage in favor of the tutor, Thomas B. Kemp, according to the conditions of the sale. The date of the notes is the 15th of June, 1835. There was an additional personal security, on the three first notes, but they were all payable to the order of the tutor.

It is alleged that, on the 8th October, 1838, the tutor fraudulently, illegally, and without having received payment of the amount, delivered up to Rowly, the purchaser of the plantation and slaves, and the debtor, four of said notes ,and released and cancelled the mortgage given to secure them; that afterwards the tutor resigned his trust, and the plaintiff was appointed tutrix of the minors; that, with the exception of the first note, which was duly paid to the former tutor, and several smaller sums which will be admitted, the amount of the four last notes and interest is still due by the said Rowly, for which they still of right have the first mortgage on said plantation and slaves. It is charged in the petition, that the release of the mortgage and the cancelling of the notes was effected, at the instance of the debtor and tutor, for the purpose of defrauding the minors, without any payment in lawful money, or its equivalent, being made; and that, on the day of the release, the 8th October, 1838, Rowly and his wife mortgaged to Daniel W. Core, residing in Philadelphia, the whole of the Marengo plantation and slaves, for the consideration stated in the act; that the release of the minors' mortgage was to give greater security to said Coxe for the loan made by him to Rowly, the illegality of which Coxe was aware of, the said Coxe well knowing that the release of the mortgage was made for the purpose of enabling Rowly to borrow from him depreciated bank notes and sinking bank stocks, for which said mortgage to Coxe was given. The intendment of the petition is to effect the mortgage of Coxe, by notice of the alleged fraud in the release of the mortgage of the minors by the tutor. The object of the suit is to reinstate the minors in their rights of mortgage adversely to Coxe, and he is accordingly made a party, together with Rowly and Lansing, a third purchaser of the Marengo plantation and slaves, who, so far as this litigation relates, has no interest, being bound to pay only the amount of his bid at sheriff's sale, which will not be affected by any change in the order of mortgages, and no decree being asked against him. There are creditors of the hypothecated property by judicial mortgages, originating after the release of the minors' mortgage, who have also been made parties (the rights of these will be noticed in their proper place), and who are affected by the decree to be rendered. Mrs. Rosely is also

KEMP V. ROWLY. Kens v. Rowly. a party, by reason of a tacit mortgage which exists in her favor on the property of her husband. There was a judgment in favor of the plaintiffs, against the principal debtor, Rowly, for \$30,000, with interest according to the tenor of the notes, subject to a credit of \$1000, to take effect from the 11th March, 1841; and the rights of the minors, as mortgage creditors, with the vendor's privilege on the plantation, slaves, etc., are restored and reintegrated, to take effect against all parties from the date of the original adjudication, made by the Court of Probates of Concordia, on the 15th June, 1835. The defendants have all appealed.

The points of attack and defence have been various. Those which the court consider material and requiring any notice, will be considered as they have been presented in argument.

I. The power of the tutor to grant the discharge of the debtor, and to release the mortgage, except on payment, is denied; and it has been urged that, in the view of the law, the mortgage must be held as still existing in favor of the minors. The tutor is authorized to receive payment, and, whatever may be the relations between him and the debtor, resulting from their private agreements, the receipt and discharge of the debt, by reason of payment given by the debtor, in an authentic act, so far as third persons are concerned, are evidence of the extinguishment of the debt, and the release of the mortgage consequent thereto is valid to all intents and purposes. By our Code, art. 327, the tutor has care of the person of the minor, and represents him in all civil acts. He is bound to administer the estate of his ward as a prudent administrator, and is responsible for damages resulting from a bad administration. These provisions are identical with the two first principles of art. 450 of the Napoléon Code, and Merlin thus gives his opinion on the power of tutors to reise mortgages, given as securities for debts due to minors. After stating, in general terms, that the tutor, on receiving payment, may release a mortgage without recurring to the authority of justice or of a family meeting, inasmuch as no form is required to attend a payment, which he has the power and it is his bounden duty to receive, he adds: "Il le pourrait encore, lors même qu'il ne recevrait pas le montant de la dette, et qu'ainsi l'affranchissement de l'hypothéque accordé par lui, représenterait une espèce de remise, sinon de la dette, du moins des suretés, qui la guarantissaient. Qui peut le plus, peut le moins. Le tuteur peut recevoir les sommes mobilières dues au mineur et les dissiper. La liberation n'en est pas moins acquise au débiteur, la responsibilité du tuteur reste seul engagée. Art. 450 du Code Napoléon. Si la radiation ou la remise de l'hypothéque vient à compremettre le recouvrement de la dette, il en demeurera pareillement responsable, mais la radiation de l'hypothéque n'on opérera pas moins son effet." The tutor having the right to raise the mortgage, it must yield to the rights of subsequent mortgagees. The reason of Judge Simon, in the case of Delavigne, Syndic. v. Gaiennié, 11th Rob. 171, has a direct application to the facts of this case, and were a contrary doctrine established, the purposes of the laws concerning the recording of mortgages would be completely frustrated.

II. It becomes necessary to examine the validity of the release, so far as relates to the parties to the act, and those who, by reason of their privity to it, are affected by notice, and stand in no better situation as to their hypothecary rights, than the parties themselves. The capital of the first note, due in June. 1836, was paid, and when the release was given, the last note was not due. The

Kemp

debt of the minors was well secured, and bore interest at ten per cent. The plantation was in cultivation, and the adequacy of the security has not been questioned. If the interests of the minors were to be consulted, what reason can be offered for changing an investment lawfully made, and so well calculated to subserve their wants and conveniences. No debts required the raising of money, and the conversion of this security, particularly at the time it was made, during the suspension of specie payments by the banks of this State, must have originated from some other views than those which a prudent administrator would have taken, in relation to the interests of those whose persons and property were confided to his charge. The minors did not want the money; the interest alone was more than sufficient for their support; and no reason has been given, approaching to a justification of this act, on behalf of the tutor; and when we look at the facts connected with it, we can find nothing in them which can exonerate him from the responsibility which the law attaches to his administration. The release was granted by the tutor, to enable Rowly, the debtor, to effect a loan from Coxe. The pretended equivalent received by the tutor was \$15,000, in Rail Road money, and \$10,000 in Agricultural Bank stock. The notes and the stock were of banks in Mississippi, which had suspended specie payments. The stock was transferred directly from Coxe to the tutor. and the notes were delivered after the release and mortgage to Coxe were completed, the mortgage bearing the same date and being executed before the same officer, the parish judge of Concordia. The mortgage was given by Rowly and wife, who gave joint and several notes for the amount.

In relation to the stock, the counsel for Rowly do not claim to take advantage of it as a payment, even for its value, but urge that the debt of the minors ought to be credited with that of the Rail Road bank notes, which they allege were worth at the time of the transaction ninety per cent, making \$13,500. Conceding that the \$15,000 of bank notes were really worth that sum, it is not easy to find a sound reason for which the minors should be charged with it. That the tutor was justified, under the circumstances, in receiving for this well secured debt, the sole patrimony of his wards, the depreciated bank notes of another State, is a proposition repugnant to the first and elementary principles of the law of mandate. Mr. Rowly well knew the law, and that, between the tutor and the minors, the receipt of the bank notes by the former had no binding force in law as to the rights of the minors, and that they could only be bound by the soi disant payment, on its being established that its value enured to their benefit. Nor has the allowance of this credit any foundation in the equity which this case presents. When Rowly was sued on this loan by Coxe, he urged in defence that this very bank stock, when received, was worth but \$50 per share, and that the bank notes were not worth more than 60 per cent, and obtained a diminution of the amount due on account of the depreciation of these very notes. 12 Robinson's Reports, 278. The attempt to pay the minors at par, with notes at a discount of ten per cent., and with stock of a bank which had ceased to pay its obligations, can receive no countenance from a court of justice. The law considers the release of the mortgage by the tutor, under such circumstances, as a fraud on the rights of the minors, and we cannot permit any of the parties to take advantage of it. The agent of Core was a party to the act of the mortgage, executed before the same officer and at the same time with the release, and knowledge in him of the whole transaction is proved beyond question, which binds his principal. Mrs. Rosely also stands affected

Kemp S. Rowly. with notice. As to the law concerning notice to agents as binding principals, vide Sugden on Vendors, chap. 17, p. 534 et seq. Story on Agency, § 451.

III. A bill of exceptions was taken to the admission of the former tutor, who was offered as a witness by the plaintiff, to prove the non payment of money in discharge of the minors' debt, and the fact of the receipt of notes and stock by him, as charged in the petition.* We think he was a competent witness, and that the court did not err in receiving his testimony. The necessity of the case which admits agents as witnesses for their principals, is equally applicable to tutors, when called to establish facts, the knowledge of which rests with them alone. It is contended by the counsel for Rowly, that the note due in 1837 is prescribed by lapse of time, and that the minors cannot recover the amount. We think that this action, which is for the restitution of minors against acts committed in fraud of their rights, is not prescribed by the term fixed for the prescription of promissory notes.

It has been contended that the mortgage rights of the minors have been lost, in consequence of the non-inscription of the mortgage within ten years from its date. The mortgage, as we have seen, was dated on the 15th of June, 1835, and was duly recorded, and it was not reinscribed until the 19th of June, 1845, some days after the judgment was rendered in the court below. More than ten years had elapsed since the date of the mortgage; but the grounds on which we base this decision takes the case out of the rules relating to the peremption of mortgages after the lapse of ten years. We have said that the mortgage was in fact released, but hold that the parties and privies to the pacts in which that release originated, cannot take advantage of what we conceive to have been their own wrong, to the detriment of the minors.

The recorder of mortgages was not bound to reinscribe the mortgage after its release by the tutor, and it may be considered as not within the power of the minors to have a reinscription effected until reintegrated in their rights by the decree of a court. We do not think the rules established in the case of Shepherd v. The Orleans Cotton Press, ante p. 100, concerning the peremption of mortgages by reason of the non-renewal of their inscription, applicable to this case.

Having come to the conclusion that the release of the mortgage by the tutor was valid, third persons cannot be prejudiced by the causes which rest exclusively with those who were parties and privies to the transaction, and which we are bound to declare, so far as the minors are concerned, as of no effect and void.

IV. We give precedence to the hypothecary rights of the minors over the Coxe mortgage, which takes rank before the judicial mortgage of the Mechanics' and Traders' Bank, and that of the Union Bank of Mississippi. The former was based on a conventional mortgage, given by Rowly and wife to the bank subsequently to the release, and therefore we hold it to have effect adversely to the mortgage of the minors. The mortgage of the Union Bank also takes precedence of it, and the effect of our decree will be to give the minors the benefit of the Coxe mortgage, to which the minors stand of right substituted to the amount of their debt, to the extent of one-third interest in the plantation

^{*} The testimony of this witness was excepted to on the grounds: 1, that he was interested in having the mortgage reinstated, which would release him from liability to the minors; 2, that he could not be heard to establish the illegality of his acts and his own turpitude; 3, that his parol evidence could not be received against his own written acts

and slaves, as mentioned in the original act of mortgage in favor of the tutors. The effect of the several mortgages on the other two-thirds of the plantation and slaves, will not be touched by this decree. The rights of the minors will also take precedence of the tacit mortgage of Mrs. Rowly.

We allow two credits, not allowed in the judgment of the District Court, one of \$300, the other of \$1000, to date from the 1st August, 1842.

It is therefore ordered that the plaintiff recover from the defendant, Charles N. Rowly, the sum of \$27,700 00 principal, and ten per cent interest from this day on said amount, until paid; and the further sum of \$34,047 43\$, being arrears of interest, and costs of court, with right of mortgage and vendor's privilege on the individual third part of the Marengo plantation, lands, slaves, &c., bought by said Rowly at a probate sale thereof, on the 15th June, 1835, and mortgaged by him to Thomas B. Kemp, as tutor of the minors, James and David B. Kemp, by authentic act, passed on the 17th June, 1835, as mentioned and described in the plaintift's petition and said authentic act. And it is further decreed, that the said mortgage and privilege established by this decree, take precedence of the mortgage in favor of Daniel W. Coxe, and of the tacit mortgage of Mrs. Jane Rowly, so far as relates to the said one-third interest in said plantation and slaves; and to that effect the said mortgage in favor of said Thomas B. Kemp, tutor, is revived and reintegrated adversely to the said hypothecary rights of the said D. W. Coxe and Jane Rowly, and substituted in the place and stead thereof; and, for the amount of said mortgage in favor of said Coxe, the said mortgage in favor of said Thomas B. Kemp, tutor, is declared to take precedence of the mortgage and judgment of the Mechanics' and Traders' Bank and of the Union Bank of Mississippi, and for no more. And it is further ordered that the said one-third interest in said Marengo plantation and slaves be seized and sold to satisfy the plaintiff's debt, interest, and costs; that there be judgment against said Lansing; and that the costs of this appeal be paid jointly by the plaintiff, D. W. Coxe, and the said defendants, Rowly and Lansing.*

- JURE v. FIRST MUNICIPALITY OF NEW ORLEANS.

No appeal will lie from an order dissolving an injunction on the execution of a bond by defendants in compliance with art. 307 of the Code of Practice, where the facts of the case show that the dissolution can work no irreparable injury to the plaintiff.

A PPLICATION for a mandamus to Buchanan, Judge of the Fifth District Court of New Orleans, directing him to allow the plaintiff a suspensive appeal.

Schmidt, for the petitioner.

Roselius, contra. To grant an injunction would defeat the objects of art. 307

^{*} H. A. Bullard and Frost prayed for a re-hearing, on the ground that, though the opinion of the court declares that the release of the mortgage by the first tutor was valid, as to third persons without notice, and that, especially as to the Mechanics' and Traders' Bank, effect ought to be given to their mortgage adversely to that of the minors on one-third of the Marengo estate, yet the decree gives the mortgage of the minors full effect as to that bank.

JURE S.
FIRST .
MUSICIPALITY.

of the Code of Practice. The judgment being interlocutory, and affecting no irreparable injury, no appeal will lie. Code Pract. art. 566.

The judgment of the court was pronounced by

SLIDELL, J. This case comes before us on an application for a mandamus.

The potitioner represents that having leased the meat market of the First Municipality of the city of New Orleans, and being in peaceful possession and punctually paying his rent, the municipality, pretending that the petitioner had no right to the occupancy of two certain stalls in said market, ordered the police officer to destroy or remove the same, to prevent which your petitioner addressed a petition to the Fifth District Court of New Orleans, praying for an injunction to restrain the municipality, which was granted on giving bond. That the defendants having taken a rule upon petitioner to show cause why the injunction should not be set aside, upon furnishing security according to the provisice of the 307th article of the Code of Practice, the judge made the rule absolute, and ordered the injunction to be set aside, upon the execution of a bond, with surety, in the sum of \$1,100. That from the order thus rendered he desired a suspensive appeal, and accordingly presented a petition in due form, and with the offer of such security as the judge might require, which was refused, although the petitioner alleged that the order would work an irreparable injury to him. The petition concludes with a prayer for a mandamus, and is accompanied by an affidavit of the truth of the allegations of the petition.

The provisions of article 307 are as follows: "Whenever the act prohibited by the injunction is not such as may work an irreparable injury to the plaintiff, the court may, in their discretion, dissolve the same; provided the defendant execute his obligation in favor of the plaintiff, with the surety of one good and solvent person, residing within the jurisdiction of the court, for such sum as the court may determine according to the nature of the case, as security that he will deliver the property in dispute in the same state in which it was at the moment of issuing the injunction, and that he will pay besides to the plaintiff all damages he may have sustained by his act, if a definitive judgment be rendered against him in the suit pending."

Now, it will be observed in the present case, that the petitioner, who was lessee for a term of twelve months, had himself estimated the value of the two tables in question at \$3 per diem, making an amount for the term of his lease of \$1,095, so that the bond required to be given is ample in pecuniary amount to cover any loss; and there is no suggestion, nor can we presume in advance, that an insolvent surety will be accepted by the court.

The power given by article 307, is one highly conducive to the administration of justice. We are at a loss to see how an irreparable injury can be sustained in this case by its exercise, and it is obvious then the practical object of this grant of power to the court below would be defeated in this case, if the plaintiff were permitted immediately to suspend its operation by an appeal.

It must also be observed that, if the suspensive appeal had been granted, the isolated question of the dissolution of the injunction would be presented in this court, the case, on its merits, being still untried. Now the Code permits an appeal from an interlocutary order only in cases where the order may work an irreparable injury, an hypothesis which the facts already noticed preclude.

We decide this case upon its own peculiar circumstances. When a case is presented in which the power of an inferior court may be reasonably supposed, upon the showing of the applicant, and an inspection of the record, to have been

unduly exercised, and an equitable case is presented for our interference, it will be time enough to consider whether article 307 absolutely precludes the summary relief of an appeal suspending the interlocutory order to bond. MUNICIPALITY.

Mandamus refused. tend private to the contraction and excluding all excluding anality with applicable

Hobgood v. Brown et al.

to a said a distribution destruction, amplicati

When the property of the property of the property of the party of the

Alle Ambron Cadle cos in burde in sec time the selections who

A sheriff, though made defendant, with the parties by whom a fi. fa. had been taken out, in an action to enjoin the execution, need not be made a party to an appeal taken by the plaintiffs in execution from a judgment dissolving the execution, where the judgment is not attempted to be amended to his prejudice.

Where a f. fa. issued from a District Court is levied on land and slaves, within the jurisdiction of the court of another district, an injunction may be obtained from the latter.

A simulated sale vests no title whatever in the pretended purchaser, and may be disregarded by a judgment creditor in executing a f. fa. It is not subject to the rules governing real contracts which operate injuriously to creditors, and which can only be avoided by a direct

PPEAL from the District Court of East Feliciana, Johnson, J. The de-A fendants, Lockhart and Arrott, appealed from a judgment perpetuating an injunction obtained by the plaintiff against a fi. fa. issued from the District Court of the First Judicial District.

Lawson and Merrick, for the plaintiff. The court a qua correctly overruled the motion of the defendants, objecting to the jurisdiction of the court. See Lawes et al. v. Chinn, 4 Mart. N. S. 388. Barbarin v. Saucier, 5 lb. N. S. 361 and 500. Oger v. Daunoy, 7 lb. N. S. 658. Dunn and Wife v. Vail, 7 Mart. 416. Where a purchaser is in possession under a conveyance, or where the act of sale is in due form and authentic, the question of fraud cannot be inquired into collaterally, in a case commencing with a seizure. The party claiming rights upon the property, must bring a direct revocatory action.

Weeks v. Flower et al. 9 La. 379. Burland v. Carrollton Bank, 14 La. 189.

Muse, on the same side.

Z. S. Lyons, for the appellants. The motion to dismiss is based on an evident clerical error, and cannot prevail. Act of 1839. 3 La. 281. The court was without jurisdiction to arrest an execution issued from another tribunal. C. P. 617. 4 Mart. N. S. 390. 7 Ib. N. S. 656. A simulated sale may be entirely disregarded. Cammack v. Watson, 1 Ann. Rep. 132. Wright v. Cham-

The judgment of the court was pronounced by

King, J. The motion to dismiss this appeal cannot prevail. The appeal was taken in open court. No bond of the appellants in favor of the sheriff was necessary, in order to enable the former to have their case heard as against the plaintiff in the cause. The judgment is not sought to be amended to the pre-

The statement in the motion for the appeal, that it was made by the counse, of the plaintiff, instead of the counsel of the defendants, is evidently a clerical error in transcribing the record.

Lockhart and Arrot held a twelve months' bond, executed by Eckley, Harrell and Nettles, under which they caused a fieri facias to issue from the District Court of the First Judicial District, directed to the sheriff of East Felicians. The sheriff proceeded to execute the writ'on a tract of land and a number of slaves, in the possession of Harrell. Hobgood, the plaintiff in the present action, enjoinep

Honggod 9. Brows. the proceeding, alleging that he was the owner of the property seized, by purchase from Harrell and wife. A motion was made in the court below to dissolve the injunction, on the ground that the judgment of Lockhart and Arret was rendered in the First District Court, and that the District Court of East Feliciana was without authority to arrest its execution. The motion was overruled, and, we think, correctly, under the authority of the case of Lawes et al. v. Chinn. 4 Mart. N. S. 388.

The defendant, Lockhart, alleges in his answer, that the sale from Harrell and wife to Hobgood is simulated and void; that it was made by the parties collusively and fraudulently, for the express purpose of defeating the defendant's claim; and he offered witnesses, on the trial below, to prove these allegations, and, as one of the badges of fraud, that the sale was accompanied by no change of possession. The testimony was rejected, on the ground that the validity of the sale could not be collaterally questioned, and that the party claiming rights upon the property which it conveys, must, before exercising them, cause the act to be annulled in a direct revocatory action. The judge, in our opinion, erred.

A simulated sale wants the essential requisites of a contract. It vests no title whatever in the essentials purchaser, and may be disregarded by the judgment creditor in the execution of his fieri facias. It is not subject to the rules governing real contracts which operate injuriously to creditors, and which can only be avoided by a direct action. When a plaintiff in execution, finds himself opposed by such a pretended and unreal transfer, he must be permitted to prove its falsity. Cummack v. Watson, 1 Ann. Rep. 132. Wright v. Chambliss, 1 Ann. Rep. 262. The court below, in our opinion, erred in perpetuating the injunction.

It is therefore ordered, that the judgment of the District Court be reversed. It is further decreed, that this cause be remanded for a new trial, with instructions to the district judge to receive testimony to show that the sale from Harrell and wife to Hobgood was simulated, and that the sale was not accompanied by a change of possession; the appellee paying the costs of the appeal.

Cook v. BANK OF LOUISIANA.

A principal who avails himself of a purchase made by an agent by selling the property, will be bound to comply with stipulations made by the agent with the owner at the time of the purchase.

A PPEAL from the District Court of West Feliciana, Johnson, J. Patterson, for the appellant. Bowman, for the defendants. The judgment of the court was pronounced by

Rost, J. The plaintiff mortgaged four tracts of land to the defendants to secure a loan of \$3,600, which was subsequently reduced to \$3,000. He afterwards sold two of those tracts to Barrett, who assumed the payment of the balance due the defendants. Barrett died without paying this sum, and, at the probate sale of his succession, the defendants purchased the two tracts of land, for \$2,400. The price was paid by the plaintiff, and the defendants obtained a clear title. They subsequently sold that land for \$4,000, part cash, and the remainder in notes bearing nine per cent interest. After this sale, the defendants sued out an order of seizure against the plaintiff for the sum of \$3,000 and in-

terest, and caused the two other tracts of land mortgaged to be seized. The plaintiff enjoined the sale on the following grounds: 1st. That he was entitled to BASK OF LOUa credit of \$2,400, paid by him, for the defendants, to the succession of Barrett. 2d. That he suffered the bank to purchase the property for that sum, and paid the price, on the express agreement between him and their cashier, that whenever the land was sold by them, the profits of the re-sale were to be applied to the payment of his debt. 3d. That the land has since been sold for an amount more than sufficient to discharge his indebtedness, and that he has a just claim in reconvention for the difference. The defendants allowed the credit of \$2,400; and the court below having given judgment in their favor for the balance and interest, the plaintiff appealed.

The person who was cashier of the defendants at the time of the purchase has been interrogated, on oath, by the plaintiff, in relation to the agreement alleged by him, and has answered as follows:

1st. I did agree with Mr. Cook to purchase in the land, to prevent its being sacrificed, and to give him an opportunity to dispose of it again, on better terms, if possible, the proceeds then to be applied to the payment of his bond; and it was understood that Mr. Cook was to pay the whole amount of this bond, whether this land produced the amount it was bid in at, or less.

2d. I do not recollect whether there was a resolution of the board authorizing me to act in this matter, or not; but I had the verbal authority of such of the directors as I could see at the time, to attend at the sale, and act as I thought most advisable. If I had no authority to purchase, could the bank sell the property so purchased?

The defendants having since sold the land cannot be permitted to evade the stipulation on which it was acquired, unless they show that those stipulations have been expressly renounced by the plaintiff. The present cashier says, that, after the first seizure, the plaintiff came to him, and insisted upon his taking the land and giving him a credit for \$2,400; that he remonstrated with the plaintiff as to the bank's giving that credit, and urged him to keep the land, and pay the bank a reasonable amount on the bond; but that he finally consented to allow it, and to give the plaintiff further time to pay the balance; that the delay given having expired, a second order of seizure was issued, on which, through error, that credit was not allowed.

We do not understand what this witness means. He seems to think that the legal effects of the purchase by the defendants, depended upon its being entered on their books, in the order of its date. The land belonged to the bank from the day of the adjudications The mortgage upon it was extinguished by confusion, and the price paid by the plaintiff was compensated against an equal amount of his bond by operation of law, the defendants being entitled to the fruits of the land, instead of interest on the price.

The testimony of Sims, who purchased from the defendants, shows that the plaintiff considered his original agreement as still binding upon them, after the stay of execution. He had a clear legal right to require a credit of \$2,400, after the purchase by the bank, and his doing so cannot be construed into a renunciation of his previous agreement. Hall, the first cashier, says that the proceeds of the re-sale were to be applied to the payment of the bond, but is silent in relation to the application of the price paid by the plaintiff for the benefit of the defendants. The imputation must, therefore, be made in the manner provided by law.

BANK OF LOU-

The land has since been sold by the bank for a price more than sufficient to pay their claim. But as the whole price is not shown to have been paid, the accounts between the parties cannot, at this time, be finally settled.

It is therefore ordered, that the judgment in this case be reversed, and the injunction perpetuated, with costs in both courts; reserving to both parties their rights on the final settlement of their accounts.

NEW ORLEANS CANAL and BANKING COMPANY v. BARROW.

Where the endorser of a note resided, at the time of protest, about nine miles from the town in which the note was payable, and was in the habit of receiving his letters and papers at the post office in that place, notice of protest deposited in that post-office, on the day of protest, and addressed to him at that place, is sufficient.

A PPEAL from the District Court of West Feliciana, Boyle, J.

Phillips, for the plaintiff, cited Bullard & Curry's Dig. p. 43, no. 14. Follain v. Dupré, 11 Rob. 454. Winter, on the same side. Ivor, Lyons, and Bowman, for the appellant.

The judgment of the court was pronounced by

Rost, J. Barrow was sued as endorser of a promissiory note, payable at Bayou Sara. There was judgment against him, and he appealed. The case turns on the sufficiency of notice of protest. It appears that, at the time of protest, Barrow resided in the parish of West Feliciana; his dwelling house was about nine miles distant from the town of Bayou Sara. The letter notifying him of protest was deposited in the Bayou Sara post office, on the day of protest, addressed to him at Bayou Sara. It is proved that he usually got his newspapers and letters at the Bayou Sara post office.

We consider the evidence of notice sufficient. This subject has been very much discussed, and there is some conflict of authority. But we think it ought to have been put at rest by the opinions of the Supreme Court of the United States, which were elaborately given, in the cases of the Bank of Columbia v. Lawrence, 1'Peters, 583, and the Bank of the United States v. Carneal, 2 Peters, 551. The reasoning in both these cases covers the present; but the former case is more nearly identical in its facts with that now under consideration. There the note was payable and protested at Georgetown, the notice was put into the post office of that place, addressed to the endorser at Georgetown; the endorser lived in the county of Alexandria, on a farm about two or three miles from Georgetown, and that was the nearest post office to his place of residence, and the one at which he usually received his letters.

Judgment affirmed.

DAVIS v. LARGUIER et al.

Country merchants acting as mere forwarding agents for the neighbouring planters, charging no commission for their services, but getting an indirect compensation in the patronage and good will of the planters in the business of their country store, by whom cotton has been shipped to a merchant for sale, are liable only for reasonable prudence in the selection of

the merchant, and for the payment of the proceeds when received; they cannot be made responsible for any loss resulting from the dishonesty of the -person to whom the cotton was shipped, if reputed at the time to be honest and solvent.

A PPEAL from the District Court of East Baton Rouge, Johnson, J. G. S. Laeey, for the plaintiff. Brunot, for the appellants, cited Story on Agency. §84 (notes), 87, 89, 90, 96, 97, 106, 110, 111. Civil Code, arts, 2969, 2975, 2977, 2987. 6 Mart. N. S. 259. 8 Ib. N. S. 115—464. 8 La. 536, 11 La. 286. 4 Robinson, 109.

The judgment of the court was pronounced by

SLIDELL, J. It appears that Larguier & Son were merchants or country storekeepers, at Baton Rouge, and that the plaintiff, a planter, placed fifteen bales of cotton in their hands. This cotton Larguier & Son, shipped, under bills of lading in their own name, to one Laudumiez, a merchant in good repute at New Orleans. Laudumiez sold this cotton, and suddenly, and to the surprise of his mercantile friends at New Orleans, among whom he had been up to that time considered a solvent and upright man, absconded, and never accounted to the defendants for the proceeds. It appears also, that Laudumiez and Larguier & Son had been in like business relations for some time previously, and this was the first occasion on which any want of punctuality or dishonesty had been shewn. The plaintiff seeks to make Larguier & Son liable for the value of the cotton.

The allegations of the plaintiff's petition, which was not filed until four years after Laudumiez absconded, are very vague and general. After stating that the defendants are commercial partners, doing business at Baton Rouge, he charges that they are indebted to him in the sum of \$480, "for this, to wit: that the said Larguier & Son, in the latter part of 1839, or the beginning of 1840, received from your petitioner fifteen bales of cotton, the average weight of which was about four hundred pounds per bale, that the same has been disposed of by the said Larguier & Son, for and on their account, whereby they have become liable to your petitioner for the value of the same," as per account annexed. The account debits the defendants "with the proceeds of 15 bales cotton delivered to you, and for the amount of which you are responsible, weight averaging, &c., \$480."

To these loose averments the defendants answered in substance, that they received the cotton as agents, to effect a sale in New Orleans; that they consigned it to *Laudumiez*, a merchant at that place in good credit at that time, who soon after absconded, and never accounted for the proceeds.

The evidence offered by the plaintiff has failed to satisfy our minds of the liability of the defendants. Two or three witnesses have been examined by the plaintiff, who seem to have had a like interest to make the defendants liable; their testimony in itself is not very coherent, and they do not depose as to the relations of this plaintiff with the defendants, but their own. The only witness who pretends to state the relations of the parties before us, gives an account of the matter which is not such, in our opinion, as to fix a clear liability on the defendants. He states that his own cotton and the plaintiff's, were delivered to the defendants at the same time. On his direct examination the only explanation he gives, tending to exhibit the nature of the business is, that, the defendants were merchants, plaintiff's cotton was delivered to them on account of plaintiff, and left with defendants to be accounted for. On his cross examination he states, that he left his own cotton with them, "to be done with as they

and the

DAVIS V. Languinn.

thought proper, and looked to them for the proceeds. That they were in the habit of selling witness's cotton, and accounting to him for the proceeds. That Davis's cotton was to be sold in the same manner with his. That he was in the habit of taking his cotton to Mr. Larguier, who he believes was in the habit of sending it to New Orleans for sale; and that after witness delivered his cotton to defendants, he looked to them alone for the proceeds." Neither this witness, nor any of the others, say that the defendants ever charged any commission for their services, nor does it appear that the defendants divided commissions with the New Orleans consignee. It also appears that the planters did not expect, in former transactions, to receive any thing from the defendants till their cotton was sold in New Orleans, and would call from time to time to make enquiries, and when the proceeds came to the defendants, they were paid over. It is obvious that the intention of all the parties must have been, not that the cotton should be disposed of in the village, but that it should be shipped for sale to the great mart at New Orleans. That the defendants should have made themselves the guarantors of sales and safe returns, not only without a del credere commission, but without any commission at all, is a proposition too strange to be adopted upon the loose evidence submitted to us.

There is much reason to believe, from a consideration of the whole case, that the defendants were mere forwarding and intermediary agents, transacting this business for the neighbouring planters, without commission, for their accommodation, and getting an indirect return in the patronage and good will of the planters, in the business of their country store; that, as such agents, they were liable for reasonable prudence in the selection of the New Orleans merchant, and for the payment of proceeds when received; that in the present case they have acted with good faith, and, under the evidence presented, ought not to suffer for Laudumiez's dishonesty.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment for the defendants, with costs in both courts.

Lagrandik mester netad 27

PERKINS v. GRANT et al.

Without the express authority of his client, an attorney at law can receive nothing but money in satisfaction of a judgment belonging to the former.

A PPEAL from the District Court of West Feliciana, Boyle, J.

Rattiff and Cowgill, for the appellant. Ivor, for the defendants, cited 3.

Robinson, 278. The judgment of the court was pronounced by

King, J. Grant and Barton, two of the defendants in this action, obtained a judgment against Row and others, and, in virtue of an execution issued under it, a twelve months' bond was taken, which was seized by the present plaintiff. At the maturity of the bond, the property originally sold was seized, and adjudicated, for \$125, to Dalton, the attorney of the present defendants, who were the plaintiffs in execution, under the agreement that Dalton should convey the land to one Fisher, that the latter should assume the payment of the judgment, and that the parties to the bond should be discharged. Dalton subsequently died. After the lapse of about a year, an alias fi. fa. was issued on the bond,

against the present plaintiff, who enjoined the writ, alleging that the judgment had been extinguished by the agreement of *Dalton*, which it is contended the present defendants acquiesced in and ratified, by their silence and inaction for more than twelve months. It is further urged that the defendants are bound in good faith, to place the plaintiff in his original position in regard to the land. The injunction was dissolved in the court below, with damages, and the plaintiff has appealed.

The defendants disavow the act of Dalton, and it has not been shown that the latter was authorized to enter into the agreement to receive the land, or to take the responsibility of Fisher in satisfaction of the judgment, nor that they ever, in any manner, assented to it. It does not appear that they were aware of the agreement, nor is any other circumstance shown from which a ratification of the attorney's act can be inferred. Without such authority, or a subsequent ratification, it is clear that the defendants are not bound by his act. An attorney can receive nothing but money in satisfaction of his client's judgment, without the express assent of the latter. If the plaintiff has a remedy, it is not against the defendants in this suit, but against other parties.

Judgment affirmed.

PERKINS O. GRANT.

PIERCE et al. v. PIERCE et al.

Courts of Probate as they existed before the reorganization of the judiciary under the constitution of 1845, had jurisdiction of actions for the partition of the property of successions, and power to determine questions of title to real estate arising in such actions, either directly or indirectly. C. P. 1022. C, C. 1250, 1304. Stat. 27 March, 1843, s. 3.

A PPEAL from the Court of Probates of Washington, Richardson, J. A. Hennen, for the appellants. No counsel appeared for the defendants. The judgment of the court was pronounced by

King, J. The plaintiffs instituted this action in the Probate Court praying for a partition of their ancestor's succession, and that their co-heirs should be decreed to collate certain property which they had received. The defendants excepted to the jurisdiction of the court, alleging that the suit was not for a partition, but an action in revendication. The exception was sustained in the court below, and from the judgment dismissing the action, the plaintiffs have appealed.

The judge, in our opinion, erred. The Court of Probates, as it lately existed, had jurisdiction of partitions of succession property, and whenever, in suits for partition, the title to real estate was brought in question, either directly or collaterally, authority was conferred on these courts by statute, to decide upon such questions of title. Code of Practice, art. 1022. Civil Code, arts. 1250, 1304. Acts of 27th March, 1843, p. 45, § 3.

It is therefore decreed that the judgment of the court below be reversed, and that the cause be remanded to be proceeded with according to law.

CROWLEY et al. v. COPLEY.

The laws requiring levées to be made on lands lying on the Mississippi river, are not laws imposing a tax within the meaning of the third section of the act of Congress of 90 February, 1811, exempting lands sold by Congress from any tax imposed under the authority of the State government, for five years from the date of the sale.

CROWLEY O. COPLEY. The 6th section of the statute of 16 February, 1842, authorizing parish judges to discharge the duties of district judges in certain cases, declaring that its provisions shall not apply to districts in which the circuit system exists, and the statute of 26 March of the same year having established that system from the 1 January, 1843, in the district embracing the parish of Concordia, an order of seizure and sale issued since that date by the parish judge of that parish, acting instead of the district judge, is a mere nullity.

A PPEAL from the District Court of Concordia, Curry, J. Rowley, Frost and Sanders, for the appellants. Shannon and Dunlap, for the defendant. The judgment of the court was pronounced by

Rost, J. The making of a levée on the defendant's land was adjudicated to the plaintiffs, under the act of 1842. The inspector of the district testifies that the levée was made in conformity with the conditions of the adjudication, and that he accepted it; that it was 165½ rods in length; and that the plaintiffs were to receive \$2 62½ per rod, making the total sum of \$434 43½. The defendant baving failed to pay this sum the plaintiffs proceeded in rem against the land, and obtained an order of seizure, under which it was ultimately sold and adjudicated to the plaintiffs. These parties then applied for a monition, and the defendant appeared on that application and made opposition to the sale on many grounds, two of which only deserve to be noticed.

1st. He calls the regulation by which owners of land on the banks of the Mississippi are compelled to make and keep up levées a law imposing a tax, and maintains that this land, having been purchased by him from the United States, within the five years that preceded the making of the levée, neither the police jury, nor the legislature, had power to impose that tax upon the land.

2d. It is proved that, in the absence of the district judge, the judge of the parish in which the land is situated granted the order of seizure, under the provisions of an act approved Feb. 16, 1842. The defendant contends that so far as that parish was concerned, that power was taken away from the parish judge after the 1st day of January, 1843, by an act of the 26th March, passed during the same session of the Legislature (1842).

The first ground is untenable. The laws requiring levées to be made along the Mississippi river, are not laws imposing taxes within the intent and meaning of the act of Congress relied on by the defendant.

The second ground, we consider, well taken. After the 1st January, 1843, the parish judge of the parish of Concordia had no authority to represent the district judge in any case, and the order of seizure, under which the land in controversy was sold, was an absolute nullity.

The court below gave judgment in favor of the defendant, and the only modification required is, to reserve the rights of the plaintiffs for the sum due them for making the levée in front of the land.

It is therefore ordered that the judgment be so amended as to reserve the right of the plaintiffs to recover from the defendant, or against the land in controversy, the sum of \$434 43\frac{3}{4}\$, with interest from the judicial demand, and privilege upon said land; and that the judgment as amended be affirmed, with costs.

all the state of t

HEPBURN et al. v. RATLIFF et al.

Where, in an action by the holder of a promissory note endorsed in blank, plaintiff alleges that, by a second endorsement in blank, made by certain persons as commissioners of a bank, the note was transferred to him, the allegation is unnecessary; and, in the absence of any pretence of an equitable defence against the bank, or of plaintiff's having come unfairly by the note, he will not be required to prove the authority of the commissioners. Notice of protest addressed to the endorser of a note at the post office at which he was in the habit of receiving his letters and papers, mentioning the State in which it is situated, is sufficient, though the name of the parish be not mentioned.

A PPEAL from the District Court of West Feliciana, Boyle, J.

A Bowman and Bonford, for the appellants. Possession of a promissory note endorsed in blank by the payee, is prima facie evidence of title. The note is payable to bearer, and no subsequent endorser can restrain its negotiability. It was unnecessary for the plaintiffs to prove the transfer from the bank commissioners, though, ex abundanti cautelâ, this was done. See Kent's Commentaries, 3d vol. pp. 89, 90 and 114. Story on Promissory Notes, § 343. Burnes v. Haynes, 13 La. p. 12. Fitzwilliams v. Willcox, 2 Robinson, p. 303. As to the want of notice, the notary's certificate shows that the notice to Barrow was directed to St. Francisville, La.; and the assistant postmaster at that place testifies that, at the time the notice was sent, Barrow was in the habit of receiving his letters at that office. It was urged successfully in the court below, by Barrow, that the notice was not directed to the parish of his domicil, but simply to St. Francisville, La. This technical objection, which rests on no reasonable interpretation of the law of notice, was answered by the court in the case of Nott's Executors v. Beard, 16 La. 308.

Ratliff and Cowgill, for the defendant, Barrow. The notice should have been addressed to the endorser Barrow, at his domicil or usual place of residence. Stat. 13 March, 1827, § 2. It was addressed to him at St. Francisville, and his residence is proved to have been twelve miles from that place. There was, moreover, no proof of the authority of the commissioners of the

bank, by whom the note is alleged to have been endorsed to plaintiffs.

The judgment of the court was pronounced by

SLIDELL, J. This suit was brought upon a promissory note, drawn at St. Francisville, by Ratliff, to the order of, and endorsed by, Barrow. Barrow's endorsement is in blank; the note also has the endorsement in blank of Harrod & Willard, styling themselves commissioners. The plaintiffs in declaring on the note, aver, that Barrow endorsed it to the Atchafalaya Bank, who transferred it to the plaintiffs.

At the trial, the endorsement of Barrow being proved, the plaintiffs proved the handwriting of Willard & Harrod, but it was not proved that they were duly authorized commissioners of the Atchafalaya Bank; and it is now contended, that having alleged the ownership of, and transfer by, the Atchafalaya Bank, the plaintiffs were bound to prove it, and that, not having done so, judgment was properly rendered for the defendant, Barrow.

As the indorsement of Barrow was in blank, the averment of title derived from the Atchafalaya Bank was an unnecessary averment; and in a court proceeding according to the rules of practice at common law, the plaintiffs might have had leave to amend their declaration, and then have struck out the blank endorsements of Harrod & Willard. It is not pretended that there was any equitable defence that could have been set up against the bank, nor that the plaintiffs have come unfairly into possession of the note, and the question is

HEPAURE.

whether, upon a bare technicality of this sort, we will put the plaintiffs to the expence of remanding this cause for the purpose of the formality of amending their petition, and striking out the endorsements of Harrod & Willard. We do not think the ends of justice require that we should thus turn the plaintiffs back. See the case of Emerson v. Cults, 12 Mass. 79. Disregarding this objection, we proceed to the remaining point in this cause, which is, whether Barrow had due notice of protest.

The note was protested in New Orleans, where it was made payable, and on the day of protest the notary put the notice for Barrow in the post office at New Orleans, addressed to him at St. Francisville, La. It is proved that Barrow resided about twelve miles from the St. Francisville post office, that he had a box in that office, and was in the habit of receiving his letters and papers at that office. It is also fairly inferrible from the record and evidence, that Barrow resided in the parish of West Feliciana. The proof of notice is ample. See Bank of the United States v. Carneal, 2 Peters, 543. Story on Promissory Notes, § 343.

It is therefore decreed that the judgment appealed from be reversed, and the plaintiffs recover of the defendant, William K. Barrow, the sum of \$500, with interest from the 23d day of January, I843, and costs in both courts.

McCalop v. Newcomb et al.

Acknowledgment of the debt by the maker of a note, does not interrupt prescription as to the endorser. The maker and endorser are not debtors in solido.

PPEAL from the District Court of East Baton Rouge, Burk, J.

A Brunot, for the appellant, contended that the maker and endorser of a note are bound in solido, citing Duranton, vol. 6, nos. 207, 213, 241, 242, 243, 187, 188, 189, 190. Civil Code, arts. 2086 to 2089, 2103, 2102. Code of 1808, p. 282. Toullier, vol. 6, p. 751. Poth. on Obl. (Evans' Ed.) vol. 1, pp. 172, 174, 180. 4 La. p. 151. 9 Rob. 26. Code Napoléon, arts. 1200, 1201. Pandectes Françaises, vol. 5, pp. 104, 105. The acknowledgement of the obligation by one of the parties in solido, interrupted prescription as to his codebtors. Civil Code, arts. 2486, 3517. 7 La. p. 181. 6 Rob. p. 256. 6 Duranton, p. 303.

The judgment of the conrt was pronounced by

King, J. The defendants, Newcomb and Carl, are sued as the maker and endorser of a promissory note. Carl, the endorser, pleaded the prescription of five years. His defence prevailed in the court below, and the plaintiff has appealed.

The note sued on matured, and was protested, on the 5th of January, 1841. The defendant, Carl, was cited in this action on the 21st of Febuary, 1846, more than five years after the maturity of the note. Newcomb, the maker, acknowledged his liability on the note repeatedly, before the expiration of the five years, and the plaintiff contends that this recognition of the debt interrupted prescription as to the endorser, the parties to the note being debtors in solido, from the date of the protest. The question now presented, was elaborately examined in the case of Jacobs v. Williams, in which it was held, and we think correctly, that prescription was not interrupted as to the endorser by the acknowledgment of the maker. 12 Rob. 183, and authorities there cited.

Judgment affirmed.

DAIGRE v. DAIGRE et al.

Conduct notoriously bad will authorize the removal of a mother from the tutorship of her children; and the neglect and refusal of the under tutor to take any measures for her removal, is a sufficient cause for his removal.

A PPEAL from the Court of Probates of East Baton Rouge, Tessier, J. G. S. Lacey, for the plaintiff. Herron, for the appellants. The judgment of the court was pronounced by

Eustis, C. J. The judgment appealed from removed the defendant, Céleste Daigre, from the tutorship of her minor children, on account of notorious bad conduct. The evidence fully authorized the judgment, and is of such a character as imposed on the relatives of the minors the duty of removing them from the pernicious example of their mother, and from the home which her conduct has made the scene of scandal and profligacy.

The petition charges that the under tutor ought to be removed, for having neglected his duty in not instituting judicial proceedings for the protection of the minors, and refusing to take any steps in their interest against the mother, though fully apprized of her conduct. The under tutor was also removed by the District Court, and both parties have appealed.

On the appeal, as well as in the court below, the under tutor has united with the tutrix in defeating the humane and laudable efforts of the plaintiff, who is a relative of the minors, and who appears under an appointment of the court, to save them from the fatal influence of their mother's example. This is the mode which he adopts to promote their interests. There is neither reason nor good faith in such conduct.

The judgment is therefore affirmed, with costs in both courts, to be paid by the defendants personally.

MENARD v. WINTHROP et al.

Where the certificate of a notary, offered to prove notice of protest to the endorsers of a note, written at the foot of a notice of protest dated 26th of June, 1841, the day of the maturity of the note, states that "a copy of the above notice was, on the 26th inst., put in the post office," &c., directed to the endorsers, it is not sufficient. The omission to state in the certificate the month and year, cannot be cured by any inference from the date of the notice.

A PPEAL from the District Court of East Baton Rouge, Burk, J. The plaintiff appealed from a judgment of nonsuit, in an action against the endorsers of a promissory note. Plaintiffs offered as evidence of notice of protest, a notarial certificate, in the following words:

"Baton Rouge, June 26th, 1841. Messrs. F. D. Conrad, A. Winthrop & Adams. Please to take notice that a promissory note, drawn by Manuel Moreno, for \$300, dated 24th December, 1840, and due this day, has been duly protested for non-payment, and the holder looks to you for payment, as endorsers thereof.

Your obedient servant. Wm. H. Wikoff, Not. Pub.

MENARD 9. WINTHROP. "I certify that a copy of the above notice was, on the 26th inst., put in the post office at this place, directed to F. D. Conrad, Esq., East Baton Rouge; and also copies were served in person, on the same day, on Messrs. A. Winthrop and Amos Adams.

WM. H. Wikoff, Not. Pub.

ENOS HEBERT,

J. LARGUIER.

"I certify the foregoing to be a true copy of the original, on record in my office. Witness my hand and seal of office, this 13th day of October, 1846.

WM. H. WIKOFF, Not. Pub."

G. S. Lacey, for the appellant. No counsel appeared for the defendants. The judgment of the court was pronounced by

SLIDELL, J. Winthrop, Conrad & Adams, are sued as endorsers on a promissory note. There was judgment of non-suit as to the endorsers, and the plaintiff has appealed.

We are of opinion that notice of protest has not been sufficiently proved. The plaintiff offered in evidence a certified copy of the notarial certificate of protest, in which the notary certifies that, on the 26th inst., he put the notice for Conrad into the post office, and served the notices upon Adams & Winthrop, personally. This certificate coutains no date of month or year, and it is impossible for us to say to what month and year the expression 26th inst. is referable, unless we deduce it, by conjecture, from the circumstance that the copy of notice contained in the certificate bears date, June 26, 1841. But this is too loose to justify a judgment against the endorsers. The notice might have been dated in June, and yet not have been mailed or served in that month.

Judgment affirmed.

FERRIDAY et al. v. PURNELL, Administratrix.

Though a joint and several note, signed by several parties, was executed exclusively for the benefit of one, neither of them can be regarded as sureties in relation to the payee (C. C. 2086, 2089); but, as between themselves, the other makers are sureties of the one for whose benefit the note was made, and where one of the former has paid the debt, he has his remedy against his co-sureties, in proportion to the share of each. C. C. 3027. The makers not standing in the relation of sureties to the payee, payment before suit did not forfeit the recourse of the party by whom the payment was made, against his co-sureties.

Where a joint and several note is signed by an individual, and by a commercial firm in their partnership name, they being in fact the sureties of another maker for whose benefit the note was executed, the partnership must be considered only as a single party to the note, and between themselves and their co-surety, they are liable for only one-half of its amount.

A PPEAL from the District Court of Concordia, Farrar, J.

Poindexter, for the plaintiffs, cited Civ. Code, arts 2086, 2099, 2100, 2103, 2157. Frost, for the appellant. The judgment of the court was pronounced by King, J. J. C. Jones, Thos. D. Purnell, and the firm of Ferriday, Ringgold & Co., executed a joint and several note, payable to the Mechanics' & Traders' Bank of New Orleans. The note was made for the benefit of Jones, who subsequently became insolvent. It was paid by the plaintiffs, Ferriday, Ringgold & Co., without suit, and they claim, in this action, from the succession of their co-obliger, Purnell, one-half of its amount. The defences opposed

FERRIDAY

PURNELL.

by the defendant are: 1st, that the plaintiffs paid the note voluntarily, without suit, and have no recourse against their co-obliger, who, it is contended, was a co-surety; and 2ndly, that if the defendant be liable at all, it is only for a rateable portion of the debt, which is one-fourth, the firm of the plaintiffs being composed of three persons. A judgment was rendered in the court below, in favor of the plaintiffs, for one-half of the amount of the note, and the defendant has appealed.

I. The obligation was in solido, and the bank could have exacted payment from any one of the obligers. As regarded the bank, none of the parties to the note stood in the relation of sureties. The present plaintiffs could have opposed to the former neither the plea of discussion nor division, and were not required to suffer suit before discharging the debt, in order to avail themselves of their remedy against the obligers. But it is admitted that the note was made exclusively for the benefit of Jones, and that, as between the makers, the parties to this suit were the sureties of Jones. Their obligations, then, amongst themselves, must be governed by the principles which regulate suretyship, and by those the surety who has satisfied the debt has his remedy against his co-sureties, in proportion to the share of each. Civ. Code, arts. 2086, 2089. 3027.

II. The plaintiffs were a commercial firm, and executed the note in the partnership name; consequently, it became a partnership liability. The partnership stood as one party to the note, and, as between themselves and their cosurety, they were liable for only one-half of the debt.

Judgment affirmed.

COPLEY v. SANFORD, Executor.

- The court will judicially notice the fact that, the common iaw is the basis of the jurisprudence of the State of Mississippi.
- The court will not require the provisions of the common law on any subject to be proved as facts by the testimony of witnesses, but will ascertain for itself what that law is, by the examination of commentaries on it.
- The vendor's privilege on moveables recognized by the Civil Code of this State, is unknown to the common law.
- In the distribution of the assets of a succession among its-creditors, one who has absolutely sold and delivered a moveable, is, by the common law, a mere ordinary creditor for the price. Where a vendor of moveables sold and delivered in another State, would have no privilege
- under its laws, he can have none in this State. Where property sold in another State, by whose laws the vendor was entitled to a privilege, has been removed to this, by the laws of which it is considered an immovable, to

preserve the privilege, the act of sale must be recorded in the mortgage office. C. C. 3238.

- PPEAL from the Court of Probates of Madison, Downes, J. This appeal is taken from a judgment rejecting an opposition to a tableau of distribution presented by the executor of Mary Chaille, by which one Watson was allowed a privilege as vendor upon the proceeds of the sale of slaves, originally sold by him to the deceased, in Mississippi.
- Shannon and Dunlap, for the appellant. Watson's act of sale not having been recorded in this State, he can have no privilege. Civ. Code, arts. 3238, 3239 3240, 3326, 3332, 3335. 12 Mart. 543. 1 lb. N. S. 384, 296, 222.

 Snyder, for the appellee Watson. Watson was entitled to a privilege. C. C.
- art. 3194. It may be objected, that the sale took place in the State of Missis-

COPLEY 9. STANFORD. sippi, and that the laws of Mississippi were not introduced, to show that Watson was entitled to his privilege in that State. In the absence of proof to the contrary, the court will presume that the laws of a foreign country are the same as our own, in the construction of contracts. The laws of Louisiana must govern this case; and under those laws the vendor, until his claim is prescribed, has a privilege upon the object sold, in the hands of the vendee or his heirs, and can enforce the same, unless it impair the rights of mortgages fairly acquired.

Amonett, on the same side.

The judgment of the court wes pronounced by

SLIDELL, J. Watson having been placed on the tableau of distribution of the succession of Chaille as a privileged creditor, by reason of his having been the vendor of certain slaves and articles of furniture, Copley opposed the allowance of this privilege. The opposition was rejected, and Copley appealed. The slaves and moveables were sold, and delivered by Watson to the deceased, in Mississippi. It is proved that in Mississippi slaves are considered as movembles. It is a matter pertaining to the history of this Union, and of which the court is bound to take judicial notice, that the common law is the basis of the jurisprudence of the State of Mississippi.

Such also are the relations of this State with the other States of this Union, and such are the daily necessities of the administration of justice, that it would be wrong for us, at this day, to say that this court will not take judicial notice of what the common law is, and that, instead of searching for it ourselves in the commentaries of such authors as Blackstone and Kent, whose works are daily quoted in this tribunal, and the perusal of which the court has made a pre-requisite of admission to the bar, we will only notice it when proved as a fact by the testimony of witnesses.

Taking judicial notice of the common law, and that it forms the basis of the jurisprudence of Mississippi, it is our duty to know that the vendor's privilege upon moveables, as recognized in our Code, is unknown in that system, and that at common law he who absolutely sells and delivers a moveable is, in the distribution of the assets of a succession among creditors, a mere ordinary creditor for its price. See Wiston v. Stodder, 8 Martin, 135. Unless the common law has been modified by statute in Mississippi, which has not been proved nor even suggested, Watson would have had no privilege as vendor in Mississippi, and as such can have none here.

We must also remark as to the slaves, that, even if the vendor's privilege existed in Mississippi, it could not have been preserved against Louisiana creditors in this State, without being recorded according to our law. Upon their arrival and the domiciliation of their owner here, our laws operated upon them; they became immovables; and the vendor, to preserve his privilege upon an immovable, must record it. Civil Code, art. 3238.

It is therefore decreed that the judgment of the court below be reversed, so far as it accords to *Watson* the vendor's privilege; that the said *Watson* be ranked as an ordinary creditor; and that this cause be remanded for further proceedings, according to law; the costs of the said opposition and of this appeal to be borne by the succession.

Woods v. KIRKLAND.

An injunction obtained by the plaintiff, in an action for a trespass on land, will not be perpet uated on the testimony of a witness that defendant had said that he would trespass on plaintiff's land, where no actual trespass is established.

A PPEAL from the District Court of West Baton Rouge, Burk, J.

Elam, for the appellant, contended that the injunction granted in this case should be perpetuated. Herran, for the defendant, cited Code of Pract. art. 298. The judgment of the court was pronounced by

Kane, J. The plaintiff seeks in this action to recover damages for trespasses alleged to have been committed on his land by the defendant, and he accompanied his suit by an injunction, inhibiting the defendant from further invasions of his property. The general issue was pleaded in defence. The court below considered that the plaintiff had failed in his proofs, and rendered a judgment of non-suit, from which this appeal has been taken.

The alleged trespasses were not proved on the trial; but one of the witnesses stated, that the defendant said he would cut wood on the plaintiff's land. It is contended that, in view of this menace, the injunction should have been perpetuated, although no actual trespass was committed.

We consider the testimony too vague and inconclusive, to authorize the perpetuation of the injunction.

Judgment affirmed.

WEBB, Administrator, v. KEMP.

Where the amount in contest, in a rule taken on a sheriff, to show cause why he should not be made liable for the balance due on a f. fa., of which no return was made, is less than three hundred dollars, no appeal will lie; and where, in such a case, an appeal has been taken, it will be disregarded by the court, though no objection on the ground of want of jurisdiction be made by either party.

A PPEAL from the District Court of St. Helena, Jones, J. Merrick, for the appellant. Baylies and Lawson, for the defendant. The judgment of the court was pronounced by

King, J. The sum in controversy in this cause is below the jurisdiction of this court, and the appeal must be dismissed. A rule was taken on the sheriff to show cause why he should not be held liable for the amount of a fieri facias which went into his hands, directing him to make \$410, with interest, of which no due return was made. Before the rule was taken, the sheriff had paid to the plaintiff \$400, on account, for which the latter had given his receipt on the writ; and the controversy between the parties relates to the balance due on the writ, which is much less than \$300. The claim is evidently fictitious, and cannot confer jurisdiction on this court. We have already had occasion to say, that we would decline considering causes not within the jurisdiction of the court, although the parties themselves should not make the objection.

Appeal dismissed.

FLUKER v. BULLARD:

A sale under a f. fa. of a promissory note, never in the actual possession of the sheriff, confers no title on the purchaser. To make a valid seizure of tangible property, the thing levied upon must be taken into actual possession by the officer.

There can be no valid pledge of a note payable to order, where the note has not been endorsed by the pledger, nor put into the possession of the pledgee, nor of any third person agreed

on by the parties. C. C. 3128, 3129.

A PPEAL from the District Court of East Feliciana, Johnson, J.

A Z. S. Lyons, for the appellant. Choses in action may be sold under a fl. fa., and no seizure is necessary. 4 Mart. N. S. 416. 5 La. 486. The seizure conferred a privilege. C. P. art. 722. Lawson, for the intervenor, cited Wilson v. Munday, 5 La. 484.

The judgment of the court was pronounced by

King, J. The plaintiff alleges that he is the owner of a promissory notewhich he acquired by purchase from Bailey, who acquired it at a sheriff's sale as the property of Robert Dyer, by whom it was owned at the date of the seizure. He further avers that J. P. Bullard has obtained possession of the note in question, and prays that the latter be decreed to surrender it to him, or to pay its amount. Bullard, in his answer, disclaimed the ownership of the note, and alleged that he held it for Nettles. Nettles intervened in the suit, and alleged that, prior to the sheriff's sale under which Bailey purchased, the note had been given to him in pledge by Dyer, to indemnify him against any loss he might sustain as the endorser of Dyer. He further alleges that the plainttff's title is defective, because the sheriff never had possession of the note seized, and because the note was sold under a writ which had expired before the date of the sale. He prays to be maintained in his possession of the note, until the extent of his liability for Dyer shall have been finally determined, and the purposes of the pledge fulfilled. There was a judgment in favor of the intervenor in the court below, from which the plaintiff has appealed.

It becomes necessary to enquire only into the first of the alleged defects, as that irregularity, in our opinion, vitiated the sheriff's sale to Bailey, and is fatal to the plaintiff's demand. The sheriff states in his return, that when property was demanded of the defendant in execution, the latter gave up the note in controversy, then in the hands of J. P. Bullard. Bullard appears to have continued to be the depositary of the note, notwithstanding the supposed levy; and it is not shown that notice of the seizure was given to him, nor that the sheriff ever had the note in actual possession.

In the case of Simpson v. Allain it was held that, in order to make a valid seizure of tangible property, it is necessary that the sheriff should take the property levied upon into actual possession. 7 Rob. 504. In the case of Gobeau v. The New Orleans & Nashville Rail Road Company, the same doctrine is still more distinctly announced. The court there say: "From all the different provisions of our laws above referred to, can it be controverted that, in order to have them carried into effect, the sheriff must necessarily take the property seized into his possession? This is of the essence of the seizure. It cannot exist without such possession." 6 Rob. 348. It is clear, under these authorities,

that the sheriff effected no seizure of the note in controversy, and consequently his subsequent adjudication of it conferred no title on Bailey. It still remains the property of Dyer, for whom Bullard held it originally for collection.

The title of the intervenor is also defective. He claims to hold in virtue of an act of pledge from Dyer. The note is payable to order; and was not endorsed by the pledger, nor put in the possession of the pledgee, nor of a third person agreed on by the parties. Civil Code, arts. 3128, 3129.

It is therefore ordered that so much of the judgment of the court below as rejects the plaintiff's demand as in case of non suit, be affirmed; and that, in other respects, said judgment be avoided and reversed. It is further decreed, that the intervenor's demand be dismissed, that he pay the costs of his intervention in the court below, and that the plaintiff and intervenor pay each one half the costs of this appeal.

FLUKER. BULLARD.

WOMACK v. WOMACK et al.

One by whom an action had been commenced as tutrix of minor heirs, to recover the value of improvements made by their father on lands of the defendant, may, on subsequently qualify. ing as administratrix of the father's estate, amend her petition, and claim to recover in the capacity of administratrix. Such an amendment does not alter the nature of the demand

The succession of a deceased person is acquired by his heirs from the moment of his death, and with it the right to institute all actions which the deceased could have instituted; and this right of action is not suspended during the delays allowed by law to the heir to decide whether he will accept or renounce the succession. C. C. 934, 939.

Where a Probate Court has jurisdiction of an action for a sum of money against a succession in the hands of an administrator, its jurisdiction cannot be divested by a partition of the succession between the widow and heirs of the deceased, made pending the action. In such a case the administrator may be dismissed, and the widow and heirs be substituted as defendants, and judgment be rendered against them for their respective portions of the debt. The value of useful improvements, made on property occupied by a party under an agreement that he should pay no rent, may be recovered from the owner,

PPEAL from the District Court of St. Helena, Leonard, J. The facts of this case are stated in the opinion of the court infra. There was a motion to dismiss the appeal, on the ground of want of jurisdiction, the amount claimed from each heir being less than \$300.

A. Hennen, for the plaintiff. The plaintiff claimed \$1,200 of the administrator of the estate of Womack, who being dismissed, the heirs, nine in number, were made defendants. From the widow in community, only an heir's -a child's portion, was claimed. Judgment was given for \$88 against each of the defendants, against none of whom were \$300 claimed. The question is, when there is a claim for more than \$300 against several defendants, jointly only, but not in solido, can the defendants appeal, when no one of them has been condemned to pay \$300. We contend that the court has no jurisdiction.

The amount in contest is certainly not \$300, as regards each defendant. Because the Code of Practice has required that each defendant should be made a party, it does not follow that each defendant has the right to appeal.

The case of Ware and wife v. Welsh's Heirs, 10 Mart. 430, supports the judgment of the court, on the merits. There was no usufruct of the land. For improvements made thereon the plaintiff claims remuneration. If the amendment was improperly allowed, the plaintiff, as partner in the community, is entitled to one half of the judgment. No objection was made to the evidence given in to support of this right, and the court can go on to decree in her favour. Bryan and wife v. Moore's Heirs, 11 Mart. 26. Langlini v. Broussard, 12

WOMACK

Mart. 244. When a right is asserted on one ground, and shown on another, judgment will be given according to the justice of the case. Dig. 255.
Newton on the same side.

Baylies, for the appellants. 1. As to the motion to dismiss. The plaintiff and appellee demands of the defendants, the partner in community and the heirs of Abner Womack deceased, the sum of twelve hundred dollars. The judgment below gave the appellee eight hundred dollars, decreeing the partner in community to pay one-ninth of the sum, and the eight heirs the balance, according to their virile portions. The defendants have appealed from this judgment, and a motion is made to dismiss the appeal on the ground, that the judgment against each defendant is for a less sum than \$300, and is not appealable. The suit was originally instituted against the administrator of the succession of Abuer Womack deceased, but he having been discharged from the administra-tion, the partner in community and the heirs accepted the community property purely and unconditionally, and became parties to the suit as defendants. What was the value of the matter in dispute, is the important question? As far as relates to the plaintiff, it is whether she shall recover \$1,200 of the defendants combined, and in what proportion? Whether of the partner in community one half, or one-ninth, as awarded; as relates to the defendants, it is whether they shall be entirely released from a claim exceeding three hundred dollars; and if not, an incidental question arises among themselves, as to what

amount each one shall contribute to the payment of the judgment?

The partner in community certainly had a right to appeal, as she was liable, legally, to pay one-half of the judgment. But it is contended that she must be viewed as an heir, because, in another suit, she had renounced in favor of the heirs all her interest in the community except one-ninth, or, in other words, had taken what is styled a child's portion. This was an arrangement, however. made, not by law, but by her own voluntary renunciation, and does not change her liability to creditors. If it is conceded that the partner in community is entitled to an appeal, can she avail herself of it, without her co-defendants being brought before the appellate court? And if so, can they not also join in the appeal? If the plaintiff had appealed, because the partner in community was decreed to pay, not one-half, but one-ninth, could she be severed from her codefendants, and they left to comply with the judgment of the inferior court, while she might be rendered liable by the appellate court to pay one-half, and the plaintiff be thus enabled to recover more than she originally claimed. It seems, if the plaintiff is entitled to an appeal as to all of the defendants, that they ought also to enjoy the same right. It has been decided that all the parties to the judgment in the inferior court-ought to be made parties to the appeal. 3

Rob. 26, 140, 436. 6 La. 320.

The plaintiff, as tutrix of her minor children, instituted suit against the administrator of the succession of Abner Womack. Her right to do so was denied, whereupon she applied and was appointed administratrix of the succession of Wm. H. Womack, and was allowed to amend her petition by becoming plaintiff in the latter capacity instead of the first. At the time the amendment was allowed, the succession of Abner Womack had been partitioned among the heirs and the partner in community; these had become parties to the suit, were liable to be sued in the District Court, and the administrator had been discharged. A suit and judgment in the name of the tutrix required a different disposition of the amount recovered, from a judgment in the name of the administratrix. The one became the property of the minors, and the other of the creditor of the deceased insolvent. The amendment was improperly allowed. 11 La. 573. 1 Rob. 407. A plea was made to the jurisdiction of the Probate Court and overruled. No law authorized the institution of a suit in the Probate Court against the partner in community, nor against the heirs who had been placed in possession of the succession, as in this case, in which the community property exceeded \$60,000. If liable, the defendants had a right to insist that the

amount of liability should be fixed by a jury.

William H. Womaek occupied a tract of land about 20 years, by permission of his father Abner Womack deceased, and it is admitted that he did so without being liable to pay rent. This possession was that of an usufructuary. C. C. art. 525. At the expiration of that usufruct, the usufructuary has no claim for improvements. C. C. art. 589.

The judgment of the court was pronounced by

WOMACK.

King, J. The plaintiff instituted this action as the tutrix of the minor children of W. H. Womack, deceased, to recover from the administratrix of Abner Womack, the value of improvements made by the father of the minors on a tract of land, which he had been permitted by Abner Womack, his father, to occupy for a number of years. The authority of the plaintiff to maintain the action as tutrix was objected to, whereupon she caused herself to be appointed administratrix of the succession of W. H. Womack, and amended her petition, claiming in that capacity. To the opinion of the court permitting her to make this amendment, the defendants excepted. A judgment was rendered in favor of the plaintiff, from which the defendants appealed.

The judge did not, in our opinion, err, in permitting the plaintiff to amend her pleadings, and prosecute her claim as administratrix. The succession of the deceased was acquired by his heirs from the moment of his death, and with it the right to institute all the actions which the deceased could have instituted. These rights of action are not suspended during the delays allowed by law to the heir, to decide whether he will accept or renounce the succession. Civil Code, arts. 934, 939. Erwin et al. v. Orillion, 6 La. 213. O'Donald v. Lobdell, 2 La. 303. 4 Toullier, nos. 82, 63, 84.

A part of the succession which devolved upon the plaintiff's wards consisted of the improvements in question, and it became her duty, as tutrix, to institute a suit for the recovery of their value, without awaiting the appointment of an administrator. After the plaintiff had been appointed administratrix of the beneficiary succession, it was equally her duty to claim the value of the improvements for the benefit of the entire succession, which she then administered for the creditors as well as the heirs, and for this purpose it was not necessary to institute a separate action. She could well intervene in the suit then pending; and this intervention, in a capacity which authorized her to claim the entire debt, for the benefit of the minors as well as the creditors, did not alter the nature of the demand. If there was any foundation for the objection originally urged to the right of the tutrix to claim more than the portion coming to her wards, it ceased when she became administratrix, and in that capacity was made a plaintiff in the action.

During the pendency of the action, a partition of Abner Womack's succession was made between his widow and heirs. The administrator was thereupon dismissed from the suit, and the widow and heirs substituted as parties defendant. The latter filed a plea to the jurisdiction of the Probate Court, which was overruled, and we think correctly. When the suit was instituted, the succession was under the charge of an administrator, the demand was for a sum of money, and the Probate Court had clearly jurisdiction of the cause, of which it was not divested by the subsequent discharge of the administrator, and partition among the widow and heirs.

Upon the merits, it is shown that Abner Womack put his son W. H. Womack in possession of a tract of land, on which the latter resided for a number of years, and made useful improvements. It was understood that the son should pay no rent. The plaintiff is entitled to the value of those improvements, and the estimate placed on them by the judge below is fully supported by the evidence. Ware and wife v. Welsh's Heirs, 10 Mart. 430. The widow and heirs of Abner Womack having been made parties defendant, after the partition, judgment was properly rendered against them, for their respective portions of the debt.

Judgment Aftermed.

Aunic v. Giz.

A judgment rendered by default against a wife, in an action on a note by which she bound herself jointly and severally with her husband, will be binding on her, though the note was given for a debt of the husband's, where no fraud or duress is alleged to have been exercised to prevent her appearance and defence of the action.

Where a married woman, for the purpose of shielding certain lands from a creditor conveys them to a third person by a simulated sale, her heirs, on proof of the existence and contents of a counter-letter by which the purchaser acknowledged the simulation, and of its concealment or destruction by the latter, may recover the land, with damages, profits and rents.

A PPEAL from the District Court of East Baton Rouge, Johnson, J. The plaintiff avera, that her mother was the owner and possessor of certain lands, and that a short time previous to her death, by act sous seing privé, she sold the same to defendant; that the property was the paraphernal property of the vendor; that the sale was fictitious, without consideration, and was made for the purpose of protecting the property from the creditors of her husband; and that a counter letter was executed by the defendant, acknowledging its simulation. She prays that the property may be decreed to belong to her. The defendant answered, contending that the contract was entered into for the purpose of protecting the property from François Rivas, a creditor; that it was fraudulent and reprobated by law; and that the court can not interfere to protect parties, under such circumstances. The plaintiff appealed from a judgment dismissing her action on the ground that the stipulation, alleged to exist in the counter-letter, being illegal, creates no cause of action.

G. S. Lacey, for the appellant. The transfer of the property to defendant was not fraudulent, nor is it reprobated by law. This is evident from its object. It was made for the purpose of shielding the paraphernal property of Madame Hortense from the unjust law-suits and persecutions of her husband's creditor; a stronger case than that of Griffin v. Lopez, mentioned in 17 La. 128, which the Supreme Court there say, evinces no immorality or dishonesty on the part of transferror. The mother of plaintiff took this method to accomplish what the law, by a suit for separation of property, would authorize her to attain, viz: the protection of her separate property from her husband's creditor. In addition, we will state, that there are several adjudicated cases where such relief as we pray for, has been extended, or would have been, if a counter-letter had been produced; the relief was refused, not on the ground of the moral turpitude of the original transaction, but, for the want of a counter-letter, showing that defendant was deviating from the original transaction, and was committing a new fraud. 6 Mart. N. S. 206. 8 lb. N. S. 448. 4 La. 169, 351. 17 La. 128. 19 La. 412. 3 Rob. 452. The counter-letter having been lost, parol evidence of its contents was admissible. Civil Code, art. 2258. 1 Mart. N. S. 189. 2 La. 168. 12 La. 162. Phillips on Evidence, Cowen and Hill's Notes, vol. 3, part 2, and numerous cases there cited.

Notes, vol. 3, part 2, and numerous cases there cited.

Elam, for the defendant. The contract disclosed by the counter-letter was illegal, and can produce no effect. C. Pract. art. 19. Civil Code, arts. 1887, 1889. Graner v. Carraby, 17 La. 118. Counter-letters are not allowed to shield transactions reprobated by law. C. C. art. 2236. Domat, book 3, tit. 6, ss. 14, 15 (1 vol. p. 423). The illegality of the transactions on which plaintiffs action is based, requires that her petition should be dismissed. 5 Mart. 160. 6 Mart. 524. 3 lb. N. S. 46. 4 La. 169. 19 La. 412. 2 Rob. 272. 3 Rob. 452, 481. 4 Rob. 209. 5 Rob. 490. Armstrong v. Toler, 11 Wheaton 258, 275.

. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff sues to recover from the defendant a tract of

and in the vicinity of Baton Rouge, containing about 117 superficial acres, of which she alleges her deceased mother, during the marriage which existed between her and her late father, made a simulated sale to the defendant, for the purpose of protecting it from the unjust and vexatious pursuit of one François Rivas, who was a creditor of her husband. She alleges that a counter-letter was given to her said mother, which acknowledged the simulation, and contained authority to enable her mother to recover back the property, which the defendant subsequently obtained possession of and destroyed. There was judgment for the defendant, and the plaintiff has appealed.

Besides the plea of the general issue and an averment of title, good faith, &c., on behalf of the defendant, it is urged for the defence that, admitting the averments of the petition to be true, which is not conceded, the conveyance to the defendant was for an unlawful and immoral cause, that the court can give no assistance in giving effect to its object, and that the evidence shows that the reap purpose of the conveyance was te defraud François Rivas.

The evidence satisfies us that the conveyance from the plaintiff's mother to the defendant was simulated, and made for the purpose of defeating the execution of a judgment, which was rendered in favor of François Rivas, on the 19th June, 1827, for \$413 50, with interest, against both husband and wife, the said sum being the amount of a promissory note made by them, in solido, in favor of said Rivas, on the 21st of April, 1824. The judgment was rendered by default, neither party defendant appearing. The conveyance was under private signature, and executed on the 4th of August, 1826.

The wife was bound by the note which she executed jointly and severally with her husband, although, if the debt for which it was given was her husbannd's alone, and she merely his surety, she could have resisted the exaction of the amount, by availing herself of her exception to such a contract resulting from her condition as a married woman. But having made the exception, and no fraud, restraint, or duress, having been charged to be exercised in relation to her non-appearance after citation, the judgment against her must be considered as valid.

At the same time, under the hypothesis on which the plaintiff bases her right of recovery, the law cannot visit upon her the consequences of having made an immoral and illegal contract in conveying the property in dispute from the reach of the creditor of the husband, though he was also her creditor. The condition of married women, their subjection to the marital power, and the relief which the law itself gives them against their own contracts, prevents the same immorality from attaching to an act of this kind, as if committed by a person in the possession of their entire rights. If the husband had the means of inducing his wife to bind herself for his debts, and of preventing her from making a legitimate defence against their recovery out of her property, it may well be assumed that the removal of the property from the pursuit of his creditors, was more his act than her's.

The husband and wife both were parties to the act of conveyance to the defendant. The act of sale by which the mother of the plaintiff acquired the property in dispute declares, that the payments were made and to be made for it out of the paraphernal funds of the wife, and that the property should remain as her paraphernal property. It is in evidence that she had received, during marriage, sufficient paraphernal property to make the payments.

The existence and contents of a counter-letter from the defendant, executed

AUBIC P. Gilat or about the time of the conveyance, has been fully established. Its non-appearance has been accounted for. Indeed there is every reason to believe that the defendant, who was the tutor of the plaintiff during her minority, has himself destroyed it, if he has not it in his possession. The evidence shows him throughout to have been a mere spoliator, and the plaintiff's title is sufficient to enable her to recover the land from him, with its rents and profits.

The recovery in this case can have no illegal or immoral effect. Some of the heirs of François Rivas have discharged the plaintiff from the original judgment had against her mother, which the conveyance to the defendant was intended to frustrate. The return of the property to the plaintiff will restore it to the operation of the judgment, for the benefit of those of the heirs who have not released the plaintiff.

It is therefore decreed that the judgment of the District Court be reversed, and that the plaintiff recover from the defendant the land described in the petition, with costs in both courts; her claim for damages, profits, and rents, being reserved.

the distance of soviety of boundary and which we

Course of the street of a hour on it would have a 36 yearse.

BANK OF LOUISIANA v. WILCOX et al.

A note discounted by a bank, at the highest rate of interest allowed by its charter, for the besefit of the maker, to whom the proceeds were paid, will, if unpaid at maturity, bear the same rate of interest from that time till payment.

A husband is not responsible for debts contracted by his wife before marriage.

APPEAL from the District Court of West Feliciana, Boyle, J. A. M. Dunn, for the plaintiffs. Bosoman and Lyons, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The Bank of Louisiana formerly held a note of one Mussenden, endorsed by Walker, Laurie and Henderson. Mussenden died, and his widow, one of the present defendants, renounced the community of acquête and gains. After this renunciation, she made the note now sued upon, to the order of and endorsed by Henderson. The bank discounted it, the proceeds were passed to her credit, drawn by her check, and applied to the payment of the protested note of her husband.

The defendant, Mrs. Wilcox, was perfectly competent to contract, and did contract, with the bank; and the fraud, which she alleges was practised upon her by Henderson, has not been proved.

The question is raised, whether interest was rightfully adjudged at the rate of nine per cent per annum after maturity. The note itself stipulates no rate of interest after maturity. But it has been proved that it was discounted by the bank; and, as it was payable at twelve months after date, the bank had a right to take, upon the discount, nine per cent, according to its charter. After the maturity of this discounted note, the bank is entitled to a like rate of interest from the party discounting, as has been many years since settled in the case of The Bank of Louisiana v. Sterling. 2 La. 61. The rule was reaffirmed in the case of the Commissioners of the Clinton and Port Hudson Railroad Company v. Kernan. 10 Rob. 174.

The judgment was improperly rendered against the husband, the debt having BAKE OF LOUIbeen contracted by Mrs. Mussenden, before her marriage with Wilcox.

It is therefore decreed that the judgment of the court below be reversed; and Wilcox.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed, that the plaintiffs recover of the defendant, Caroline E. Mussenden, now Mrs. Wilcox, the sum of \$800, with interestat the rate of nine per cent per annum from the 18th day of March, 1843, till paid, and costs of this suit in the court below; the costs of this appeal to be paid by the plaintiffs.

Union BANK OF LOUISIANA v. JONES.

In an action by the holder against the endorser of a note, the maker is generally a competent witness for the endorser; but not where the note was endorsed by the latter for the accommodation of the maker. In such a case he is not indifferent, being liable for the costs in the case of judgment against the endorser; but not liable, if in his favor. C. C. 2260.

A PPEAL from the District Court of St. Tammany, Briggs, Parish Judge, presiding. The judgment below was in favor of the defendant, and the plaintiffs appealed.

Halsey, for the appellants. Jones and Childress, for the defendant, cited as to the admissibility of the maker of a note in a case like the present, Waters v. Petrovic, 19 Ln. 584.

The judgment of the court was pronounced by

SLIDELL, J. This suit is brought against the defendant as endorser of two notes, one made by *Penn*, and one by *Minter*, and both discounted by the plaintiffs. They stipulate interest at seven per cent from maturity.

It appears that the note of *Penn* had been put in suit against him, but had been destroyed by fire, with the other records of the court in which the suit was brought. Independently of the books of the bank, which were objected to, the notarial copy made at the time of protest by the notary, aided by the testimony of two witnesses examined in the cause and the admissions in the answer, sufficiently establish the former existence of the note, its endersement by the defendant, that it was discounted to renew a previous note of the maker, and its destruction. There should have been judgment for the plaintiffs upon this portion of his claim.

The note of Minter was also discounted by the bank, to take up an antecedent liability of the maker, the defendant being an accommodation endorser. He has urged in argument, as in his answer, that this note was endorsed by him and discounted on certain conditions, which have not been fulfilled; and, in support of this defence, he offered Minter, the maker of the note, as a witness. The plaintiff excepted to the competency of this witness, and we are of opinion that he should have been excluded. In an ordinary case the maker would probably be a competent witness for the endorser, to prove the existence of such a defence, upon the ground of indifference in point of substantiated interest; and, in this respect, the provision of our Givil Code harmonizes with the prevailing rule of the commercial law; for, in the language of article 2260, he is not interested either directly or indirectly in the event of the cause. If the plaintiff gains he is still liable for the amount of the note to the endorser; if the plaintiff loses he is still liable for the like amount to the

URIOF BARE plaintiff. But where the endorser, in whose favor he is called to testify, is at endorser for the accommodation of the maker, his relation is that of principal towards the endorser as surety; and if there be judgment against the endorser, the maker is liable not only for the amount of the note but for the costs of the suit against the endorser. The case therefore is not one of indifference in point of essential interest; and under our Code, as well as numerous authorities, the maker, in such case is an incompetent witness for the defendant, without a release. See Chitty on Bills, 655. Greenleaf on Evidence, vol. 2, § 204. Pierce v. Butler, 14 Mass. 303. Van Schaack v. Stafford, 12 Pick. 565. Hubbly v. Brown, 16 John. 70.

The bill of exceptions, however, to the admission of this witness has not been presented by the plaintiffs in argument, and we shall consider it as not relied upon. We notice the position of the maker of the note to show that he is no f a full witness, and that, from this consideration as well as the nature of the facts asserted by him, we are not permitted to affirm the judgment of the court below. He does not prove an offer of a sufficient mortgage to secure the debt, nor his ability to give one.* There is a probability, under his testimony, that no application was made by him for the Jenkins & Bonner draft till after their bankruptcy, and the liability on that bill was not, according to his own statement, the sole consideration of the note now sued upon.

The case, however, as to this note, is not presented in such a form, as to enable us to give final judgment for the plaintiffs.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the plaintiffs recover of the defendant the sum of \$680, with interest thereon at the rate of seven per centum per annum, from the 5th day of July, 1842, until paid, and costs in both courts. It is further decreed that the claim of the plaintiffs against the defendant, as endorser upon the note of Thomas W. Minter, be dismissed, as in case of non suit-

BABIN v. NOLAN.

It is no objection to the homologation of a partition made by a notary, who holds also the office of parish judge, that any objections to his decisions as a notary, on questions arising in the course of the partition, must be determined by him in his capacity of parish judge. Per Cu-. riam: The inconvenience, if it be one, is the necessary result of the parish judge system.

PPEAL by the defendant from a judgment of the Court of Probates of 1 West Baton Rouge, Favrot, J. W. B. Robertson, for the plaintiff. Brunot, Lobdell and Labauve, for the appellant. The judgment of the court was pronounced by

Rost, J. All the questions involved in this controversy but one, have twice before been put at issue between the same parties, and each time finally determined by judgments of the Supreme Court, which are res judicatas between them. 6 Rob. 508. 10 Rob. 373.

^{*} The defendant alleged that it was stipulated with the agent of the plaintiffs, at the time of his endorsing Minter's note, that the plaintiffs should accept mortgage security from Minter for his debt, and release the defendant as endorser, and that they subquently refused to do so, though Minter executed a mortgage for that purpose. PORTER.

The remaining question is presented by the opposition of the defendant to the homologation of the partition of the property of the community which had existed between the defendant and his deceased wife, now represented by the plaintiff, on the ground that the judge of the Court of Probates had himself made the partition, in his capacity of notary public; that it should have been made by another notary, because it would be absurd to appeal from the decision of the notary on questions arising in the course of the partition, to the same person acting as judge.

There is nothing in this objection. The inconvenience suggested, if it be one, was the necessary result of the parish judge system, and it has never before been doubted that parish judges were competent to exercise the functions of notaries in all cases. Until a comparatively recent period they were the only notaries in many parishes, and, under the view taken by the defendant's counsel in this case, no partition could have been effected in those parishes. The decision of the judge, on questions arising in partitions made before him as notary, could be appealed from, if not satisfactory to the parties.

After a careful examination of the record, we can discover no error in the court below. Courts of justice can afford no relief to the defendant, and we hope and trust that this seventh* appearance of the same parties before the Supreme Court, may be the last.

Judgment affirmed.

BEARD, Tutor, v. Morancy et al.

Where the preperty in controversy in a petitory action, is proved to be in the possession of the wife of a person offered as a witness for the defendant and of a third person, who cultivate it together, and it is shown that the witness controls and ships the crops, he will be incompetent. Per Curiam: A husband cannot be a witness either for or against his wife. C. C. 2260.

A possessor in good faith, in case of eviction, is entitled to be paid for necessary improvements made even after judicial demand and judgment of eviction, such as clearings, levées, and ditches, without which the land could not have been so cultivated as to yield the rents and profits claimed by the plaintiff.

One holding under a judicial sale must be considered as a possessor in good faith until judicial demand, and as such accountable, in case of eviction, for the fruits from that day only.

One who removes, and converts to his own use, the materials of a house built on land from which he has been evicted, and for the value of which he was liable, will not be released from that liability, by proof that the ground on which the house was built has since been destroyed by the encroachments of a river.

The owner of a tract of land fronting on a river, cannot be made to contribute to the cost of a levée made at right angles to the river, on property of another proprietor, and which was necessary to bring it into cultivation, although the levee may benefit both tracts.

The husband of a married woman is bound with her, in solido, for her acts as a tutrix.

A PPEAL from the District Court of Carroll, Curry, J. McGuire, for the appellant. J. Dunlap, for the defendants. Thomas and Bemiss, for Minor, cited in warranty. The judgment of the court was pronounced by

Rost, J. This ease was originally a petitory action, in which the Supreme Court gave a final judgment in favor of the plaintiff for the land claimed, and

^{*} See 4 Robinson, 278. 6 Ib. 508. 8 Ib. 193. 10 Ib. 373. 12 Ib. 315, 531. The hope expressed in the text was not realized. See the same case, post, p. 357.

BRARD ... MORANCY.

remanded the case for further proceedings as between Morancy and the plaintiff, in relation to the fruits and improvements, and as to all questions between Morancy and the warrantors. See 3 Robinson, 119. The court below gave judgment in favor of the defendant against Wm. B. Minor, on his warranty, for the sum of \$2000, with five per cent interest thereon per annum from the 1st of January, 1842, natil paid; this judgment to be credited with the sum of \$506 67, with ten per cent interest thereon per annum, from the 7th of February, 1832, until paid. The court also gave judgment in favor of the defendant, Lowry, and against the plaintiff, for the balance due for the value of the improvements over that of the fruits, in the sum of \$1559 30, and also in the further sum of \$506 67, with ten per cent interest thereon, from the 7th of February, 1832, till paid, being, say the court, the amount to be refunded to Wm. B. Minor, as having been paid by him on the price of the land recovered by the plaintiff. From this judgment the plaintiff alone has appealed.

Our attention has first been called to two bills of exception, taken by the plaintiff during the trial below. The first was taken to the opinion of the court admitting O. B. Cobb as a witness, on the ground that he was interested in the event of the suit, and otherwise incompetent to prove the facts intended to be established by him. It is proved by the declaration of this and other witnesses, that the property incontroversy is now in the joint possession of Lowry and the wife of this witness; that they cultivate it together, and that Cobb himself controls and ships the crops. The husband cannot be a witness either for or against his wife. Civil Code, 2260. The judge erred in admitting the testimony of this witness, and we will consider it as not in the record.

The other bill of exceptions was taken to the opinion of the court admitting testimony, relating to improvements made since the judgment of eviction. The question presented by this exception was fully examined in the case of *Pearce v. Frantum*, 16 La. p. 423. The court in that case came to the conclusion that, under the general principles of the civil law, and the enactments of the laws of Spain, the party evicted was entitled to be indemnified for the useful improvements by him made on the property during the whole time of his possession. This doctrine appears to have been acquiesced in ever since. Our impression is, that the rule has been laid down too broadly; but there can be no doubt that the party evicted is entitled to be paid for necessary improvements. The improvements in this case were clearings, levées and ditches, without which the land could not have been brought into cultivation, so as to yield the rents and profits which the plaintiff now claims. These were necessary improvements, and the judge did not err in admitting evidence in relation to them.

The defendants and their vendors, holding under a sale by the Court of Probates, must be considered as possessors in good faith up to the day of the judicial demand, and as such accountable for the fruits from that day only. But the court erred in considering that, from 1836 to 1840, there was not exceeding five acres of cleared land. The testimony establishes that, since 1836, there has been about the same quantity of cleared land upon the tract, that which caved into the river being annually replaced by new clearings. The plaintiff has claimed \$200 a year for rent, and the lowest estimate of the witnesses entitles him to that sum, from the judicial demand to the delivery of possession.

It is also proved that the defendants removed from the land a dwelling house and other buildings, worth, as they stood, from \$800 to \$1000. The fact that the spot on which those buildings stood has since caved into the river, cannot

give to the defendants a title to the materials taken by them; and the same principle which entitles them to indemnity, for improvements made since the judicial demand, requires that they should pay the value of those materials, which, from the evidence, we take to have been \$400.

In relation to the improvements, it is proved that 62 acres of land have been cleared and fenced by the defendants. The court below allowed them \$25 an acre, making the sum of \$1550.

The levée made at right angles to the river, two lots above the land in controversy, cannot be charged as an improvement upon it. It was necessary to protect and bring into full cultivation the lot on which it was made. Owners of land below it, although they may be benefitted by its erection, cannot be made to contribute to it, against their consent. The cost of making a ditch along that levée, and of clearing all the ditches afterwards, was also improperly allowed by the court below. On the trial, the witness, Beniss, stated that he had heard and corroborated the testimony of Cobb, and that he was well acquainted with the premises, and with the levées and ditches made on the land in controversy. Taking the statements of Cobb as part of the evidence of Beniss, it is shown that there are 62 rods of levée, and 287½ rods of ditching, properly chargeable as improvements. The levée is proved to be worth \$5 per rod, and the ditches \$1 per rod, making together the sum of \$592 50.

Judgment was properly given in favor of the defendants for the note of \$506 67, paid to the minors now represented by the plaintiff, by the purchasers at the probate sale. James Beard, their present tutor, was the husband of their mother when the proceeds of that note were raceived. He was bound, in solido, with her for the acts of the tutorship, and has acknowledged, since his appointment, that the amount of the note had been duly received. The court erred in allowing interest at the rate of ten per cent per annum upon it; the plaintiff is only entitled to legal interest. The principal, and interest from the judicial demand to the day of the rendition of this decree, will amount to \$889 78, which added to \$1550, for clearing, and \$592 50 for improvements, will make the sum due the defendants \$3032 28. Against this sum the plaintiff is entitled to compensate nine years' rent due on the 1st January last, at the rate of \$200 a year, and \$400 for the value of the materials removed from the land. This will leave in favor of the defendants a balance of \$832 28, with legal interest from this date, subject to the payment of rent to the plaintiff from the 1st of January last, at the rate of \$200 a year.

It is therefore ordered, that the judgment rendered in this case between the plaintiff and the defendants be reversed. It is further ordered, that the defendant, Lowry, recover of the plaintiff the sum of \$832 28, with legal interest from this date, subject to a credit at the rate of \$200 a year from the 1st January, 1847, till paid. It is further ordered that no writ of possession issue in favor of the plaintiff until this judgment is satisfied. It is further ordered that, if the balance due the said Lowry under this decree is not paid or tendered within 60 days from notice to the plaintiff, the defendant, Lowry, may issue his execution against the plaintiffs for the same. It is further ordered, that the plaintiff pay the costs of the court below; those of this appeal to be paid by the defendants.

BEARD v. MORAKCY.

New Orleans and Carrollton Railroad and Banking Company v. Patton et al.

Where a bill, drawn by one who was at the time cashier of a branch bank, payable to a person who was president of the branch, and endersed by him, and by a third person who was a director of the same branch, who is presumed to have received the proceeds, was discounted by the branch, but not protested at maturity, the circumstances under which the note was discounted, by the act of one of the endorsers, and with the approbation of the other, will take the case out of the rules applicable to ordinary endorsers. Per Curian: Both endorsers being bound to see; the note paid, they will not be permitted to profit by the neglect or fraud of an officer of the bank, whose conduct they were bound to supervise, to egomerate themselves from liability as endorsers.

A PPEAL from the District Court of Carroll, Curry, J. Benjamin and Micou, for the appellants, Stacy and Sparrow, for the defendants. The judgment of the court was pronounced by

EUSTIS, C. J.* This is an action against the defendants, who were endorsers on a bill for \$402, drawn at the town of Lake Providence, by H. M. Dobbs, on Brisbane, Marshall & Co. of Bayon Sara. The bill was dated on the 11th of April, 1842, was not protested, and was found among the private papers of Dobbs, after his decease, about the third of October following. It was then forwarded to the branch of the bank at St. Francisville, was returned unpaid, and it does not appear that any demand was ever made on the drawees.

The charter of the bank required the appointment of five directors for the branch at Lake Providence, which is a small village on the banks of the Missippi. This bill was discounted at the branch bank located there, of which Patton, the defendant, was at the time president; Benjamin, a director; and Dobbs, the drawer of the bill, the cashier. The defendants, with the three other directors were appointed, and it was their imperative duty, to supervise the conduct of the cashier, in the administration of the affairs of the bank.

This bill was discounted with the aid of one of the parties, and the approbation of the other, who was the president of the board and the last endorser, Benjamin, is presumed to have received the proceeds. They are both bound to see the bill paid. They are not permitted to profit by the neglect, perhaps fraud, of an officer of the bank, whose conduct they were bound to supervise. The conflict between their interests and duties produced by the discount of the cashier's bill, under the circumstances disclosed in evidence, with their endorsements, takes them out of the rules in relation to ordinary endorsers.

The judgment of the District Court is, therefore, reversed, and judgment is rendered in favor of the plaintiffs, against the defendants, in solido, for the sum of \$402 02, with interest from the 21st of April, 1842, until paid, and costs in both courts.

^{*} SLIDELL, J., being interested, did not sit on the trial of this case.

BIRD v. McCALOP.

Where an endorser does not reside in the town in which the note is psyable, but receives his letters and papers from the post office at that place, a notice of protest pet into the post office there, addressed to him at his domicil, though not intended to be forwarded by mailwell be sufficient.

A PPEAL from the District Court of West Baton Rouge, Burk, J. The facts of this case are stated in the opinion of Slidell, J., infrd.

Brunot, for the plaintiff, cited Bank of Louisiana v. Watson, 15 La. 38. Stat. of 1827, 1 Moreau's Dig. 96. Bank of Columbia v. Laurence, 1 Peters 578.

Loucks, for the appellant. The notice to the endorser was insufficient. The

Loucks, for the appellant. The notice to the endorser was insufficient. The end and aim of post office establishments is the transmission of letters and papers from one section of the country to another. The law uses the post office solely as a means of conveyance, and has never adopted it as a depository of papers where persons may, or may not call for them, as they please. Vide Story on Promissory Notes, p. 375 (in notis), Laporte v. Landry, 5 Mart. N. S. 360. Ireland v. Kipp, 10 John. R. 490. S. C. 11 John. R. 231. Louisnana State Bank v. Rowel, 18 Mart. 506. The Supreme Court, in the case of Laporte v. Landry, 5 Mart. N. S. 360, say, that "where notice cannot be conveyed by mail, it is idle to put it into a post office, which is not a legal place of deposit for notices." And Thompson (on Bills, ch. 6, §4, p. 475—477, 2d. edit.) says: "If it is necessary to send notices by a special message, as where the party receiving 't lives out of the course of the regular post, the expenses of such notice will be allowed, &c."

G. S. Lacey, on the same side. Whenever the endorser lives in the same place where the demand is made, the notice to the drawer or endorser of a note, must be served personally. Notes to Story on Promissory Notes, \$374.

must be served personally. Notes to Story on Promissery Notes, §374.

The same rule governs, where the party resides a few miles from town, and there is no post office nearer than the one in which the notice is deposited. In this case, notice must be served personally, or left at the place of deing business. Ireland v. Kipp, 10 J. R. 490. Chitty on Bills, 9 American Edition, §475, b. and cases there cited. Story on Promissory Notes, § 374. 5 Mart. N. S. p. 359.

The statute of 1827 does not alter the law merchant, in relation to the manner of giving notice of protest; but simply introduce a new mode of proof of service of notice. 8 La. 171. 15 La. 54. 6 Rob. 500. 11 Rob. 467-8. Carmena v. Doherty, 7 Rob. 87.

The judgment of the court was pronounced by

SLIDELL, J. The defendant is sued as endorser of a promissory note, and the case turns solely on the question of notice. The note was dated and payable at Baton Rouge. The notice for the defendant was deposited by the notary, on the day of protest, in the post office at Baton Rouge, addressed to the defendant, at West Baton Rouge. It is proved that the defendant resides in the parish of West Baton Rouge. A witness who has been in the defendant's employ nine years, as his overseer and in other capacities, says that "the Baton Rouge post office is the one at which the defendant is in the habit of receiving his letters; that he has a box there; that when letters are directed to McCalop, West Baton Rouge, they are received from the office in Baton Rouge; that this has always been the custom, but does not know whether or not it is an arrangement."

We consider this proof of notice as sufficient. We have already considered this subject in the case of *Hepburn* v. *Ratliff*, and p. 331, and have there referred to the opinions of the Supreme Court of the United States in the cases of the

BIRD O. McCalop. Bank of Columbia, 1 Peters, 582, and of the Bank of the United States, 2 Peters, 551. In the former case, 1 Peters, 582, the same points were presented by counsel as are now urged, and some of the same authorities cited. It was then, as now, urged by counsel, that post offices are places from which letters are to be forwarded, and not places at which letters are to be left, when not intended to be conveyed from them; and it was also urged that the expense of sending a special messenger could be recovered of the party to whom he is sent. That case was elaborately considered, and the rule then settled seems to us a reasonable one, and founded in considerations of general convenience and the interests of commerce.

Judgment affirmed.

New Orleans and Carrollton Railroad Company v. Patton et al.

and the region to provide the state of the street of the state of the

Decisions in Hepburn v. Ratliff, ante p. 331, and Bird v. McCalop, ante p. 353, affirmed.

A PPEAL from the District Court of Carroll, Curry, J. Benjamin and Micou, for the plaintiffs. Stacy and Sparrow, for the defendants. The judgment of the court was pronounced by

Eustis, C. J.* This case turns upon the rules laid down by this court in the cases of *Hepburn et al.* v. *Ratliff et al.* ante p. 331, and *Bird* v. *McCalop*, ante p. 353, recently decided. The judgment is, therefore, affirmed, with costs.

New Orleans and Carrolaton Railroad and Banking Company v. Patton et al.

anar data and and an arminimum

Where no issue has been joined, nor judgment by default taken, no judgment can be rendered against the defendant.

A PPEAL from the District Court of Carroll, Curry, J. Benjamin and Micou, for the plaintiffs. Stacy and Sparrow, for the appellants. The judgment of the court was pronounced by

Eusris, C. J.* In this case there was no issue joined nor judgment by default taken, and the court erred in rendering judgment against the defendants.

The judgment of the District Court is therefore reversed, and the case remanded for further proceedings; the costs of the appeal and those of the court incurred after the service of the petition and citation on the defendants, to be paid by the plaintiffs and appellees.

^{*}SLIDELL, J., being interested, recused himself, and did not sit on the trial of these cases,

THOMAS v. MARSH.

Where a note payable at a bank is held by the bank itself, no formal demand of payment is necessary during banking hours. The maker, having promised to make payment at the bank, it is his duty to be there within the usual banking hours. After these hours, it is time enough to deliver the note for protest.

Where the cashier of a bank, which is the holder of a note, delivers it to a notary for the purpose of being protested, it is not necessary that the notary should state in his protest, that he exhibited the note to the cashier at the time of demanding payment. The object of presentment and exhibition being that the debtor may know that he is paying to a party entitled to receive, and that the note is ready to be delivered to him on payment, the exhibition would be unnecessary in such a case, the cashier having himself handed the note to the notary.

The declaration of an endorser that he had received notice of the protest of the note, and that it would be necessary to make arrangements to pay it, unaccompanied with any complaint as to informality, will be taken as to an admission of his liability founded upon seasonable notice.

A notice of protest received through an irregular channel, if it reach the party as soon as he could have received it by the regular mode of transmission, is binding.

A PPEAL from the District Court of St. Martin, Boyce, J. The facts of this case are stated in the opinion of the court, infra. The defendant appealed from the judgment below, which was against him.

T. H. Lewis, for the plaintiff. No specific form of words is required in making a demand of payment of a note, but any phrase used which shows, substantially, a call for payment of the notes, is sufficient. 5 Mart. N. S. 513. 6 La. 730. 16 La. 311. 4 Ib. 462. Chitty on Bills, Springfield edition of 1836, pp. 421, 422. The cashier of the bank, being the holder of these notes, and no person appearing at the bank to pay them, during banking hours, on the days they were payable, and there being no funds of the drawers in bank to pay them, and he having no right to protest them until the banking hours had elapsed, no formal demand of payment was necessary. 3 Kent's Com. 97, 98. I1 Wheat. Rep. 176. 2 Peter's Rep. 549. 2 H. Black. R. 510, 11. Demand, at the place of payment, on the day of maturity, after banking hours, is sufficient—at all events, it is good against the drawer of notes. 3 Mart. N. S. 428 to 431. Chitty on Bills, 424. The testimony of John F. Miller, taken without objection, shows that Marsh

actually received notice of these protests, and promised to pay the notes. Fore-

man v. Wikoff, 16 La. p. 23.

W. L. Brent and Magill, for the appellant. There was no sufficient presentment or demand of payment, nor proof that the notary had the notes with him at the time of the alleged demand. 3 Mart. N. S. 427. 12 La. 472. 13 La. 343. 15 La. 244, 312. 10 Rob. 498. 3 Kent's Com. 95, note a. 6 Eng. Com. Law Rep. 53. Presentment and demand should have been made during the business hours of the bank. 3 Kent's Com. ed. 1832, p. 102. Petersdorf, Sup. 194. 7 East. 385. 13 Ib. 469. 14 Ib. 504. 1 Maule & Selwyn, 28. 6 Esp. 17 Eng. Com. Law, 141. 15 La. 223. 10 Rob. 470. As to the insufficiency of the direction of the notices, see 16 La. 20, 310. 3. Rob. 164. 11 Rob. 492. There is no proof that the defendant was aware of his discharge, at the time of his declaration that it was necessary to make arrangements for the payment of the notes; without such evidence, he cannot be bound. 8 Mart. 148. 4 Ib. N. S. 125. 5 Ib. N. S. 360. 2 La. 318. 11 La. 17. 12 La. 465, 468. 13 La. 421, 431. 16 La. 315, 318. 1 Rob. 572. 2 Rob. 158. 10 Rob. 40, 62. Story on Bills, 320. 2 Kent's Com. 113.

The judgment of the court was pronounced by

SLIDELL, J. All the notes upon which this suit is brought were payable at the office of disco unt and deposit of the *Union Bank of Louisiana*, at St. Martinsville. Two of them were drawn, the other two endorsed, by the defendant.

THOMAS V. MARRIL

We will first consider the defence set up against the claim upon the notes, of which the defendant was maker. It is that there was no presentment or demand of the notes at the place of payment specified in them; and that, if such demand or presentment was made, it was not until the bank was closed, and that it should have been made during the business hours of the bank. The testimony comists of the statements of the cashier, who was examined as a witness in the cause, and of the notarial certificates of protest. By the former it appears that Dumartrait handed the notes to the notary after banking hours. By the latter, that the notary was called upon by Dumartrait, as cashier of the bank, on the respective days of maturity, to protest the notes; that accordingly, on these days respectively, as his protest sets forth, upon said request and in virtue of the original note, of which copy is annexed, he went to the bank to demand of the maker its payment, where being and applying to the cashier, the cashier informed him that Marsh was not there, and had not, nor had any one for him, deposited in the bank, nor left in his hands, the money to pay the notes, whereupon he protested, &c.

The objections raised upon this showing are, that the notes were not actually presented to the cashier by the notary at the time of making the demand, and also, as already stated, that, at the time of the demand, the bank hour had passed. These objections are not tenable. The note being deposited in the bank for collection, the bank, as agent, was holder of the note: Where a note is made payable in bank, it is not necessary to make the demand elsewhere. The maker promises that he will make payment there. It is his duty to be at the bank within the usual bank hours, and when the note is held by the bank itself, no formal demand is necessary to be made during those hours. When they have passed, then it is time enough to deliver it for protest, as was done in this case. As the cashier himself handed the notes to the notary, for the purpose of protesting them, he knew they were in the notary's hands; and the omission of the notary to state in his protest that he exhibited the notes to the cashier, seems to us, under the circumstances, immaterial; for the object of presentment and exhibition of the note Itself, is, that the maker may know that he is paying to a party entitled to receive, and that it be ready to be delivered up to him on payment. The present case, as to the question of presentment, is not distinguishable from the case of Carneal v. Bank of the United States, 2 Peter's, 549. See also 13 Pick. 469.

Our next inquiry is as to the notes upon which Marsh is sued as endorser. Here also the defence is set up, that there was not a due demand of payment. The facts as to the presentment of the endorsed notes are the same as stated respecting those of which the defendant was maker, and in law exhibit a demand and default sufficient to charge the endorser. In the case just cited Carneal was sued as endorser.

But it is said that the defendant was not duly notified of protest. The notices of the respective protests were put into the post office at St. Martinsville, one addressed to Jonas Marsh, New Iberia; the other to Jonas Marsh, parish of St. Martin. It appears from the testimony that Marsh lived from one and a half to two miles nearer to the New Iberia post office, than to that of St. Martinsville. The objection raised by counsel is, that the notices should have been addressed to New Iberia, in the parish of St. Martin. The objection is not applicable to one of the notices; as to the other, there is evidence in the record which counteracts the objection, if otherwise tenable. Miller, a party to all

THOMAS V.

These notes, and whose testimony was received without objection, testifies that, after the protest of the notes, he received notices of protest, and that Marsh told him he also received the notices, and said it would be necessary to make arrangements to pay them. Authorities have been cited by the defendant to the effect that, to make a waiver obligatory upon the party making it, it is indispensible that it should be made with a full knowledge of all the facts; that is, with a full knowledge that there has been a want of due notice of the dishonor of the note. Such is undoubtedly the rule; but it is not apposite to the present case. The evidence goes, not to establish a waiver, but to prove that the defendant had received due notice. The declaration of the defendant that he had received notice, and that it would be necessary to make arrangements to pay the notes, unaccompanied by any complaint as to informality, may be taken as an admission of his liability founded upon seasonable notice. There could be no ignorance on his part how and when the notice reached him; and a notice received through an irregular channel, if it reach the party as soon as he could have received it by the regular mode of transmission, is equally binding. Chitty, 504. Story, § 338. Under the admission of the defendant, coupled with the consideration that Marsh lived in the parish of St. Martin, and that the post offices of New Iberia and St. Martinsville were both in that parish, it is not unreasonable to suppose that he may have got the letter at the St. Martinsville post office as soon as it could have reached him through that of New Iberia, or that the letter, being addressed generally to the parish of St. Martin, may have been transmitted by mail to New Iberia. In the absence of the admission, no such presumptions would be permitted; but with it they are fair subjects of inference, for the unqualified acenowledgment of liability under a full knowledge of the facts, is inconsistent with the idea that, under the facts so known to him, he was discharged. Judgment affirmed.

O'BRIEN v. POLICE JURY OF CONCORDIA.

One who alleges that he has a joint interest with the plaintiff in a contract between the lutter and the defendants, and that he furnished money and labor for its execution and is entitled to one half of the contract price, cannot intervene in an action on the contract, instituted by the plaintiff to recover the price of the work done in pursuance of it. The intervenor, not being a party to the contract, has no more claim upon the amount due by defendants than any other creditor, and the obligation of the defendants cannot be divided against their consent.

One who has made a levée, under an adjudication by the inspector of roads and levées under the provisions of the act of 26 March, 1842, relative to roads and levées in the parish of Concordia, in case of the land not selling for the whole amount of the adjudication and the insolvency of the owner, may recover from the parish any balance due.

A PPEAL from the District Court of Concordia, Curry, J. T. P. Farrar, for the appellant. The intervention should have been dismissed. C. P. 389. 1 La. 431. 7 La. 196. There should have been judgment for the plaintiff. See the case of Croiset v. Police Jury of Pointe Coupée, 1 La. 110. Morgan v. Same Police Jury, 11 La. 162. Justinian, Juris præcepta, lib. 1, tit. 1, § 3. Code of Pract. 14. Sparrow, for the intervenor. Poindexter, for the defendants. The judgment of the court was pronounced by

O'BRIEN O. POLICE JURY.

Rost, J. The making of a levée was adjudicated to the plaintiff by the inspector of roads and levées of one of the districts of the parish of Concordia, under the act of 1842, applying specially to the roads and levées of that parish. He built the levée, according to the terms of the adjudication, and it was duly accepted by the inspector. The plaintiff subsequently proceeded in rem for the amount of the adjudication, and the land upon which the levée was erected did not sell for an amount sufficient to pay him. He now claims from the police jury the amount unpaid.

The defendants contend that the act of 1842 is of a local nature, and gives no right to the contractor to proceed against the parish; that he can only proceed against the owner of the land personally, or, in case the owner does not reside in the parish, against the land itself.

After issue joined, Richard Haurahan intervened, alleging that he was to have a joint interest in the contract made between the plaintiff and the defendants, and to unite with the plaintiff in performing the said contract; that he did so, and furnished money and labor, and was to receive one-half of the amount agreed upon; that the plaintiff refuses to allow his demand; and that he, the intervenor, claims one-half of the sum due by the defendants.

The plaintiff moved to dismiss the intervention, on the ground that the intervenor had not made out a case entitling him to that mode of relief. The motion was overruled, and the plaintiff excepted. On the merits, the court below gave judgment in favor of the defendants, and both the plaintiff and the intervenor appealed.

The petition of intervention should have been dismissed. The intervenor was not a party to the contract, and has no more claim upon the fund in the hands of the defendants than any other creditor of the plaintiff. By his own allegations, as well as by his evidence, it appears that there is an unsettled account between him and the plaintiff. The defendants have nothing to do with that account, and their obligation cannot be divided against their consent.

In relation to the plaintiff, we think there is error in the judgment appealed from. The defendants are responsible, unless their responsibility had been waived in the contract of adjudication. The plaintiff proceeded against the land, and it is admitted that the former owners were insolvent at the time the sale was made. The admission that the land was then worth more than the plaintiff's claim, could not, in any case, prejudice his right. But it is further admitted, that there was a controversy about the ownership of it. This uncertainty as to the title was no doubt the cause of the low price at which it was adjudicated; and if it be true that it sold below its value, the defendants are to blame for suffering it, not the plaintiff, who probably required the greater part of the amount due, to pay for this work. The levée was not ordered to be made for the special benefit of the owner of the land on which it stands, but for the general benefit of the parish; and, in default of other means, the parish must pay for it.

It is therefore ordered that the judgment be reversed, and the intervention dismissed, with costs in both courts. It is further ordered, that the plaintiff recover from the defendants the sum of \$818 34, with legal interest from the 5th October, 1843, till paid, and costs in both courts.

NOLAN v. BABIN.

Where judgments for sums of money are enjoined the measure of damages is established by the third section of the stat. of 25 March, 1831; but where the judgment is for the delivery of specific property, the amount of damages is a question of fact, to be ascertained in an action on the injunction bond.

A PPEAL from the District Court of West Baton Rouge, Burk, J. Brunot, for the plaintiff. W. B. Robertson, for the appellant. The judgment of the court was pronounced by

Rost, J. There is no error in the judgment of the court below, refusing to assess damages on the dissolution of an injunction taken to restrain the delivery of property. Where judgments for sums of money are enjoined, the rule of damages is established by the statute under which the plaintiff claims. But when the judgment enjoined is for the delivery of property, as in the present case, the measure of damages is a question of fact, to be ascertained in an action upon the injunction bond.

Judgment affirmed.

PIERSE v. AMONETT et al.

One with whom slaves seized under an attachment are left, in virtue of an agreement between the parties that he shall have control over them till the termination of the action, with authority to hire or otherwise employ them, has no such use of the slaves as is contemplated by art. 47 of the Code of Practice; and, being the mere depositary of the slaves pending the attachment, possessing in the name of another, he cannot maintain a possessory action for their recovery. C. P. 48.

A PPEAL from the District Court of Madison, Selby, J. Pierse, pro se.

Thomas and Snyder, for the appellants. Amonett, one of the appellants appeared on the same side. The judgment of the court was pronounced by

King, J. This is a possessory action instituted by the plaintiff to recover the possession of two slaves, of which he alleges he has been forcibly and frauduently dispossessed by the defendants. The defendants deny that the plaintiff has ever had such possession of the slaves in controversy, as authorizes him to maintain this action, They further aver that they are the owners of the slaves, under a sheriff's sale. A judgment was rendered in favor of the plaintiff in the court below, from which the defendants have appealed.

It appears, from the evidence, that the slaves in question belonged to McKee, and were attached at the suit of E. T. Powell. Pierse, the plaintiff, and J. I. Amonett, one of the defendants, became the sureties of the defendant in attachment in a bond to release the slaves, in consequence of which the following agreement was entered into:

"In the case of E. T. Powell v. G. B. McKee, Ninth District Court, Parish of Madison, Louisiana. In this case, the boys attached, Asbury and Sam, have een left with Allen Pierse, and he has full control over them till the suit is ter-

PIRRSI

minated, or some amicable arrangement made, and has authority to hire them, and do the best he can with them.

"23d January, 1846. (Signed.) Agent for McKEE,

" W. S. THOMPSON. 44 Attest

"EDLEY T. POWELL." "JAMES I. AMONETT.

Under a judgment rendered in the State of Tennessee against McKee, and made executory in this State, the slaves were seized and sold, during the temporary absence of the plaintiff, Pierse, from the State, and purchased by the defendants.

To the plaintiff's right of action, it is objected that he has not claimed as owner, and was not in possession for twelve months previous to the institution of this suit : to which he answers that, he is entitled to the use of the slaves, and was fraudulently dispossessed.

The term "use" which occurs in the 47th article of the Code of Practice, is there employed in its technical sense, to designate one of the titles in virtue of which the possessory action may be maintained. It is clear that the agreement under which the plaintiff claims, invested him with no such title. He was the mere depositary of the slaves pending of the proceedings in attachment, possessed in the name of another, and was not entitled to the possessory action. C. P. art. 48.

It is therefore ordered, that the judgment of the District Court be reversed, and that there be judgment for the defendants, the appellee paying the costs of this appeal.

NUGENT v. HICKEY.

To bind another by a note the power must be express and special.

Where from the plaintiff's own books a credit appears to have been given exclusively to a particular individual, he alone is liable for the debt.

Where the proceeds of crops received and sold by factors were more than sufficient to pay for any supplies or advances made by them for the use of a plantation, but, instead of being applied to the extinguishment of those debts, they were appropriated to the payment of private debts of an agent of the owner of the plantation, the owner cannot be made responsible by the factors, for such supplies or advances.

PPEAL from the District Court of East Baton Rouge, Burk, J.

Elam, for the appellant, cited Story on Agency, ss. 61, 93, 95, 127, 256.

7. Civ. Code, art. 1960. 17 La. 353.

T. G. Morgan, for the defendant. Walsh had no authority to bind the defendant by note. Story on Agency, ss. 62, 65, 68, 69, and notes 2, 72, 76. Civ. Code, art. 2966.

The judgment of the court was pronounced by

EUSTIS, C. J. This case involves the question of the liability of the defendant for a debt of \$2,332 121, due to the partnership of Nugent, Turpin & Watt, doing business in New Orleans.

It is charged in the petition that the defendant, being the owner of the Parc Perdu plantation, in the parish of St. Martin, constituted S. W. Walsh his agent for the management of it, with full power for the purchase of stock, or the necessary articles for the use of the plantation, and for the settlement of accounts

in relation to the same; that Walsh remained on the plantation for several years, and under said power contracted the debt sued on with Nugent, Turpin & Watt, and closed the account by a note in their favor, on the 11th July, 1840, which note is held by the plaintiff, and is the subject of the present suit. The note is signed by S. W. Walsh, agent for P. Hickey, for Pare Perdu plantation.

note is signed by S. W. Walsh, agent for P. Hickey, for Pare Perdu plantation. The power of attorney under which Walsh acted is in the words before mentioned, and also directs that in all cases in which his, Hickey's, interest may be concerned, in relation to the plantation, Walsh should act for him and in his name, as though he were present. There was no plantation account kept by Nugent, Turpin & Walt, the factors. The account in which Hickey is sought to be made liable is against Simon W. Walsh alone, in which supplies for the plantation, and money advanced on account to Walsh, are charged to him. No liability attached to Hickey by reason of the note given in his name, for Walsh had no authority to bind him in that form; and from the factors' own accounts, it appears that the credit was given exclusively to Walsh. There is one ground of defence taken by the defendant, which is conclusive. It appears that the proceeds of the crops of the plantation received by Nugent, Turpin & Walt, and sold by them, were more than sufficient to pay the debts contracted for the

plantation. It is evident the factors were bound to apply the proceeds of the crops to the extinguishment of the plantation debts, and had no right to pay the agent's private debts with them, and leave the plantation debts unprovided for. In other words, *Hickey's* funds ought to have gone to the payment of his debts; and, on the shewing of the plaintiff, and assuming that the factors knew the authority under which *Walsh* managed the plantation, there is no cause of ac-

ROGERT 9. . HICKEY.

New Orleans and Carrollton Railroad Company v. McKelvey.

Judgment affirmed.

A variance from the corporate name in a petition filed in an action instituted by a corporation, which cannot mislead the defendant as to his creditor, is immaterial; as where a railroad company, invested with banking privileges, and incorporated under the name of the "New Orleans and Carrollton Railroad Company," is termed in the petition the "New Orleans and Carrollton Railroad and Banking Company."

Where a note is payable at the office of a particular bank, a demand of payment at the place specified, of one apparently in charge of the affairs of the bank as its cashier or agent, if the maker be not present, is sufficient. The holder is under no obligation to present it elsewhere, nor personally to the maker; and where the notary states in his protest that a demand was made of one having apparently such authority as agent, it will be prima factor evidence of the fact, and throw on the defendant the burden of proving it untrue.

A PPEAL from the District Court of West Feliciana, Boyle, J. Phillips, for the plaintiffs. Bowman, for the appellant, cited Code of Practice, arts. 343, 344, 345, 346. 17 La. 234. Acts of 1833, p. 9.

The judgment of the court was pronounced by

tion against the defendant.

King, J. The defendant is sued as the maker of two promissory notes, payable at the office of the New Orleans and Carrollton Railroad Company, at Bayou Sara. The suit is instituted in the name of "the President and Directors of the New Orleans and Carrollton Railroad and Banking Company."

CARROLLTON RAILEGAD COMPANY MCKELVEY.

NEW ORLEANS The defendant admits his signature to the notes, but denies that any such corporation exists as that named in the petition, or that he is indebted to such a corporation. He further denies that a legal demand was made at the place of payment, or on the proper person. There was a judgment in favor of the plaintiffs, and the defendant appealed.

The corporation possessed originally no banking powers, and when invested with those privileges, by a subsequent amendment of the charter, 'no change was made in its name. The inadvertent addition of the word "banking" to the plaintiffs' name, which in reality more truly describes the character of the corporation, is not so material a variance from the corporate name as to affect the validity of the pleadings. It could have led the defendant into no error, in regard to his creditor.

The notary states in his protest, that he presented the notes at the office of discount and deposit of the New Orleans and Carrollton Railroad and Banking Company, to Robinson Mumford, agent of said office of discount and deposit, of whom payment was demanded, &c. It is contended that this demand is insufficient : first, because there is no proof of Mumford's agency ; secondly, because it was not made at the place indicated in the notes.

Where a note is made payable at the office of a particular bank, it is sufficient to demand the payment at the specified place, of a person apparently in charge of the affairs of the bank, as its cashier or agent, if the maker be not present; and, in the event of dishonor at that place, the holder is under no obligation to present it elsewhere, nor personally to the maker. 10 La. p. 208. Story on Bille, ss. 234, 235.

The statement of the notary in his protest of a demand on such an apparently authorized agent, makes such primd facie evidence of the fact, as to put the defendant on the proof that it is untrue The place described by the notary as that at which the demand was made, is evidently the office of the plaintiffs, at Bayou Sara, where the notes were payable. See the case of Thatcher v. Goff et al. 13 La. 363. Judgment affirmed.

Rowly et al. v. KEMP, Tutrix.

Where a purchaser at a judicial sale fails to comply with its terms, his acts may be treated as

Where a sheriff has made a seizure under a fi. fa., he is not bound to return the writ, unless required to do so by the plaintiff. He may sell under the seizure even after the return-day, where the failure to sell before is not attributable to the plaintiff.

Where a judgment was rendered for a certain amount, subject to a credit, and the credit instead of being written in the body of the ft. fa., was endorsed on it, in a certificate of the clerk under the seal of the court, the error, if it be one, is no ground for enjoining the execution for its whole amount.

The fact of an execution being issued for more than the amount due under the judgment, will not authorize an injunction for the whole amount.

One holding a prior mortgage cannot prevent the sale of the mortgaged property at the suit of a subsequent mortgagee. He must exercise his rights on the proceeds.

PPEAL from the District Court of Concordia, Curry, J. Frost and H. A. Bullard, for the appellants. Thomas and Snyder, for the defendant-The judgment of the court was pronounced by

Rowlx

Eustis, C. J. The plaintiffs enjoined the proceedings under a writ of fieri facias, issued on a judgment obtained by the defendant, Elizabeth Kemp, tutrix, against the plaintift, Rowly, which welhave recently had before us, ante p. 316, The injunction was dissolved, with twenty per cent damages on the amount of the execution enjoined, and five hundred dollars special damages and costs.

The plaintiffs have appealed.

I. The principal ground on which the injunction was obtained, related to the irregularity of the proceedings of the sheriff in the execution of the writ subsequent to the first exposure for sale of the property seized. The defendant, Charles N. Rowly, as attorney in fact of Lansing, bid for it, and it was adjudicated to him, and he not complying with the terms of the sale, the sheriff readvertised the property for sale, treating the acts of Rowly, attorney in fact, as nullities, as he was bound to do, for his conduct throughout shows that his sole object was to embarrass the proceedings of the sheriff, and defeat the process of the court, It is well settled that, having made a seizure, the sheriff was not bound to return the writ, unless required by the plaintiff, but might proceed to sell under the seizure, notwithstanding the expiration of the return day of the writ, the failure to sell not having been attributable to the plaintiff. Dugat v. Babin, 3 Martin, N. S. 393. Labiche v. Lews, 12 Robinson, 8. The objection to the regularity of the proceedings under the writ, as well as the reasons given for Rowly's refusal to comply with his bid, we consider untenable.

II. In the judgment of Elizabeth Kemp, tutrix, on which the execution issued, there was a credit of \$1,000 allowed, to take effect from the 11th March, 1841. This credit, instead of being written in the body of the writ, was endorsed on it, in the terms of the judgment, under the certificate of the clerk and the seal of the court. This error, if it be one, which we do not admit, could furnish no ground for enjoining the execution, for its whole amount, upwards of \$60,000.

III. It is urged, on behalf of Rowly, that the whole of the judgment was not due, and that such has been the decision of this court on the appeal in that case. This is true. We reduced that judgment \$1,300, on account of credits which we thought ought have to been allowed to Rowly. But Rowly did not stay the execution on appeal which he took from that judgment by giving bond and surety, and thereby authorized the issuing of the execution. He did not present this as one of the reasons for which he asked for the injunction; he did not allege that the debt was not due to the plaintiff in execution. But, in any event, the extent for which Rowly could claim relief, would be for the amount by which the judgment was reduced, and affords no reasonable excuse for enjoining the proceedings for the recovery of the balance of it.

IV. But there are other parties besides Rowly, who are plaintiffs. His alterego, Jacob D. Lansing, and Samuel Rowly, of the State of New York. Hamilton M. Wright and James Wright, of the city of New Orleans, unite with Rowly in defeating the recovery of the plaintiffs' debt. Both Samuel Rowly and Lansing are, or appear to be, purchasers of the Marengo plantation and slaves, at sheriff's sale, at different periods, and the only relations they ought to have in this controversy are as stakeholders of the price.

V. Hamilton M. Wright and James Wright assign, as their grounds of application, that they purchased the judgment of the Mechanics' and Traders' Bank, and have become subrogated to all its rights, and that under their execution the

Rower's

Marenge plantation was sold, and bought by Samuel Rouly, who is now alleged to be the owner, but that the sale did not satisfy the flebt.

It appears that these parties instructed the sheriff, through their attorney, Mr. Frost, who is also the sole attorney of Rowly, and the surety in the injunction bond, if Samuel Rowly should become the purchaser of the property at sheriff's sale, to dispense with his giving any security on the twelve months' bond for the purchase money, which was accordingly done. There is evidence before us which authorizes the belief that this judgment was assigned to the Messre. Wright, for the purposes of Rewly, and that the consideration of the transfer from the bank came from him.

It is urged that, pending the appeal from the original judgment, the defendant in this suit and plaintiff in the other, had no right to enforce the mortgage by executing the judgment, and that the court has recognized the rank of the mortgage of the Mechanics' and Traders' Bank, adversely to the rank of the minors' mortgage, on which the bank had taken a suspensive appeal. The appeal was suspensive only as to the rank of the mortgages. The order granting the appeal expressly provided that, the execution of the judgment against Rouly and Lansing should not be suspended. The bank was interested in the distribution of the proceeds of the property mortgaged; but no case is before us in which it was authorized to enjoin the sale of the property mortgaged to the minors, which extended only to ene-third of the plantation and slaves, while that in favor of the bank extended to the whole, and amounted only to the sum of \$9,383 22, with interest. 6 Mart. N. S. 615. 7 Ib. N. S. 281.

The judgment appealed from was against the plaintiffs in solido, and the surety, for \$12,000, being twenty per cent on the amount of the principal and interest of the judgment of Elizabeth Kemp, tutrix, and of the execution enjoined, and five hundred dollars special damages, incurred for expense of counsel fees,

The amount of the injunction bond is only \$5,000 A party applying to a court to suspend its process, which had become embarrassed with difficulties which he himself has been instrumental in creating for his own special benefit. ought to present a clear legal case, to protect himself from the payment of damages to the injured party. The law authorizes the court to impose them on the dissolution of injunctions wrongfully sued out. The maximum rate which the court has power to assess is high-very high; but the abuse is great which the law intends to remedy. It endangers the security of property, as well as the proper administration of justice, and it is our duty to repress all attempts to defeat the execution of judgments upon frivolous or fraudulent pretexts. We consider that there was no pretence on the part of Rowly to arrest this execution, and those who have lent their names for the furtherance of his purposes, as we think the other plaintiffs have, cannot complain if they are treated as his instruments, and amerced accordingly. The original judgment bears ten per cent interest, and we trust the delays will not be long ere the minors shall be restored to their rights. The injunction was granted in Jan. 1846, and we think twenty per cent damages too high, under the circumstances.

It is therefore ordered that the judgment appealed from be reversed, and that the defendant recover from the plaintiffs in solido, and John W. Frost, their surety, the sum of five thousand dollars, with costs; the defendant paying the costs of this appeal.

HYNES v. COBB et al.

The nullity resulting from a stipulation for usurious interest attaches to the agreement for interest only, and does not destroy the obligation for the principal.

An agreement to pay the highest rate of conventional interest upon a nominal principal, part of which was composed of usurious interest, is usurious.

Where a party has stipulated, in a note, for usurious interest after maturity, he cannot recover legal interest even from judicial demand.

A payment made after maturity on a note which bore usurious interest from that time, where no imputation is expressed in the receipt nor otherwise shown, will be imputed to the principal, that being the debt which the maker had the most interest in discharging, the stipulation for interest not being binding on him. C. C. 2160, 2162.

A PPEAL from the District Court of Madison, Curry, J.

A This is an action on a promissory note for \$5,254 10, dated the 13th of November, 1841, and due on the 1st January, 1842, bearing ten per cent interest from maturity. The facts of the case are these: The agent of the plaintiff loaned the defendants a sum of money, which, with twenty per centadded thereto, made the amount specified in the body of the note, and also charged the defendants the highest rate of conventional interest upon the original amount of money, as well as upon the twenty per cent usury included in the face of the note. The defendants pleaded the usurious character of the contract, and appealed from a judgment rendered against them.

Amonett, for the plaintiff.

Snyder and Shannon, for the appellants. The contract, being usurious, was made in contravention of a prohibitory law, and cannot be enforced; and the plaintiff, by the turpitude of the contract, has forfeited the right to recover any portion of the note sued on. Rosenda v. Zabriskie, 4 Rob. 493. Cox v. Rowly, 12 Rob. 273. Hagan v. Canal Bank, 1 An. Rep. 62. Under the law, at the time the contract was made between the plaintiff and defendants, the stipulation for usurious interest vitiated and avoided the whole contract. According to art. 2895 of the Code, interest cannot be stipulated at a higher rate than ten per cent per annum; and under this Code all contracts made in contravention of a prohibitory law are void. C. Code 12, 1887, 1889. To test the question whether or not the contract is void ab initio or only pro tanto, it is proper to inquire whether a loan of money with a stipulation for usurious interest, is a divisible or indivisible obligation. If the latter, the whole contract must follow the fate of the usurious portion. If the former, then it can be pruned of its illegalities, and the loan for the amount actually received be sustained. The usury being the primary inducement to make the loan by the plaintiff, forms the main and principal motive for the contract. It is only necessary to inquire with what intent the loan was made by the plaintiff. The evidence of Lovry, who acted as the agent of the plaintiff, fully discloses the moving cause and consideration of the loan, viz: twenty per cent premium on the money loaned, and ten per cent interest on the original amount of the loan and the premium.

The judgment of the court a quá is clearly erroneous. The demand of the

The judgment of the court a qud is clearly erroneous. The demand of the plaintiff should have been rejected at his cost. In the decisions heretofore made by this court upon questions of usury, it has never gone so far as to declare the whole contract to be void. But by reference to those decisions it will be perceived that the question has never been fully presented to the court. The contracts have only been sought to be avoided to the extent of the usury, in the cases heretofore adjudicated upon, and the court in all the recent decisions have declared the contracts void to the full extent demanded by the defendants, in the various suits heretofore decided. The defendants therefore contend, that the contract having been made in contravention of a prohibitory law, is absolutely null and void; that the contract of loan with a stipulation for usury is indivisible,

Hynns Conn. and that if void for any portion, it mints the whole transaction, and bars a recovery for even the actual amount loaned by the plaintiff; that if the contract is not void ab initio, the plaintiff is precluded from recovering interest on any part of the loan, and that the judgment must be reduced to the actual amount received by the defendants.

The judgment of the court was pronounced by

SLIDELL, J. The defendants are sued as makers of a promissory note, payable to the plaintiff, and on which interest was stipulated, after maturity, at the rate of ten per cent. The note was not protested, nor is any default shown, other than that created by the judicial demand. The defendants pleaded usury, and claim the nullity of the entire contract, both for principal and interest. It appears that the amount promised to be paid by the note, which was dated Nov. 30, 1841, and payable on the 1st day of January, 1842, being a little more than one month, was composed of the amount loaned on that day to the defendants, and of twenty per cent added thereto, being at a rate exceeding two hundred per cent per annum.

It is urged by the defendants, that the nullity of the entire contract should be decreed. But the rule is well settled that in contracts stipulating usurious interest, the nullity attaches to the agreement for interest only, and does not destroy the obligation for the principal. See the cases of Walden v. City Bank, 2 Rob. 178. Rosenda v. Zabriskie, 4 Rob. 493. Also the case of Reed v. Duncan, 1 An. Rep. 265. Twenty per cent therefore must be stricken from the face of the note. The agreement to pay ten per cent after maturity upon a nominal principal sum, of which an important portion was in reality for usurious interest, was usurious, and cannot be enforced.

It remains, then, only to consider, whether legal interest can be granted on the amount levied, from the date of default.

There was no protest, nor other evidence of default, till the judicial demand by the citation of the defendants, in the year 1845.

Under the law, as it existed at the time of the making of the contract, it was provided that, in contracts which do not stepulate for the payment of interest, it is due from the time the debtor is put in default for the payment of the principal. Art. 1932. So article 1935 declares that, in eases where no conventional interest is stipulated, the legal interest at the time of default shall be recovered, although the rate may have been subsequently changed by law. Looking to the terms of these articles, and to the policy of our laws prohibiting usury, we do not think we should be authorized to give even legal interest from judicial demand to a party who had stipulated an usurious conventional interest after maturity.

It appears that, on the 6th January, 1845, an endorsement was made on the note of a payment, on that day, of \$240. No imputation is expressed in the receipt, nor otherwise shown. In an ordinary case, the law would make the imputation to the interest. But the article of the Code which directs that imputation, must be construed in connection with other rules in pari materia. One of these is that, where the receipt bears no imputation the payment must be imputed to the debt which the debtor had at the time most interest in discharging, of those that are equally due. See arts. 2162, 2160. Here the stipulation for interest had in law no binding force, and, looking to the spirit of the law and the legislation on this subject, as a whole, we think, in the absence of any agreement, the imputation should be made to the principal.

The plaintiff has asked for judgment, with mortgage upon certain property described in an act of mortgage purporting to be signed by the parties, and

Hynna v. Conn.

comprising both land and slaves. It is admitted by the plaintiff, that the names of the negroes were not in the act when it was signed. The notary who passed the act, and who was also the agent of the plaintiff in making the usurious loan, was offered as a witness by the plaintiff, and stated on his direct examination, "that Mr. Cobb told him to put in the ten negroes; that the space was left blank in the act, and he was authorized to put the ten negroes by Mr. Cobb." On his cross examination he says: "The act was passed at Mr. Cobb's house, and that Mr, and Mrs. Cobb did not object to putting the negroes in. That he went upon the boat to Mr. Cobb's, to pass the act. That the boat barely touched at Mr. Cobb's." The slaves appear by the mortgage to be the wife's property, and in the notary's unsatisfactory statement of this irregular proceeding, there is nothing to show that she authorized him to fill up the blank. The plaintiff has established no mortgage right to the slaves.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the plaintiff recover of the defendants the sum of \$4,138 42, without interest, and with mortgage on the land only, described in the mortgage executed on the 30th November, 1841, before Alfred J. Lowry, notary public, whereof a copy is on file in this suit, and costs in the court below, those of this appeal to be paid by the plaintiff.

Brown v. Bemiss.

A f. fa. levied on an undivided half of a tract of land cannot be enjoined by the owner of the other half, on the ground of his having a privilege thereon for the price of a levée made on the land under an adjudication by the inspector of roads and levées, nor on account of a claim for the increased value of the property from useful improvements while plaintiff in injunction was a possessor of the land in good faith. If entitled to a privilege for the cost of the levée, the party has a right to be paid by preference out of the proceeds of the sale of the property seized; but if he has only a claim for the increased value of the property resulting from useful improvements, a separate appraisement of the land and improvements should be made after the sale; and the sexing creditor will be entitled to receive the value which the land bears to the product of the sale, and the plaintiff in injunction the value of the improvements estimated in relation to the same product; the rents of the property since the notice of seizure, to be added to the share of the seizing creditor, and deducted from the plaintiff's.

A PPEAL from the District Court of Madison, Selby, J. Thomas, for the appellant. Amonett and Steele, for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiff, being joint owner with one Rufus Stone, of certain lands fronting on the Mississippi river, enjoined the seizure under execution of the undivided half belonging to Stone, on the following grounds: 1st. That under an adjudication made to him, in due form of law, by the inspector of roads and levées, he had erected a levée in front of the whole land, and was entitled to a mortgage and privilege upon the undivided half of Stone, for one-half of the price of adjudication. 2d. That he had previously purchased the interest of Stone, at a sheriff's sale, which was subsequently set aside on the proceedings had on the monition. 3d. That, between the sale and the decree setting it aside, he was a possessor in good faith, and made upon the land useful and valuable improvements, for which he is entitled to be compensated. 4th. That it

Brows v. Bruiss. is necessary for the preservation of his rights, that the levée and improvements made by him be appraised separately, and that he is entitled to be paid the amount of that appraisement, before the seizing creditor proceeds to sell the land.

The defendants took a rule to show cause why the injunction should not be dissolved, on the ground that the plaintiff has not made out a proper case for such a remedy; that he has not shown the existence of a privilege; and that, if the privilege exists, it is no cause for an injunction. The court below dissolved the injunction with five per cent interest on the amount of the judgment enjoined, and the plaintif appealed.

The court did not err in dissolving the injunction. The seizing creditor has the right to go on and sell. If the plaintiff is entitltled to a privilege for making the levée, he must be paid by preference out of the proceeds. If he has no privilege, but only a claim for the increased value of the property resulting from useful improvements made by him, his remedy is clearly pointed out in the case of Lanusse v. Lanna, 6 Mart. N. S. 103. The separate appraisement, for which he contends, is to be made after the sale; and when the respective values of the land and of the improvements are ascertained, he and the seizing creditor are to receive their proportions out of the proceeds; that is to say, the seizing creditor the value which the land bore in relation to the product of the sale, and the plaintiff the value of the improvements considered in the same way; the rents of the property, according to the proportion which each holds in it since the notice of seizure, to be added to the share of the seizing creditor, and deducted from the plaintiff's, For the preservation of the plaintiff's rights it is necessary that the judgment be amended.

It is therefore ordered that the judgment dissolving the injunction be amended, and that the sheriff, on receiving the proceeds of the sale, be directed not to pay them over to the seizing creditor, but bring them into court, to be paid to the plaintiff, or to the seizing creditor, or to both, as the District Court may direct, in conformity with the views expressed in the foregoing opinion. It is further ordered, that the judgment as amended be affirmed, with costs.

Brown v. Police Jury of Madison et al.

Decision in Brown v. Bemiss, supra p. 365, affirmed.

A PPEAL from the District Court of Madison, Selby, J. Thomas, for the appellant. Stockton and Steele, for the defendants, cited Civil Code, arts. 3239, 3240. Code Pract. arts. 296, 683. 6 Mart. N. S. 615. 7 Ib. N. S. 281. 2 La. 66. Amonett, on the same side. The judgment of the court was pronounced by

Rost, J. The facts of this case are the same as those of the case of Brown v. Bemiss, just decided, and for the reasons therein given the same decree must be entered.

It is therefore ordered that the judgment dissolving the injunction be amended, and that the sheriff, on receiving the proceeds of the sale, be directed not to pay them over to the seizing creditor, but to bring them into court to be paid to the plaintiff, or to the seizing creditor, or to both, as the District Court may direct. It is further ordered, that the judgment, as amended, be affirmed with costs.

TAYLOR V. RUNDELL.

the property of the state of th

Contracts entered into during minority, may be rendered valid, by a ratification, either express or implied, made after the disability has ceased. C. C. 1778, 1785, 1869.

Where improvements made on public lands of the United States purchased by a minor, are held by him after arriving at the age of majority, and he continues to cultivate the land, it will amount to a ratification of the contract.

A PPEAL from the District Court of Madison, Curry, J. Amonett, for the plaintiff. Shannon, for the appellant. The judgment of the court was pronounced by

Kine, J. This action is instituted upon two promissory notes executed by the defendant, payable to E. W. Thorpe, or bearer, and by the latter transferred to the plaintiff. Interest is claimed from the maturity of the notes, on the ground that they were given for property producing revenue. The defendant admits the execution of the notes, and pleads minority and a failure of consideration. A judgment was rendered in the court below against him, from which he has appealed.

Interrogatories were propounded to the defendant, enquiring into the consideration of the notes, to which he answered that, they were given for a claim, which Thorpe said he had to one thousand acres of land; that the land belonged to the government; that Thorpe had no title to any part of it; that it yielded no revenue; and that he was under twenty-one years of age when he executed the notes. Two witnesses, whose veracity has not been impeached, contradict two of these statements. They both state that the notes were given for improvements upon public land; and one of them states that the defendant made annual revenues from it. It is further shown that the defendant has always been in peaceable possession of the land and improvements, since the date of his purchase.

The answers of the defendant, stating that he was under twenty-one years of age when the notes were executed, are the only evidence in support of the plea of minority. If the effect of these had not been destroyed, by the testimony of the witnesses who contradict his statements in other respects, they would still be insufficient to support the plea. The defence is not that the defendant is now a minor, but that he was a minor in 1841, when he executed the notes, and his oath is to the same effect.

Contracts entered into during minority may be rendered valid by ratification, either expressed or implied, after the disability ceases. Civil Code, arts. 1778, 1785, 1869. The defendant has continued to hold possession of the improvements, and to cultivate the land, and appears to have made no offer to restore either. This is an affirmance of the contract.

Judgment affirmed.

KING, Executor, v. HICKY.

A third possessor, sued in an hypothecary action, cannot plead that the notes given for the original debt are prescribed. Prescription is an exception which the debtor and his creditors alone can plead. The obligation subsists until they avail themselves of the prescription; courts of justice cannot supply it.

Kine Micky. A purchaser in possession of real estate, sold by order of the probate court free of encumbrance, by whom the price has not been paid, may be condemned, in an hypothecary action by a mortgagee entitled to be paid out of the proceeds of the sale, to pay to the latter so much of the price as may be necessary to discharge his claim, where the representative of the deceased mortgagor, though notified of the proceeding, makes no opposition to it, and no creditor claims any superior privilege on the price. The purchaser is but a stakeholder, bound to account either to the plaintiff, or to the succession of the mortgagor.

PPEAL from the District Court of East Baten Rouge, Johnson, J. At a sale of the estate of Merriman, in 1833, Walsh purchased two slaves, giving his promissory notes for the price, with a mortgage on the slaves to secure their payment. The heirs of Merriman transferred the notes and mortgage to plaintiff's testator, Bowen, subrogating him to all their rights to the notes and mortgages. On the 18th January, 1845, the notes were protested for non-payment, after a demand made of the maker. On the 9th of April following demand of payment was made of the defendant, Hicky, as third possessor, and on the 2d of May ensuing, a second demand was made of him. The plaintiff thereupon instituted this hypothecary action. The defendant pleaded: 1st. The general issue. 2d. That he purchased the slaves at a probate sale of the community existing between Walsh and his wife, on 31 August, 1836, and that they were sold free of all encumbrances. 3d. The prescription of five years. There was a judgment below in favor of the defendant, on the grounds, that the claim was prescribed, and that the slaves were sold free from encumbrance, leaving the plaintiff to look for payment to the proceeds of the sale. The plaintiff appealed.

Elam, for the appellant. The sale under which the defendant holds the slaves, did not extinguish Bowen's mortgage. The principle that, a sale of property by order of a Court of Probates extinguishes all mortgages, had its inception in the case of Lafon's Executors v. Phillips et al., 2 Mart. N. S. 225, reviewed in the case of De Ende v. Moore, same vol. 336, assimilating it to the cessio bonorum, where all the creditors are presumed to be represented claiming a sale of the property for the purpose of paying the debts of the deceased. This principle was adapted to the provisions of the laws then in force, which placed the estate of the deceased, not accepted by his heirs, under the administration of the law, which required the judge to sell all the property for the purpose of paying the debts. This rule has been extended from time to time, extended to sales not made for the purpose of paying the debts of the deceased, and when the proceeds do not remain subject to the orders of the Probate Court. This rule cannot be made to apply to sales made to effect a partition.

C. C. arts. 1261, 1262, 1263, 1370, 1382, 1395.

In this case, the titles to the slaves were in Walsh, and if they made a part of the community, it is not shown that they were sold to pay the debts, for no debts are shown to have existed, other than the debt to Boven. The avowed object of the sale was to effect a settlement with his minor children, and not to pay Bowen's debt. Walsh, as tutor to his minor children, could not cause the property of the community to be sold to effect a settlement with them. Stafford v. Villain et al. 10 La. 319, and McGchee v. Dupuy, Under-tutor, et al. 7 Robinson, 229, nor to effect a partition without being authorized by the judge by the advice of a family meeting. C. C. art. 1235. All the law would sanction would have been an adjudication to him at the appraised value, to be held subject to the mortgage in favor of the minors. C. C. art. 338. The title to the slaves was not changed by the proceedings of the Probate Court, and could not in any wise effect Bowen's mortgage. Bowen should have been notified of the application to sell the property on which his mortgage rested. C. P. arts. 990, 192. 6 Rob. 302. If the judge cannot grant an order ex parte to erase and cancel a mortgage resting on property sold under his authority, that mortgage is not erased ipso jure. Vide 5 La. 330. 6 Rob. 301. This is a case in point; the sale under which Hicky bought, did not cancel the mortgages of the

minors, much less the mortgage of Bowen. "The law should be construed strictly to save a right, and liberally to give a remedy." 1 Baldwin's C. C. R. 316. 1 Peter. Dig. p. 581, sec. 36.

Kine v. Hicky.

T. G. Morgan, for the defendant. The note given by Walsh is prescribed, and consequently the mortgage also. C. C. art. 3505. Shields v. Brandegee, 4 La. 326. All mortgages imposed on the property by Walsh were released and cancelled by the sale made by the Court of Probates, and the defendant acquired the slaves free from all mortgages or encumbrances, leaving the creditors of the estate of Mrs. Walsh to their legal recourse on the proceeds of such sale, or against Walsh individually. C. P. arts. 938 to 996. Lafon's Executors v. Phillips, 2 Mart. N. S. 225. De Ende v. Moore, 2 Ib. 336. French v. Prieur, 5 Rob. 299, and cases there cited. The necessity of selling the slaves, upon whom the plaintiff claims to have a mortgage, is apparent from the fact disclosed by the plaintiff, that the price due to the vendors had not been paid.

The judgment of the court was pronounced by

Rost, J.* This is an hypothecary action, instituted against the defendant, as third possessor, and the prayer of the petition is, that he pay the plaintiff's claim, or that he surrender the property mortgaged. He answers that he holds the slaves in controversy under a probate sale, by which the mortgage has been extinguished. He also pleads the prescription of five years against the notes, to secure the payment of which the mortgage was given. Judgment was rendored in his favor, and the plaintiff appealed.

Under the state of facts presented by this case, the defendant is without capacity to plead the prescription of five years upon the notes. That prescription is an exception which the debtor and his creditors alone can plead, and the obligation subsists until they avail themselves of it; if they do not, courts of justice cannot supply it. It is in evidence that a demand was made of the original debtor, more than thirty days before the institution of this suit, and it does not appear that he refused payment on that ground.

As the succession had debts it is a fair presumption that the probate sale was made to pay them, and we will, for the purposes of this enquiry, consider that the slaves claimed passed into the hands of the defendant free from previous encumbrances, the plaintiff being entitled to be paid out of the proceeds.

Under the late decision of this court in the case of *Boguille* v. *Faille*, 1 An. R. 204, if the mortgage still existed, the plaintiff would have the right to cause the property subject to it to be sold, and to receive the proceeds. C. P. art. 68. C. C. art. 3361.

Here the property was sold ten years ago, to effect the settlement of a succession. The person who had charge of it, and who was the original debtor of the plaintiff, has rendered no account whatever of his administration; although notified of these proceedings, he has made no opposition to them, and no creditor has appeared claiming superior privileges on the proceeds of the property.

The price of the adjudication is traced by the plaintiff into the hands of the defendant, and identified. It is not pretended that any portion of it has been bond fide paid to the representative of the succession, and the defendant stands in the capacity of a stakeholder bound to account either to the plaintiff, or to the succession from which he purchased.

The sum in his hands, with the interest that has accrued upon it, is more than sufficient to pay the plaintiff's claim, and we consider him entitled to be

^{*} King, J., being a party to this case, did not sit.

Kino .

paid out of it, as he would have been, if the slaves had been sold under an hypothecary action, instituted by him.

It is therefore ordered that the judgment be reversed, and that there be judgment in favor of the plaintiff for the sum of \$1,274 85, with interest at the rate of ten per cent per annum, from the 18th of May, 1835, until paid, and costs in both courts.*

WEBB, Administrator, v. KEMP.

In proceedings against a sheriff, to render him liable, under the 7th section of the stat. of 7 April, 1836, for failure to return a f. fa. on or before its return day, he may show any circumstance which will legally excuse his failure to return the writ before that time; and where the written return on the writ is offered in evidence by the plaintiff, the facts which it recites will be evidence for the defendant.

A PPEAL from the District Court of St. Helena, Jones, J. Merrick, for the appellant. Baylies, for the defendant, cited 1 Mart. N. S. 243, 5 lb. N. S. 179, 19 La. 482, 9 Rob. 464, to show that the return made on a fifa. by defendant, having been introduced by plaintiff, was evidence for the former of the facts recited in it. The judgment of the court was pronounced by

King, J. The defendant, Kemp, is sought to be rendered liable for the amount of a writ of fieri facias directed to him, which he failed to return within the delay prescribed by law. He pleaded the general issue, and further avers that, immediately after the writ came into his hands, he made a seizure, and that the property levied upon would have been sold within the time prescribed by law, had not the plaintiff ordered the sale to be postponed to a day beyond the return day of the writ; and that he made a sale of the property seized, which produced \$100, which sum, he avers, he paid to the plaintiff, and returned the writ.

The only testimony in the record is the execution itself, with the returnthereon, which were offered in evidence by the plaintiff. From the latter it
appears that, the writ was received by the defendant, on the 3d November,
1842; that, on the 15th of the same month, a slave was seized; that the sale
was postponed by order of Thomas Webb, the plaintiff in execution, until the
first saturday in February, 1843; and that, on the 6th of February, 1843, the
slave was sold for \$100. The writ was not returned until the 9th of August
following. The court below rendered a judgment in favor of the defendant,
from which the plaintiff has appealed.

We think that the judge did not err. A plaintiff who has authorised the sheriff to protract the execution of a writ beyond the return day, cannot afterwards complain that the latter has failed to make a return within the delay fixed, nor claim to hold him liable for the amount of the execution, in consequence of his failure to make a return within the prescribed delay.

When a sheriff is sought to be rendered liable, under the act of 1826, he may show any circumstance which would legally excuse him for a failure to return, or execute, a ficri facias. No more valid excuse can be offered, than the ex-

^{*} Morgan, for the defendant, prayed for an amendment of this decree, so as to allow the defendant to surrender the mortgaged property, and thereby exonerate himself from personal responsibility.

Refused.

press instructions of the plaintiff in execution. The complaint, in the present instance, is not that the sheriff failed to return the writ after it had been executed, nor that he refused to execute it; and there is neither allegation nor proof that the plaintiff has suffered damage from the neglect of the sheriff to make a timely return.

Judgment affirmed.

WEND o. Kemp.

BAKER v. THE BANK OF LOUISIANA.

Where a mortgage mentions the parish in which the mortgaged property is situated, the bayou on which it lies, the number of acres it contains, the use made of the property as a plantation, and that it was purchased by the mortgagor at a probate sale of the succession of a person named, the conveyance being shown by evidence to be of record in the same parish, the description of the property is sufficient.

A PPEAL from the District Court of West Feliciana, Boyle, J. Ratliff and Cowgill, for the appellant. Bowman, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. In the year 1837, the Bank of Louisiana took a mortgage, with the pact de non alienando, from Samuel Wimbish, upon a tract of land in the parish of West Feliciana, to secure an indebtedness of Wimbish, and, the debt not being paid, obtained an order of seizure and sale. The sheriff having made seizure of the land, the plaintiff instituted this suit to enjoin the sale. There was judgment for the defendants in the court below dissolving the injunction, and the plaintiff has taken a devolutive appeal.

The only objection presented in argument to the validity of the bank's mortgage is, that the mortgage act does not sufficiently describe the property, and consequently that its registry in the mortgage office was not notice to third persons, and not binding upon the plaintiff, who has a notarial act of sale from Wimbish of the property, of a date posterior to the mortgage.

The description in the mortgage to the bank is as follows: "A certain tract of land, or a parcel of ground, with the improvements thereon, situate, lying and being in said parish, on the bayou Tunica; being the land and plantation purchased by the said Samuel Wimbish, at the probate sale of Samuel Davis, deceased, containing five hundred and eight acres." This description is substantially the same as that in the act of sale from Wimbish to the plaintiff, with the exception that the latter gives the boundaries or adjoining estates.

We consider the description sufficient. It states the parish, a stream on which the property lies, the number of acres, and the use made of the property, and recites the origin of Wimbish's title, which is shown by evidence to have been by deed recorded in the same parish. No one can suppose that Baker, or any other party dealing with Wimbish, and examining the records of the mortgage office, could have been deceived. It is said that Wimbish, as is shown by the testimony, owned other tracts on the bayou Tunica; but it does not appear that any of them corresponded in size with this, or were cultivated as plantations.

We must also observe that, there are circumstances which go very far to prove actual knowledge by Baker, of the mortgage of the defendants. Baker was the son-in-law of Wimbish, at the date of his alleged purchase, and living

BAKER

BANK

OF

LOUISIANA.

in the same parish with him, in which parish the land was. The sale purports to be for \$5,000 cash; and the vendee dispenses the notary from the duty imposed upon him by law, of procuring and annexing a mortgage certificate, and this without any declaration by the vendor that there were no encumbrances. There was a special subrogation to the warranty of Wimbish's vendor. In his petition for injunction, Baker does not allege ignorance of the mortgage.

The appellees have prayed that the judgment be amended so as to allow them interest and damages, and they are entitled to them.

It is therefore decreed that the judgment of the court below be so amended, that the defendants recover of the plaintiff, John D. Baker, and Stephen C. Cobb, his surety, in solido, the sum of \$631 14, bearing interest at ten per cent on the judgment injoined from the service of the injunction to the date of dissolution by the court below; and the further sum of \$150, as special damages; that the cost of this appeal be paid by the plaintiffs; and that in all other respects the judgment of the court below be affirmed.

MECHANICS AND TRADERS BANK v. Rowly et al.

A provision in a statute incorporating a bank, enacted under the constitution of 1812, "that it shall have the like privileges granted to it in making loans on mortgage, in taking security, and in enforcing payment, as are now accorded by law to the Bank of L—" will confer upon the former all the privileges granted to the latter, without any further specification. Decision in Bank of Louisiana v. Farrar, 1 An. R. 49, affirmed.

PPEAL from the District Court of Concordia, Curry, J.

A F. H. Farrar, for the plaintiffs. Benjamin and Micou, for the appellant, This suit was brought on a note and mortgage executed by the defendants, then husband and wife, in solido, in favor of the plaintiffs. At the time of the loan a commuity of acquets existed between the parties, but before the institution of suit it had been dissolved, and they were separated from bed and board. Judgment was rendered against the husband by default. The wife filed an answer denying her liability apon the contract, and pleading the separation, &c. Judgment was rendered against her, and she appealed.

Was Mrs. Rowly legally bound by the note and mortgage executed in solido with her husband? In claiming that she is not liable, she relies upon article

2412 of the Civil Code:

"The wife, whether separated in property by contract or by judgment, or not separated, cannot bind herself for her husband, nor conjointly with him, for debts contracted by him before or during the marriage."

The plaintiffs, on the other hand, insist that this general principle of law is not applicable to mortgages contracted under their charter, and rely upon

the following section:

"And further, that the said corporation shall have the like privileges granted to it in making loans on mortgage, taking security, and enforcing the payment thereof, as are now accorded by law to the Bank of Louisiana." Sec. 25, act 1 April, 1833. Acts, p. 134.

The clause in the charter of the Bank of Louisiana, which is said to be incorporated into the charter of the plaintiffs by this reference, is the 32d section of the act of April 9th, 1824. 1 Moreau's Dig. p. 55. It is in the following

words:

"In all hypothecary contracts or obligations entered into by any individual with or in favour of the said president, directors and company of the Bank of Louisiana, according to the true intent and meaning of this act, it shall be lawful for the wife of such individual to bind herself jointly and in solido with him; and in such case the property and rights of said wife, either dotal or of any other

description, shall be affected by said contracts or obligations, provided the said MECHANICS wife be of the age of majority at the time of entering into such contracts or AND TRADERS

BANK U.

Rowly.

Was it the intention of the legislature by this reference, to incorporate into the charter of the plaintiffs this section of the charter of the Bank of Louisiana? The protection granted to married women, is part of the settled policy of the land. The system from which our jurisprudence is derived, and our Codes themselves, do not leave the rights of the wife at the mercy of the husband. Aware of the great and almost unlimited control usually exercised by the husband over the wife, it was deemed necessary, for the public good, that the laws should intervene for the protection of the weaker party. This policy, however, has been abandoned by our legislature to subserve the interest and wishes of many of the banks; but in these cases it has been done by direct and explicit legislation. The Bank of Orleans and the Louisiana State Bank were not excepted from the general provisions of the laws. See their charters, 1 Moreau's Digest, pp. 62 and 68. The 32d section of the charter of the Bank of Louisiana, is copied at length and verbatim into the charters of the Consolidated Association, &c., sec. 23. 2 Moreau's Dig. p. 404. Of the Canal Bank, act of 5th March, 1831, sec. 23. Acts, p. 54. Of the Union Bank, act of April, 2d, 1832, sec. 25. Acts, p. 62. Of the Citizens' Bank, act of 1833, sec. 25. Acts p. 190. Of the Commercial Bank, act 1st April, 1833, sec. 30. Acts, p. 162. Of the Gas Light and Banking Company, act 1st April, 1835, sec. 29. Acts, p. 105. Of the Exchange and Banking Company, act 1st April, 1835, sec. 27. Acts, p. 203. Of the Atchafalaya Railroad and Banking Company, act 10 March, 1835, sec. 24. Acts, p. 50. Of the New Orleans and Carrollton Railroad and Banking Company, act 1st March, 1836, sec. 9. Acts, p. 27. Of the Merchants' Bank, act 25th February, 1836, sec. 26. Acts, p. 61. And of the Improvement and Banking Company, act 9th February, 1836, sec. 12. Acts, p. 49. The only charter similar in this respect to that of the plaintiffs', is the charter of the City Bank, 3d March, 1831 (Acts, p. 34), the 8th and 18th sections of which make reference to the privileges of other banks; and it is worthy of re. mark that the charter of the Canal Bank, passed by the same legislature, and approved only two days after that of the plaintiffs, has the provision in controversy copied at large, and verbatim.

Let us next consider some of the rules of interpretation applicable to statutes in general, and especially to charters of privileged companies: "Statutes are to be construed in reference to the principles of the common law, for it is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required." Kent's Com. p. 464, 3d ed. 1836. Dwarris on Statutes, 695. Among the rules proposed by M. Portalis, to be prefixed to the Code Napoléon, were the following: "La présomption du juge ne doit pas être mise à la place de la présomption de la loi. Il n'est pas permis de distinguer lorsque la loi ne distingue point, et les exceptions qui ne sont point dans la loi ne doivent être supplées." On these rules M. Toullier observes: "Malgré l'utilité et la justesse reconnues de ses maximes, ils furent supprimés, parce que, dit on, tout ce qui est de doctrine appartient à

l'enseignement du droit et aux livres de jurisconsultes."

It is however more particularly with special statutes, those granting peculiar privileges to certain classes or persons, those derogatory to the general policy of the law, that we have here to deal; and we assume it to be a principle that all such statutes are to be strictly construed, as if they were of a penal character. Chief Justice Marshall, speaking of a corporation, says: "Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." Dartmouth College v. Woodward, 4 Wheat. 636. "A power derogatory to private property must be construed strictly, and not enlarged by intendment." Anon. Lofft, 438. "Ambiguous words, in a private act of parliament, incorporating a public company, are to be construed against the company and in favor of private property." Scales v. Pickering, 4 Bing. 448. Barrett v. Stockton et al. 2 Mann, and Gran. 134. Acts of parliament which confer privileges upon a company, and profess to give the public certain advantages in return, are to be construed strictly against the company, and liberally in favor of the public." Parker v. Great Western Railroad Company, 7 Mann, and Gran. 253. "In the construction of statutes made in favor of corporations or particular persons,

MECHANICS E TRADERS

and in derogation of common right, care should be taken not to extend them beyond their express words or their clear import. They cannot take away a common law right, unless the intention is manifest; and, when not remedial, are not to be extended even by equitable principles." Sprague v. Birdsall, 2 Cowen, 420. "Private statutes, made for the accommodation of particular citizens or corporations, ought not to be construed to affect the rights or privileges of others, unless such construction results from express words, or from necessary implication." Parsons, C. J. Coolidge v. Williams, 4 Mass. Rep. 154. "The rights of the crown can never be taken away by doubtful words or ambiguous expressions, but only in express terms." Dwarris on Statutes, p. 706. "To bring a case within the statute, it should be not only within the mischief contemplated by the legislature, but also within the plain intelligible import of the words of the act." "A casus omissus can in no case be supplied by a court of law, for that would be to make laws." lb. p. 711. "It is a well settled rule of law, that every charge upon the subject must be imposed by clear and unambiguous language." Ib. 749. "Private acts of parliament conferring new and extraordinary powers of a special nature upon particular persons, affecting the property of individuals, or giving exemption from a general burden attaching by law upon all parties, should receive a strict interpretation." Ib.

Let us now consider this clause of the plaintiffs' charter, with reference to the principles thus announced. If the words of the act are fairly susceptible of another interpretation—if they do not necessarily and unequivocally adopt the provision in relation to married women, that provision must be held to be excluded from the meaning of the charter. The language of the act is, the bank shall have the like privileges, &c. Now let us examine what privileges were conferred upon the Bank of Louisiana in relation to mortgages: The 16th section of the charter of that bank prescribes the amount to be loaned on mortgage, and the value and nature of the property on which such such loans must be made; section 26 declares how mortgage loans shall be received and paid; section 30, that the loan shall not be paid until the mortgage shall have been recorded; section 31, that the bank may seize the property in whatever hands it may pass; section 34, that the bank shall not be delayed by a judicial respite; section 35, that the mortgaged property shall not pass to syndics or assignees of an insolvent; and section 32, that in all mortgages, &c., it shall be lawful for the wife to bind herself, etc. 1 Moreau's Dig. Now all the above provisions, save the last, are in terms as well as substance, privileges given to the bank, while the last is in terms a privilege granted to married women. In 1824, and for many years after, the legislation and policy of this State evidently favored the obtaining of money on loans on long terms, even at high interest. Such an opinion was entertained of the fertility of our soil and the extent of our commerce, that interest was not regarded, and money was eagerly sought for on any terms, provided a long time was given for its reimbursement. The exemption of married women from their contracts, and the mortgages allowed them upon the estates of their husbands, had the double effect of diminishing on one hand the desire of capitalists to loan money even at the Louisiana rates, and on the other hand to limit the ability of our citizens to obtain loans. Hence the restrictions upon contracts of married women, though so thoroughly incorporated into our laws, became for the time unpopular; their original object was forgotten, and they began to be considered burthensome and impolitic; though intended to be a protection, they were regarded as a disability, and it came to be considered a valuable privilege that married women should be allowed to borrow. Without this provision the class of borrowers dealing with the banks would have been more limited; greater particularity would have been required in ascertaining the rights of wives, and in lending to husbands only on unencumbered property; but the right of the bank so to loan, to take security and enforce payment, would still have been protected. That the charter would have been highly valuable without giving to married women such rights, is obvious from the fact that one of the banks, with whom they cannot so contract, has been for many years and is still in successful operation. The reference relied upon may therefore be considered as met and filled by the several provisions more strictly designated as privileges of the bank, and apportaining to the mode of taking securities and enforcing the

The question is not merely whether by intendment this privilege of married

women may not have been designed to be re-enacted in the plaintiffs' charter, Mechanics but whether that intention is clearly and unequivocally expressed. In many AND TRADERS statutes, particularly those intended to remedy an evil, or to prevent wrong or injustice, it is the duty of the courts to supply deficiencies in the language of the law; but this does not apply to a charter of incorporation. It is granted not for the public benefit, but for the emolument of the shareholders. It confers upon a few a portion of the rights belonging to the sovereign, and creates peculiar and exclusive privileges. Such a grant must always be strictly construed, and the privileges embraced are not to be aided by the ingenuity of judges. "It is a well settled rule that every charge upon the subject must be imposed in clear and unambiguous language." Dwarris on Statutes, p. 749. The fact that out of twelve banks claiming the right to receive mortgages from married women, all of them save the plaintiffs' and one other, have received the grant in express and unequivocal terms, and without reference from one charter to another, should also have its weight. We must presume that, if it had been intended to confer the privilege of borrowing upon such persons, it would have been so expressed in this as in the other charters. "When in several statutes in pari materia the legislature is found sometimes inserting and sometimes omitting. a clause of relation, it is to be presumed that their attention has been drawn to the point, and that the omission is designed; but if it were not intended, said Lord Ellenborough in R. Skone, we can only say of the legislature, quod voluit, non dixit." Dwarris on Statutes, p. 707.

There is another reason for a strict interpretation of such acts. They are always granted at the solicitation of parties having a direct and pecuniary interest in obtaining them. These parties always cautiously prepare the draft of their charters; it is therefore incumbent on them to state clearly what they ask. "I consider it an established and highly useful rule in the construction of all acts of parliament of a local or personal nature, to require that the persons soliciting such an act, should state in it plainly, distinctly and unequivocally, what they mean, in order that the public on one hand and the legislature on the other, may not be taken by surprise, and may not be left in doubt, as to the object and effect of the enactment." Bailey J., Doe v. Brandling, 1 Mann. and Ryl. 611, cited and approved by Walworth, Chan. in Cayuga Bridge v. Magee, 2 Paige Ch. Rep. 121. We must therefore conclude that the general policy of the law protecting married women from the improvidence of their husbands, has not been infringed in the plaintiffs' charter; that the power of wives to bind themselves for their husbands, is not given in plain, distinct and unequivocal

terms, and consequently does not exist.

The constitution of 1812, art, 4, sec. 11, provides: "That the legislature shall never adopt any system or code of laws by a general reference to said system or code, but in all cases shall specify the several provisions of the law it may enact." This provision was unquestionably intended to prevent the adoption of the common law in this State by a statute of reference. But this object is accomplished by the first clause of the proviso, and the constitution proceeds to say that in all cases the provisions of the laws intended to be enacted shall be specified. Although the desire to exclude the common law gave rise to this specified. Although the desire to exclude the common to the subject, the pro-restriction, the attention of the convention once drawn to the subject, the provision was extended as to prevent improvident legislation in other cases. French text makes this more apparent: "et que dans tous les cas elle devra décréter spécialement toute les dispositions de lois qu'elle pourra faire." This is a constitutional restriction of legislative will. A passion for law-making is certainly one of the greatest evils of our system. The constitution could not suppress this evil, but attempts to limit and control it. In order to secure the deliberate attention of legislators to the labors entrusted to them, they are prohibited from enacting by mere reference, and are enjoined to specify the provisions which they intend to adopt as laws. The acts of former legislatures, as well as foreign laws, must be included in this provision. Another object of the constitution was to make the law more accessible to the citizen. The intention of the legislature must be unequivocally expressed, to support a grant of an extraordinary power to a corporation. It must also be constitutionally expressed. If by reference, the number of the section and date of the law should always be given, and the terms intended to be adopted should be so clearly stated as to make doubt impossible, or else the provisions adopted are not specified in the mode prescribed by the constitution. In the plaintiffs' charter it is

MECHANICS AND TRADER BANK E. ROWLY. said that, "this bank shall have like privileges, &c., with another." Neither the date of the act, nor the number of the sections, thus intended to be incorporated, is given; and there is no description or specification of the nature or extent of these privileges. Other privileges appertaining to the same subject are then copied at large into the charter, thus inducing the natural belief that the privileges so specified were the same intended by the clause of reference.

The judgment of the court was pronounced by

EUSTIS, C. J. This is a case in which the husband and wife bound themselves jointly and severally in a promissory note to the plaintiffs, and executed a mortgage simultaneously to secure the payment of it. The amount they acknowledge to have received in the act of mortgage, which centains a formal renunciation of the rights of the wife.

The charter of the Mechanics' and Traders' Bank confers on that corporation similar privileges to those conferred on the Bank of Louisiana in making loans on mortgages, taking security, and enforcing the payment thereof.

The rights which the latter institution would have in a case of this kind we have determined in the suit of the Bank of Louisiana v. Farrar, 1 An. Rep. 49.

To grant a new trial on the showing of the appellant in her very informal affidavit, would be an undue interference with that discretion which judges of the first instance are, from their opportunities, best qualified to exercise.

Judgment affirmed.

STANBROUGH v. BARNES, Curator.

A possessor in good faith is entitled to remuneration for useful improvements, and is not accountable for fruits. C. C. 500. The owner has the choice either to reimburse the price of the improvements, or to pay a sum equal to the enhanced value of the soil.

A PPEAL from the Court of Probates of Madison, Downes J. Phillips, for the plaintiff. Amonett, for the appellant. Stockton and Steele, for the defendant. The judgment of the court was pronounced by

KING, J. Stanbrough presented to the curator of Bray's succession, a claimfor improvements made upon a tract of land belonging to the deceased. The administrator admitted that the improvements had been made as stated in the account, and referred the claim to the probate judge to decide upon their value. A rule was taken to show cause why the account should not be paid; in answer to which, the attorney for the absent heirs, and Wilkinson, the assignee of one of the heirs, opposed the demand, alleging that it was excessive, and that Stanbrough was a possessor in bad faith when the improvements were made. The judge determined that the land derived two-thirds of its value from the improvements; that Stanbrough was a possessor in good faith when they were made; and decreed that the land should be sold for cash, and that two-thirds of the price should be paid to Stanbrough. From this judgment Wilkinson has We think that the evidence fully supports the conclusions of the judge below, that Stanbrough was a possessor in good faith, and that two-thirds of the present value of the land are the result of his labor and industry, in clearing and fitting the soil for culture. He is consequently entitled to remuneration for useful improvements, and was not accountable for fruits. 16 La. 421, 425. Civil Code, art. 500. The choice in such cases is left to the owner, either to

re-emburse the price of the improvements, or to pay a sum equal to the enhanced value of the soil.

BARNES.

The appellant contends that, if the plaintiff be entitled to any thing, it is the enhanced value of the property, but that this should have been ascertained by the court below, and decreed to him as a fixed sum. The administrator does not object to the mode adopted for ascertaining the measure of the plaintiff's compensation, and the curator for the absent heirs himself suggests, in answer to the rule, that the relative value of the land in its improved and unimproved condition should be ascertained, and that a sale should be made, and the proceeds awarded to the succession and the plaintiff, in the proportions thus established.

Thus all the parties in interest must be considered to have made their election, and all concur in demanding that the remuneration shall be the enhanced value of the land. If, in the exercise of the discretion allowed them by law, they had chosen to pay the value of the improvements, we should not have felt authorised to affirm the judgment which has been rendered. A sale of the property in such cases, after determining the proportion which the value of the improvements bears to the entire price, is just and equitable, and the only means of effectually protecting the owner against the entire loss of his land, for the purpose of satisfying the claim of the bond fide possessor. We perceive no sound objection to a decree of this kind; it is in the nature of a judgment ordering a sale for a partition. Judgment affirmed.

HARPER v. STANBROUGH.

Every government has the right to establish and regulate the rights of property in things within its jurisdiction, in such manner as the public interest may require.

Where a testator dying in another State, possessed of slaves there, directs that, if either of his two sons, to whom his property had been bequeathed, "should die without a lawful heir, his part, real and personal, shall go to the survivor," and one of the sons receives his portion of the slaves and removes with them into this State, and dies without issue, the survivor cannot recover them, nor their increase here. The clause on which plaintiff's claim rests, though it might confer a title on the survivor by the laws of the State where the testator died, as it creates a substitution, cannot be enforced here. Such a testamentary disposition cannot operate on property within this State. Code of 1808, b. 3, tit. 2, ch. 4. C. C. 1507.

PPEAL from the District Court of Carroll, Curry, J. This is an action to A recover certain slaves, claimed by plaintiff as the surviving son of one Harper, who died in the State of Mississippi, in the year 1811. His will, dated 9th August, 1811, contains the following bequest: " I give to my two sons Jesse and William, all my lands, to be equally divided between them; if either of my sons should die without a lawful heir, his part, real and personal, to the surviving one." Jesse Harper removed, with his portion of the slaves so bequeathed, into this State, in the year 1823. In 1838, he died here, without issue. This action was instituted by the surviving brother, to recover the slaves originally bequeathed to Jesse Harper, with their increase. The plaintiff appealed from a judgment in favor of the defendant. A copy of Harper's will, which was offered in evidence on the trial, was excepted to on the ground that it had never been ordered to be executed by the probate court of the parish in

HARPER

which the property is situated. The copy was admitted. Plaintiff also offered in evidence, sec. 23 of chap. 104 (p. 458), sec. 24, chap. 9 (p. 34), sec. 45, chap. 73 (p. 379) of the Revised Code of Mississippi.

Thomas, Snyder, Prentiss and Finney, for the appellant. Two questions arise: 1st. Was the will of Jesse Harper, senior, properly admitted in evidence? 2d. If properly admitted, does it sustain plaintiff's claims to the slaves in controversy? The whole case turns upon the validity and effect of the will. Its construction, validity and effect are governed by the laws of Mississippi, where it was made, and where the property upon which it operated, was found, at the

time of the testator's decease.

1st. As to the admissibility of the will, as evidence of plaintiff's title, in the courts of this State. The will was duly probated in Mississippi, before the proper tribunal, and the transcript of the proceedings of the Mississippi tribunal are properly and duly certified. It was not necessary to have the will probated here. 6 Mart. N. S. 622. 17 La. 4. Story's Confl. Laws, § 238-9. We do not ask the execution of the will in this State, but offer it as evidence of our title to the property sued for, which title originated in Mississippi, though the contingency upon which it vested happened here. It is well settled that a foreign will is admissible in evidence to show title, without ever having been probated here, provided it has been received, and its execution ordered, by the proper tribunal of the country in which it was made. Balfour v. Chew, 5 Mart. N. S. 517. The point is still more directly decided in Johnson v. Rannels, 6. Ib. N. S. 621. The doctrine is also recognised in Robert v. Allier's agents, 17 La. 5. If this is true as regards foreign wills, when set up as the foundation of title to property located here at the time the will took effect, still more strongly will the rule apply when the property was located in the country where the will was made, and removed since the probate there. There can be no doubt the will was properly admitted in evidence.

2d. Does the will sustain the plaintiff's claim to the slaves in controversy? The will was executed in Mississippi, and took effect upon the slaves before their removal from that State. The removal of the property by one of the legatees could not destroy the rights of the other. What then are those rights? After various bequests, among which is one of the negroes in controversy, to Jesse Harper, junior, and another of several slaves to plaintiff, the testator says: "After that, I give to my two sons, Jesse and William, all my lands to be equally divided between them; if either of my sons should die without a lawful heir, his part, real and personal, to return to the surviving one," &c. This is the clause under which plaintiff claims. The contingency under which the devise over to the survivor of the two sons was to take effect, to wit: "dying without a lawful heir," &c., has occurred; and at the death of Jesse Harper, junior, without issue, the title to his share, both real and personal, of his father's estate, vested instantly in the plaintiff. The slaves in question formed no part of the succession of said Jesse, and of course no title could be derived under the probate sale. The provision of the will under which plaintiff claims, is an executory devise, according to the laws of Mississippi, where it was made, and

where the property affected by it, was located.

It is contended by defendant that this provision, taken in connexion with the previous ones, constitutes an estate tail, which by virtue of the statute of Mississippi, was converted into a fee simple, in Jesse Harper, junior, and gave him an absolute property in the slaves claimed by plaintiff. Plaintiff's right is not affected by the statute of Mississippi, converting estates tail into fees simple. This is an executory devise. An executory devise is defined by Blackstone to; be "such a disposition by will that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points. 1st. That it needs not any particular estate to support it. 2d. That by it a fee simple may be limited after a fee simple. 3d. That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same." Black. Com. book 2, c. 11. 4 Kent's Com. 269-270.

To show that this is an executory devise, and not affected by the statute of Mississippi, docking entails, we cite the following cases: "A testator devises to A, B and C, his sons; if either of them should die without children, the survivor or survivors to take his share." "This gives a fee simple to the devisees,

and the survivors, on the death of either without issue, take by executory devise." Richardson v. Noyes, 2 Mass. 56. See also Lippet v. Hopkins, 1 Gallison, 454. In the case of Cordle v. Cordle, 6 Munford, 455, the testator after dividing his estate between his sons, W. C. and D. C. provided, "that if either of his sons died without lawful heir, his surviving brother should inherit all the estate of the deceased." Held, that this was a good limitation over in favor of the survivor, upon the death of the other son without issue. In the case of Timberlake v. Graves, 6 Munf. 174, where a testatrix bequeathed certain slaves and their increase "to her nephew, J. A., to him and his heirs forever: but in case he should die without heir, then and in that case to be equally divided between her two neices, M. A. and P. A." Held, it was a good limitation over,

npon J. A. dying without issue.

In New York, where the statute converts an estate tail into a fee simple, the validity of an executory devise, and what constitues such a devise, have been well settled. C. devises his real estate to his four sons and a daughter Elizabeth, and then adds: "Further my mind and will is that, if any of my said sons, William, Jacob, Thomas and John, or my daughter Mary, shall happen to die, without heirs male of their own bodies, then the lands shall return to the survivors, to be equally divided between them." Held, that these words did not create an estate tail, but a limitation over in fee, to the survivors, on the failure of male heirs. Fosdick et al. v. Cornell, 1 John. R. 440. A devised as follows: " I give and bequeath to Catharine and Sarah, each the sum of £12 out of my personal estate, and the remainder to be equally divided among my eleven children; and if any one or more happen to die without heirs, then his or their part or shares shall be equally divided among the children." Held, that this was a good devise over, by way of executory devise. Jackson v. Staats, 11 John, 337. See also Jackson v. Blancher, 3 John. 289, and Moffatt v. Strong, 10 John. 13. In Anderson v. Jackson, 16 John. 382, E. devised a farm to his son Joseph, his heirs, &c., forever; and another farm to his son Medcef, his heirs, &c.; and added: "It is my will that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor," &c. Joseph died without lawful issue. Held, that the words quoted did not create an estate tail, especially since the statute abolishing entails, but was a good limitation over in fee, by way of executory devise, to the survivor, on failure of issue living at the death of either of the sons. In the case of Jackson v. Christman, 4 Wend. 277, the following clause of a will came up for construction: "I give, devise and bequeath to my six sons, all my real and personal estate, share and share alike, &c.; and if any of the above six should happen to die without heirs, then his or their share shall fall to the survivors of the above named sons, share and share alike." Held, these words were good and effectual, by way of executory devise, to vest in the survivor the share of one dying without issue. That a limitation over to the survivor of persons in esse, will be construed as an executory devise. See also Morgan v. Morgan, 5 Day, 517. Wilkes v. Lion, 2 Cowen, 333. Cutter v. Doughty, 23 Wend. 513. Jackson v. Chew, 12 Wheat. 153. 4 Kent's Comm. 277-8-9. From these authorities it seems clear that the provision of the will of Jesse Harper, senior, under which we claim, is an executory devise, and a legal and valid disposition in the State of Mississippi, where it was made. The majority of the cases cited also show, that the phrase

"dying without heir or heirs," means "dying without issue."
But if our construction were doubtful under the authorities cited, the statues of Mississippi themselves, fully recognise such a disposition as valid, and remove all the difficulties which have, in England, as well as in our sister States, rendered this question of executory devises so difficult and vexed. By sec. 24, H. & H.'s Digest of Miss. laws, p. 348, estates tail are converted into estates in fee simple, with the proviso, however, "that any person may make a conveyance or devise of lands to a succession of donees then living, and the heir or heirs of the body of the remainder-man," &c. Even it this were an estate tail, which it clearly is not, it would not be within the statute, because the plaintiff was a donee then living. But the 26th section of the same statute, H. & H.'s Digest, p. 349, settles the construction of the will beyond all cavil. It provides that: "Every contingent limitation in any deed or will made to depend upon the dying of any person without heirs, or heirs of the body, or without issue, or issue of the body, or without children, or offspring, or descendant, or other relative, shall be held and interpreted a limitation to take effect when

HARPER B. Stanbrough. such person shall die, not having such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be), living at the time of his death, or born to him within ten months thereafter, unless the intention of such limitation be otherwise expressed and plainly declared on the face of the deed." This section settles all the disputes in the books, as to whether the words "dying without heirs, or without issue," &c., mean without heirs or issue living at the time of the death, or an ultimate failure thereof at any future period. Where the words of the will can be construed in the first sense, then such a provision as we rely upon is admitted by all the authorities, to constitute a good and valid executory devise. The statute of Mississippi has provided that such a construction shall be given to these words, unless a different intention be expressed and plainly declared in the will. As to the effect of this statute, see 4 Kent's Comm. (5th edition) 279-280.

(5th edition) 279-280.

The provision, then, under which we claim, was legal and valid under the laws of Mississippi; and upon the death of Jesse Harper, junior, without issue, the property bequeathed to him, vested in plaintiff, as the survivor, by way of executory devise. The property did not go into the succession of Jesse Harper, junior, but, immediately on his death, belonged to plaintiff. As to the extent of plaintiff's right under the devise, see A Kent's Comm. 269-270.

stacy and Sparrow, for the defendant. The will of Jesse Harper, senior, has never been ordered to be executed by any tribunal of this State, and can not be carried into effect here. Civil Code, arts. 1637, 1681. If a will, not ordered to be executed, cannot be carried into effect on property, no one can claim any rights upon that property under the will. It is true that the Supreme Court has held differently in the case of Johnson v. Rannels, 6 Mart. N. S. p. 522. But that decision was under the old Code, whose provisions on the subject are less strong than those of the present Code. The decision in the case of Stewart's Curator v. Row, 10 La. p. 530, has overthrown the doctrine established in Johnson v. Rannels. The will contains a fidei-commissum, and is on that account void. Civ. Code, art. 1507. The property was a short time after the date of the will brought into this State, and had been subject to its laws more than fifteen years previous to the death of Harper. It may be that between the heirs of Harper, this disposition would be valid in the State of Mississippi. But the question now to be decided is between third persons, purchasers in good faith, citizens of Louisiana, and one claiming under the will. Under such circumstances, the court is bound to give effect to the laws of Louisiana. Story's Conflict of Laws, no. 244. 19 La. p. 217. 2 Mart. N. S. p. 97.

Even by the laws of Mississipi, the limitation on the title to the property in Jesse Harper, imposed by the will, did not prohibit him from alienating or en-

Even by the laws of Mississipi, the limitation on the title to the property in Jesse Harper, imposed by the will, did not prohibit him from alienating or encumbering it, and treating it in every respect as his own. Although a title in fee tail, the statute has made it one in fee simple. Rev. Code of Mississippi, sec. 24, ch. 9, p. 34; sec. 24, ch. 104, p. 458. 2 Blackstone's Comm. vol. 2, pp. 108, 109, 111, 117. The former restraints against alienation by the devisee are removed. If liable to be alienated, it was liable also to be sold for the pay-

ment of his debts.

Bemiss on the same side.

The judgment of the court was pronounced by

Eustis, C. J. This is a petitory action to recover certain slaves claimed by plaintiff under the will of his father, Jesse Harper, senior, and which are alleged to be in the possession of defendant. The petition alleges that Jesse Harper, senior, being then a resident of the State of Mississippi, executed his will on the 9th August, 1811, and soon after died, leaving two sons, Jesse Harper and the plaintiff; that by his said will, he made various devises and bequests to his said sons, but upon the express condition that, should said Jesse or plaintiff die without lawful heir, the portion devised to him should go to the survivor; that, after the death of his father, Jesse Harper took his portion of the slaves bequeathed, and among them those sued for, out of the State of Mississippi into the State of Louisiana, where he, himself, died, without issue, in 1838. The slaves are held by the defendant under a probate sale of the effects of the succession of the late Jesse Harper, junior, who died in Louisiana, in 1838, having

here removed with his slaves in 1823. The action is for the recovery of the slaves originally belonging to Jesse Harper, junior, and their issue.

HARPER V. STANDROUGH.

There was judgment for the defendant, and the plaintiff has appealed. The will was admitted to probate in the State of Mississippi. The clause relied on by the plaintiff as establishing his right to recover the slaves as his property, is as follows: "After that I give to my two sons Jesse and William, all my lands, to be equally divided between them; if either of my sons should die without a lawful heir, his part, real and personal, to the surviving one." This clause is interpreted to relate to and include the bequest of slaves, made to the sons in another part of the will.

It is contended by the cousel for the plaintiff that, the contingency on which the devise was to take effect in favor of the survivor, has occurred by the death of of Jesse Harper without issue, and that the title to his share of his father's estate vested instantly in the plaintiff; and that the slaves in question forming no part of the succession of the deceased, no title could be derived under the probate sale. The absolute property in the slaves is said to have been vested in the devisee, subject to the contingency which devolved it exclusively on the surviving brother. The difficulty which occurred to us on the argument of this case has not been overcome. It is, whether we can recognise the existence of such a title to slaves as the plaintiff's rights import, conceding that by the laws of Mississippi he would be held to be the owner of the slaves, and, as such, entitled to recover them as his property. On their permanent removal to this State, they became immovables by the effect of law.

The clause in the will of Jesse Harper, senior, on which the plaintiff's claim rests, creates a substitution. By chapter 4th, of the 2d title, book 3d, of the Civil Code of 1808, which was in force at the time the slaves in question were removed to this State, in 1823, which treats of dispositions reprobated by law in donations inter vivos and mortis causa, substitutions and fidei-commissa are prohibited. The same provisions exist in the Code of 1825, art. 1507. The nullity of substititions extends even to the instituted heir, donee, or legatee, who is charged to return a thing to a third person; and the courts of this State have uniformly given effect to the prohibition, not only as a part of the law but of the declared and established public polity of the State. Cloutier v. Lecompte, 3 Mart. 485. Farrar v. McCutcheon, 4 Ib. N. S. 45. Mathurin v. Livaudais, 5 Ib. N. S. 302. Arnaud v. Tarbe et al. 4 La. 504.

The proper application of the law to the case under consideration presents a question of importance, and by no means free from difficulty. It is contended that the law of Mississippi, having had its full effect on the property in dispute for several years, the rights of the parties were complete and vested, and cannot be held to be impaired by its removal to this State, and remaining here for the time and under the attendant circumstances.

On the other hand, it is urged for the defence, that, under the law of Louisiana, no such title in slaves as that under which the plaintiff claims, can be recognized.

It is the attribute of every government to establish and regulate such modifications of the rights of property in things within its jurisdiction, as the public interest requires. Testamentary substitutions are prohibited in this State. The prohibition is established in the interest of public order and state policy. 5 Toullier, no. 13. Discussions du Code Civil, on art. 896 of Napoléon Code, 2d

HARPER ... STANBROUGH.

vol. pp. 86 et seq. They have always been hold null by our courts, the nullity being of that character which is absolute and irremediable.

Nor does it appear material in relation to the nullity of the substitution as the basis of a title, whether the testamentary disposition acts upon the property within this State at the time of its taking effect, or subsequently on the translation of the property to this State. It is the operation of the testamentary disposition on property within the State which the law reprobates, and it is this obnoxious operation of the will of Jesse Harper, senior, which the plaintiff seeks to carry into effect through the tribunals of this State. The effect which we give to our own laws on property within our jurisdiction is no more than that which is usual, particularly in relation to this description of property.

Throughout the most populous and powerful States of this Union, the right of property in slaves is not now recognized, except under the provisions of the constitution of the United States, and, in most of them, in the course of their legislation, it has been limited to a term of years, and restricted to slaves an esse. They are persons, and their condition and the right of their master to their service depend exclusively on the law of the State under the guarantee of the constitution. It is difficult to imagine on what principle the law of a sister State can have effect on persons and slaves born in this State, and in the service of a citizen and inhabitant. Slaves are considered in Louisiana as immovables. It rests with the legislative power of the State exclusively, to regulate the different descriptions of property or ownership in relation to them. The modifications of the right of property under our laws are few and easily understood, and answer all the purposes of reasonable use. It is incumbent on courts to maintain them in their simplicity. A stranger case could not occur than this, to show the dangers and evil consequences of giving effect, within our own limits, to the complicated and involved jurisprudence upon which the title of the plaintiff has been supported at bar.

We therefore conclude that the title asserted, being a testamentary substitution which was to take effect on the death of Jesse Harper, junior, he being domiciliated and dying in this State, and his slaves being, and some of them born, therein, we cannot give it effect.

Judgment affirmed.

HARPER v. LEE.

A PPEAL from the District Court of Madison, Curry, J. This case presented the same question as the case of Harper v. Stanbrough, suprd, and was argued at the same time, the counsel being the same in both. The judgment of the court was pronounced by

Eusris, C. J. For the reasons assigned in the case of Harper v. Stan-brough, the judgment of the District Court is affirmed, with costs.

THE STATE v. BRISCOE et al.

In all cases, however summary, the plaintiff must prove his allegations, or he cannot recover.

A PPEAL from the District Court of Madison, Curry, J. Phillips, for the State. Snyder, Stacy, and Sparrow, for appellants. The judgment of the court was pronounced by

Rost, J. These proceedings were instituted under the provisions of an act relative to public education in the parishes of Concordia and St. Bernard, approved April 2d, 1835.

A rule was taken by the district attorney upon the defendants, who constituted a board of commissioners for the purpose of building a school-house in the parish of Concordia, to show cause why judgment should not be entered against them, in favor of the State, for a sum of \$1,500, alleged to have been received by them from the State treasurer, and converted to their own use. The defendants excepted to the proceedings, on the ground that the rule set forth no cause of action against them, and reserved the right of answering to the merits, should this exception not be sustained. The court below overruled the exception, but refused to permit an answer to be filed; and upon the pleadings, unsupported by evidence of any kind, gave judgment in favor of the State for the sum claimed.

However summary a proceeding may be, the plaintiff cannot recover without proving his allegations. This case must be remanded for further proceedings.

The judgment is therefore reversed, and the case remanded to be proceeded in according to law, with directions to the district judge to permit the defendants to plead to the merits the plaintiff and appellee paying the costs of this appeal.

PELLERIN v. DUNGAN.

Where a principal claims under a contract of sale made by his agent, and does not deny the authority of the agent to make it, he will be bound by its terms.

A PPEAL from the District Court of St. Mary, Boyce, J. Maskell, Simon and Morphy, for the appellant. Dwight, for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiff, who is separated in property from her husband, claims the price of eleven hogsheads of sugar made on her plantation, which she alleges were purchased by the defendant at 4½ cents per pound.

The sale, under which she claims, is shown by the defendant to have been made by her husband, acting as her agent, and to have been reduced to writing. The consideration therein stated is, the transfer to the plaintiff of certain store accounts, which it describes.

The plaintiff admits the agency of her husband in the management of her property; she does not deny his capacity to make such a contract; and, as she claims under it, she is not entitled, under her showing, to receive payment in money.

PELLERIS V. DURGAN. The court below gave judgment against her as in case of non-suit; but, as her claim is devoid of equity, the judgment must be made final, as prayed for.

It is therefore ordered that the judgment be amended, and that there be judgment in favor of the defendant, with costs in both courts, reserving to the plaintiff her rights under the contract.

PRENDERGAST v. PERKINS.

To authorize a purchaser to resist payment of the price, or to require security against eviction, he must show either that his vendor had no title to the property sold, or that he has been disquieted in his possession, or has just reason to apprehend that he will be disturbed. C. C. 2535. C. P. 710.

A PPEAL from the District Court of East Baton Rouge, Boyle, J. G. S. Lacey, for the appellant. Elam, for the defendant and intervenor. The judgment of the court was pronounced by

KING, J. This suit was instituted originally against Perkins alone, as the endorser of a promissory note, of which Beaumont is the maker. Perkins denied that the plaintiff was the owner of the note, and alleged that it belonged to her husband, Thomas Prendergast; that it was given for a part of the price of a tract of land, sold to Beaumont, which was found to be largely deficient in quantity; that the note was received by plaintiff after its maturity, and is subject, in her hands, to all equitable defences; and he pleaded a failure of consideration. Beaumont, the maker, intervened in the suit, and adopted the defences set up by Perkins; and further alleged, that he had been disturbed in the possession of the land for which the note was given; that, at the time of the sale to him, there were outstanding titles superior to those of his vendor; and that he had been compelled to institute a suit to test the validity of his title, to which his vendors, Prendergast and Branagan, had been made parties, as warrantors. He prays that, in the event of a judgment being rendered in favor of the plaintiff, its execution may be suspended, until security be furnished against the consequences of eviction. Issue was joined upon the intervention of Beaumont, and a judgment against him prayed for. A judgment was rendered against both the maker and endorser; but the plaintiff was required, before issuing execution, to furnish the security asked for by the defendant and the intervenor. The plaintiff has appealed, and complains of that part of the decree of the court below requiring her to furnish security.

It appears from the evidence, that the plaintiff was a creditor of her husband for a sum exceeding the amount of the note sued on, for her paraphernal effects, received by the latter, and that the note was transferred to her for the purpose of replacing those effects. The testimony satisfies our minds also, that Prendergast was the owner of the property for which the note was given, up to the date of the sale to Beaumont; that he was in reality the vendor of Beaumont, acting through Branagan, who was a person interposed; that the note sued on was executed for his benefit; and that it went into the hands of the plaintiff, after maturity, under circumstances which left it open to such equitable defences, if any such existed, as are available against a party receiving a note after maturity.

In order to authorise the defendant and the intervenor to resist payment, or Prepression require security, it was incumbent on them to show, either that the vendor was without title to the property sold, or that the purchaser had been disquieted in his possession, or had just reason to fear that he would be disquieted. C. C. art. 2535. C. P. art. 710. Pepper v. Dunlap. 9 Rob. 283.

PERKINS.

The only evidence relied on in support of the plea that there are outstanding titles to the land, superior to those of the vendors, Prendergast and Branagan. or that the purchaser has been disquieted, is the record of a suit instituted by Beaumont against Labauve and others, for the purpose of testing the validity of their respective titles, and the pleadings in that suit allege no better title in the defendants. The defendants, Labaure and others, have not joined issue in that cause, nor, as far as we are informed, do they deny the validity of Beaumont's title. The defendant, intervenor in the present suit, has not produced the titles under which it is alleged that Labaure and others claim, if any such exist, whereby we would have been enabled to determine whether they interfere with Beaumont's claim. The defendant and intervenor have clearly failed to show any of the circumstances which would authorise them to suspend the payment of the note, or to require security against eviction before paying it.

It is therefore ordered that so much of the judgment of the District Court as decrees that no execution issue on said judgment, until the plaintiff furnish bond, with good security, to refund the principal, interest and costs of said judgment to the defendant and intervenor, should the suit of Thos. Beaumont v. Joseph Labauve et al., No. 801, now pending before the Fourth District Court of the parish of West Baton Rouge, be decided adversely to the claim of Thos. Beaumont, be avoided and reversed. In other respects said judgment is affirmed, the appellee paying the costs of this appeal.

DUKE v. ROUTH et al.

An order of seizure and sale cannot be issued on a judgment, rendered in another State against a defendant, who appeared, but did not plead. A judgment so rendered is a judgment by

Slaves seized under an order of seizure and sale against an absentee, must be sold at the seat of justice of the parish, or at some other public place in its vicinity. C. P. 664. Stat. 5 March, 1842, s. 1.

PPEAL from the District Court of Tensas, Selby, J. This is an action of revendication, to recover certain slaves in the possession of the defendant Routh, and to set aside the order of seizure and sale under which they were sold, and purchased by him. The seizing creditor, the Bank of Alabama, was made a party. The judgment upon which the order of seizure issued, was rendered against the plaintiff, Duke, in the Circuit Court of Montgomery county, Alabama.

The judgment is as follows: "And it appearing to the court that thirty days" notice of this motion has been given to the defendants, who also appearing by attorney, and saying nothing in bar or preclusion of the same, it is therefore ordered, &c." There was judgment below against the plaintiff, who appealed.

Montgomery, Stacy and Sparrow, for the appellant. This was a judgment by default, by nil dicit. 1 Tidd's Practice, p. 505. 2 Lee's Dictionary, p. 859, 860. It did not, under the article of our Code of Practice, authorise the order of seizure and sale, which, as well as all the proceedings and the sale made under it, are null and void. Canal Bank v. Copland, 12 La. 224.

DEKE

The sale was also void for the following reasons: The defendant, Duke, was an absentee, and a curator ad hoc was appointed to represent him. The slaves were found in the parish of Tensas, in the possession of Routh, having been hired to him by Duke, and without the consent of Duke, or of the curator ad hoc, were advertised to be sold, and were sold, on Routh's plantation, and not at the seat of justice of the parish. C. P. arts. 664, 665, 666. Acts of 1824, p. 210. Laurence, Syndic, v. Bowman, 6 Rob. 21. 17 La. 82. In consequence of the property having been illegally advertised and sold on the plantation of Routh, it was sacrificed for half its value. The order of seizure and sale, and all the proceedings, should be annulled and set aside, and the defendant decreed to pay

hire for the slaves, since the date of the sheriff's sale, the 2d August, 1845.

Prentiss and Finney, for the defendant, Routh. The judgment in Alabama was not a judgment by default, in the sense of article 747, and was sufficient to authorize executory process. The judgment recites, that the defendant appeared by attorney, and permitted the judgment to be entered against him. This is equivalent to a judgment by confession; the party was present by attorney, and allowed the judgment to be entered against him. It cannot be contended that a judgment by confession, is not sufficient to sustain executory process. The judgment by default, meant by art. 747, is one of which the party was important at the time of its randition, and where he did not annear either here. was ignorant at the time of its rendition, and where he did not appear either by himself or attorney. This is manifest from an observation of other articles in regard to judgments by default. Article 310, C. P. says: "If the defendant do not appear either in person or by his advocate, after the delay provided by law, the plaintiff may take a judgment by default against him." Also, art. 311 requires that a judgment by default must show upon the record, that the defendant failed to appear. Art. 312 says: "If the defendant neither appear nor file his answer, a definitive judgment will be given." Now defendant did appear in the judgment, and, not opposing it, it is the same as a judgment by confession.

As to the sale, the only defect that can be set up is, that it took place on

Routh's plantation, instead of at the parish seat of justice.

A defendant has the privilege of having slaves sold on the plantation where they are employed; these slaves were in Routh's possession. It will be presumed that the sale on the plantation was at the instance of defendant's agent

or curator, there being no evidence to the contrary.

Routh prays, that if the sale be not sustained, he have judgment against the Bank of Alabama and plaintiff, for the amount paid by him with interest, &c-Elmore and W. W. King, for the Bank of Alabama, defendants.

The judgment of the court was pronounced by

EUSTIS, C. J. This suit is instituted to annul an order of seizure and sale and the sale made under it, and to recover from the defendant Routh certain slaves, purchased by him at him at the sheriff's sale.

The order of seizure was granted on a judgment rendered by the Circuit Court of Alabama, for Montgomery county. The defendant appeared, but did not plead; judgment was taken against him by nil dicit. This is a judgment by default. 1 Tidd's Prac. 505. 3 Blackstone's Com. 296. The order of seizure and sale could not legally be granted on a judgment rendered in another State by default.

The sale of the slaves was not made at the place required by law; it was made on the plantation of the defendant, Routh. The plaintiff was absent, and only represented by a curator ad hoc, appointed for that purpose. The sale ought to have been made at the court-house of the parish, or in some other public place in its vicinity C. P. art. 664. Acts of 1842, p. 210.

There are circumstances which lead us to believe that the debtor was not permitted to have, for the sale of his property, that public competition which the law secured to him.

It is therefore ordered that the judgment appealed from be reversed, that the sheriff's sale be annulled, and that the plaintiff recover from the defendant, Routh, the slaves mentioned in the sheriff's deed of sale annexed to the said plaintiff's petition, tegether with the sum of five hundred dollars per annum, from the 2d day of August, 1845, until said slaves be delivered to said plaintiff; it is further ordered that said defendant, Routh, pay the costs of both courts.

DUKE v. Routu

ISABELLA v. PECOT.

An appeal will be dismissed only where the appellee shows himself clearly entitled to that relief. In case of doubt, the interpretation will be liberal in favor of the appellant.

Where an appeal is granted on motion, in open court, no citation is necessary.

An irregularity in the mode of bringing up an appeal, not mentioned among the grounds set forth in a motion to dismiss, will not be noticed.

It is a general principle of evidence that, the best evidence must be produced which the nature of the case admits of.

Where a witness is introduced by a party to prove the law of a foreign country, the opposite party may require that he shall be first asked, whether the law, as to which he is about to testify, is written or unwritten. If he answers that the law is unwritten, his testimony will be admissible to prove what it is; if written, an authenticated copy of the law, or at least a copy proved to be a true copy by a witness who has examined and compared it with the original, can alone be received.

State courts have no jurisdiction of an action for freedom, instituted by one held as a slave against a person by whom it is alleged that she was illegally brought into the State from a foreign country, or against those holding under such a person. The courts of the United States have exclusive jurisdiction to ascertain and punish the offence of such an illegal importation; and, if the offence be established, the person imported must remain in the custody of the marshal, subject to the orders of the President of the United States. Acts of Congress of 20 April, 1818, and 3 March, 1819, s.3. The laws of this State do not consider that the freedom of the slave can be acquired by such an illegal importation.

PPEAL from the District Court of St. Mary, Boyce, J. The petitioner A alleges that she is a woman of color, and was brought into the State of Louisiana, about the first of March, 1836, by one Thomas Gates, from Mexico, where she was held as a slave by Gates; that, after she was brought into this State, she was held as a slave, and seized and sold to pay the debts of Gates, and was purchased by Milton Johnson, in 1840, and that at the sale of the estate of the latter she was purchased by William C. Dwight, who not paying for her, she was seized and sold at public auction, in October, 1842, to Pecot; that Pecot, when he purchased her, was informed that she claimed her freedom, as she had been brought into Louisiana, from Texas; that since said sale, Pecot has held your petitioner in bondage, as a slave; that by the constitution and laws of Mexico, slavery is not tolerated, but is prohibited; and that she was brought into the United States in violation of the constitution and laws thereof, and that by the laws of the United States no one can hold her in slavery. Wherefore, she prays that she may be permitted to sue for her freedom; that she may be taken into the possession of the sheriff of St. Mary; and that she may be declared free,

Pecot, the defendant, filled a general denial, but admitted that he bought the slave as alleged, and avers that he is her bond fide owner, &c. He cited Carson, administrator of Johnson's estate, and Dwight, in warranty. Dwight denied that Pecot had any claim against him in warranty, and answered that he purchased said slave from Sarah Johnson, wife of N. Dalsheimer, who he prays may be cited in warranty.

ISABELLA PECOT. Sarah Johnson and her husband filed a general denial, and specially denied any warranty, as Dwight placed himself in lieu and stead of the respondents, and was subrogated to the right of Sarah Johnson against Milton Johnson's estate, &c. They further alleged, that they purchased the slave from the estate of Milton Johnson, and that Carson, administrator of his estate, is bound in warranty, who they pray may be cited. John Carson filed a general denial, &c.

Before the trial, the warrantors filed an exception to the jurisdiction of the court, on the ground that the Circuit or District Court of the United States had exclusively the right to pronounce upon the charge of illegally importing the slave, which was overruled by the court, and a bill of exceptions taken.

On the trial a witness was offered to prove that slavery was prohibited by the laws of Mexico in 1835 and 1836, who was objected to on the ground that plaintiff had not previously shown that there was no statute or written law in Mexico on the subject, which he was bound to do, before being allowed to prove the laws of that country by parol. The objection was sustained. There was a judgment below for the defendant, and the plaintiff has appealed.

Dwight, for the appellant. The laws of foreign States may be proved by parol, unless it appear that they are statutory or written. 5 Mart. 673. 2 La. 154. 17 La. 514, 595. 5 Rob. 163. In suits for freedom every thing should be done in favorem libertatis, which can properly be done, even to noticing facts dehors the record. 8 La. 479. 9 La. 373. The court should notice officially the well known fact that, slavery is not tolerated in Mexico. Would it be required of a party to prove the french or english governments to be monarchies, or that Paris is the capital of France, or London of Great Britain? Why then not notice the equally well know fact, that slavery is is not tolerated in England, France, or Mexico? This court has twice, in favorem libertatis, noticed the fact of its not being tolerated in France. See 9 La. 373. Eugenie v. Prevul, lately decided, ante p. 180. One who has been once free, cannot become a slave. 8 Mart. N. S, 699. 9 La. 209, 476. A slave taken to a free country becomes free, and cannot be again reduced to slavery. 16 La. 483. 13 La. 442. 9 La. 473. 11 La. 499. 2 Mart. N. S. 401. A negro purchased in a country where slavery is not tolerated, will be presumed to be free. 4 Mart. 385. A negro or colored person, brought here from a foreign country, cannot be held in bondage. Stat. 20 April, 1818, ss. 5. 6, 7, 8. 3 Story's Laws U. S. 1699, 1700. Stat. 3 March, 1819, s. 4. 3 Story's Laws, U. S. 1753. 11 La. 602. 8 La. 479.

Splane, for the defendant.

Maskell, Simon and Morphy, for the warrantors. The exception should be sustained. The forfeiture of a slave imported, or claimed, in violation of the laws of Congress in relation to the slave trade, must be the result of a suit or judical proceeding before the United States District Courts, which, under the 9th section of the judiciary act of the 24th of Se; tember, 1789, have exclusive jurisdiction of all suits for penalties and forfeitures incurred under the laws of the United States. See Ingersoll's Dig. Vo. Courts, sec. 8. By the provisions of the act of the 20th of April, 1818, the prohibitions of which have been held to extend to carrying slaves from one country to another (9 Cranch, 403, 404); and by those of the act of the 3d of March, 1819 (Ingersoll's Dig. Vo. Slave Trade), the importation of a slave into the United States, from any foreign country, is made an offence against the laws of the general government, subject to be punished by fine and imprisonment, and forfeiture, as the case may be, and in all cases, by the forfeiture of the slave so imported, who was, by the act of 1818, to remain subject to any regulations which the legislatures of the different States might at any time theretofore have made, or hereafter make, for disposing of any such slave (sections 5 and 7), but who, by the act of 1819 (sections 2 and 4), is to remain subject to the order of the President of the United States, for the purposes provided for in the second section of said act.

The allegations of the petition are, that plaintiff was brought into the United States in violation of the constitution and laws thereof, and that, under those laws, no one can hold her in slavery; and the position taken by the warrantors,

under their exception, is, that a District Court of the United States has exclusive jurisdiction of this suit under the allegations, the object of which is to maintain and show that said plaintiff has been illegally imported, and that her owners have incurred, not only the penalties and forfeitures imposed by the laws of Congress, but also the forfeiture of their slave. The State courts have no jurisdiction to try such matters. There must be a conviction on the issue of the illegal importation, before pronouncing the forfeiture of the slave, and such conviction cannot be had but before a court of the United States, whose jurisdiction extends exclusively over all suits for penalties and forfeitures incurred

under the laws of the United States.

Plaintiff having offered a witness to prove that slavery was prohibited by the laws of Mexico in 1835 and 1836, defendant's counsel objected, on the ground that plaintiff had not previously shown that there was no statute or written law prohibiting slavery in Mexico, which he was bound to do before he could prove the laws of that country by parol. It is well known that Mexico, formerly under the Spanish dominion, and governed by the laws of Spain, under which slavery was authorised and tolerated, continues to be governed by those laws, except so far as it was found necessary to change or abrogate them after the declation of her independence. Mexico never was governed by common or unwritten laws, and having adopted the form of representative government, the former laws could not be changed or abrogated but by statute, or by the provisions of her constitution. This being premised, as belonging to the general history of that country, how could the plaintiff be allowed to prove by parol, a law, which, if it existed at all, must be written? The proof of a law of Mexico by parol, would not be the best evidence. The testimony offered pre-supposes better testimony attainable, and the judge decided correctly in rejecting it. Story, Conflict of Laws, nos. 638, 639, &c. 2 Crauch, 237. 17 La. 513.

The slave Isabella was not brought into the United States, in contravention of the law. Her owner was a citizen of Texas, which at that time (1836) had revolted from Mexico, and was invaded by an armed force from Mexico with a view to bring it again under the power of the Mexican government. During that invasion, the master fled with his slave into the United States for protection. Can it be said that, in such a case, there was any attempt to violate the laws of the United States? The plaintiff, under the very laws which she invokes, has no right to sue for her freedom. Supposing that she was imported into this country in violation of those laws, the only consequence of such illegal importation, with regard to herself, after conviction before a court of competent jurisdiction, would be, that she would remain subject to being disposed of according to the laws or regulations adopted by the legislature of Louisiana, or to being taken possession of and kept in the custody of the marshal, subject to the

order of the President.

The law of Congress of the 20th April, 1818, gives the right to the legislatures of the different States to adopt regulations for disposing of any slave illegally imported, and contemplates that such slave may be sold in virtue of such regula-lations. Sections 5 and 7. It appears that the legislature of this State, by a law passed on the 13th of April. 1818 (B. and C,'s Dig. p. 789), had already provided for disposing of the slaves imported into the United States, in violation of the law of 1807, by a sale thereof. The preamble of that act shows the object of the regulations, adopted on this subject by our legislature, in conformity with the law of Congress. The act does not contemplate that the slave shall be free, but, on the contrary, the 2d section provides, that "the decree of the Circuit or District Court of the United States for the Louisiana District, properly certified and authenticated, condemning, &c., shall be taken and considered by the sheriff, for the time being, as a sufficient warrant, to sell or cause to be sold as a slave for life, any negro, &c." The 1st section had provided that the sheriff should be required to receive any negro, &c., and keep him until the Court of the United States pronounced a decree upon the charge of illegal importation. Another law was passed by Congress in 1819, providing that any slave illegally imported should remain subject to the order of the President of the United States, for the purposes provided for in the 2d section of the act, which authorised him to make such regulations and arrangements as he might deem expedient, for the safe-keeping, support and removal beyond the limits of the United States; and the previous laws on this subject were perhaps repealed

ISABELLA V. PECOT. by the law of 1819. But is there any thing in any of those laws which gives to the slave the right of suing for freedom, and of acquiring emancipation, from the fact of having been illegally imported? There must be a decree of the Court of the United States; there must be a conviction, before the owner or purchaser of the slave can be deprived of his property; and even then the slave does not become free; he is to be sold as a slave for life under the laws of our State, or to be taken possession of and kept by the marshal, to be removed beyond the limits of the United States, under the regulations and arrangements adopted by the President.

The judgment of the court was pronounced by

SLIDELL, J. There is a motion to dismiss this appeal, upon two grounds. One is, that the transcript has been returned directly to this court, though by the order of appeal, made in 1845, it was returnable to Opelousas. The appellant has manifested suitable diligence to comply with the order granting him time, made at the last Opelousas term, and the failure to do so is entirely attributable to the fault of the clerk of the court below. Under the peculiar circumstances of this case, we think, the direct filing at New Orleans was authorited by the statute of 1846; at least, under that statute, which, in some of its provisions upon a new and difficult subject is not free from obscurity, the point is not clearly against the appellant. We adopted, in the recent case of Gilmore v. Brenham, 1 An. R. 414, a rule which we believe a salutary one, that motions for dismissal will not be sustained, unless there be a clear case for dismissal. We stated then the reasons why the appellant would be considered as entitled to the benefit of any doubt, and it is not necessary to reiterate them.

Another ground of the appellee's motion for dismissal is, that the warrantors have not been cited. The appeal was granted on motion made in open court, and no citation was necessary. Whether there be any defect in the appeal bond, is a question not necessary to be considered; for the objection is not made in the grounds of the motion, which present the mere question of citation. The warrantors have left this motion for dismissal on the grounds presented by the defendant. We shall therefore proceed to the consideration of the cause, on its merits.

The petitioner alleges that, in 1836, she resided in Mexico, in the province or State of Texas, where she had resided for some years previously; that she was held to service as a slave in said country, by a man named Thomas Gates: that, in 1836, she was brought by the said Gates across the Sabine river into the United States, and that the said Gates, with his family and the petitioner, soon after removed to the parish of St. Mary; that Gates, claiming her as a slave, held her to service in the parish where she was afterwards seized and sold to pay the debts of Gates. The mesne conveyances are then recited, by which she was eventually conveyed to the defendant Pecot, against whom she claims her freedom.

The plaintiff rests her claim to freedom on two grounds: that she was never lawfully held to slavery in Texas, because by the laws of Mexico slavery was not tolerated, but prohibited; and that, if lawfully held as a slave in Texas, her importation into the United States from Texas, a foreign country in 1836, was in violation of the laws of the United States, and that Gates thereby forfeited any right of ownership which he may have theretofore had. At the trial of the cause the plaintiff offered to prove by the testimony of a witness that, at the time when Gates held the plaintiff in slavery in Texas, slavery was prohibited by the laws of Mexico. The defendant objected to this testimony: "Upon the

PRODT.

ground that plaintiff had not first shown that there was no statute law prohibiting slavery in Mexico or no written law, which he was bound to do before he could prove the laws of Mexico by parol. And the said objection being sustained by the court, which refused to permit said parol proof by said witness and permit said question to be answered to this effect, unless it was first shown that there was no written law, the plaintiff excepts to said opinion of the court, &c."

We think the court did not err. The general principle is, that the best testimony or proof shall be required, which the nature of the case admits of. The requisition of the court, upon the objection of the opposite party, in effect was, that the witness called to prove the laws of the foreign country, should be first asked whether the law as to which he was about to testify, was a written or an unwritten law. There was no hardship in this, and its tendency was to save the time of the court by preventing the introduction of illegal testimony. If the course of examination prescribed by the court had been adopted, and the witness had declared that the law he was called to prove was an unwritten law, we must suppose the examination would have been permitted by the judge to proceed, and that the proof would have been sufficient, for courts should only require proof of foreign laws by such species of testimony as the institutions and usages of the foreign country admit of. If the foreign law be unwritten, no other testimony than that of witnesses is attainable, and it would be unreasonable and vain to require any other. But if the foreign law be a written law, then higher evidence should be produced, in the form of an authenticated copy, or at least of a copy proved to be a true copy by a witness who has examined and compared it with the original. See Church v. Hubbard, 2 Cranch, 237. Story's Conflict of Laws, ss. 639, 640. Greenleaf on Evidence, ss. 487, 488.

The ruling of the court derives, if need be, additional force from the acts of the plaintiff. On a previous calling for trial, the plaintiff had applied for a continuance, on affidavit, for the purpose of "procuring from the city of Mexico a copy, duly authenticated, of the law of the Republic of Mexico forbidding and abolishing slavery in the Republic." Besides, we know that, by the laws of Spain, of which Mexico, like Louisiana, was once a province, and which laws once governed our territory, slavery was recognized. If that law has been changed since Mexico passed from the dominion of Spain, it could scarcely have been otherwise than by written law.

The plaintiff has herself offered testimony very unfavorable to her case. Her principal witness declares that, before the plaintiff was brought from Texas, he had seen many persons held as slaves there, and that the cotton plantations there were cultivated by slave labor. It is also a matter of public history with regard to this member of our confederacy, that Texas formally announced her independence before the date at which the plaintiff proves that she was brought from Texas into Louisiana, and that the condition of slavery was recognized in that State before its admission into the Union.

Being of opinion that the plaintiff has failed to establish that she had been unlawfully held to slavery in Texas, it remains to consider the effect of her importation into the United States from Texas, then a foreign country.

In the year 1836, when a hostile army had entered the territory of Texas to renew the attempts, which had so often proved bortive, to reduce the people of that country to subjection, a portion of the population fled for refuge to the Sabine, seeking safety for their lives and property within the confines of the

ISABELLA

O.
PECOT.

United States. It may well be questioned, whether an importation of a slave, under such circumstances, could be deemed a violation of our laws concerning the slave trade. Our federal government, in its diplomatic discussions with foreign powers, has certainly asserted, on occasions not dissimilar, a very different doctrine, where the rights of her own citizens in slave property were jeoparded, when brought by uncontrollable misfortune within the foreign territory.

This consideration is not, however, indispensable to the present enquiry. If the laws of the United States would affect the rights of the owner of a slave imported under such circumstances, can the commission of the offence be enquired into by a State tribunal, at the suit of the slave against the party alleged to have committed the unlawful act, or those holding under him. We think not. The inrisdiction of the United States Court should be invoked to adjudge and punish the offence, and the person so imported, in case the verdict of a jury should ascertain the commission of the offence, would remain in the custody of the marshal for safe-keeping, subject to the orders of the President of the United States. Under the former legislation, slaves unlawfully imported were to remain subject to such regulations as the State legislature might establish, and the statute of Louisiana provided that such slaves should be sold by the sheriff as slaves for life. In 1819, the power thus given to the State legislatures was taken away, and it was enacted that the slave should remain in the custody of the marshal, as above stated. There is nothing in our State legislation which recognises the freedom of the slave as acquired by the illegal importation, and the legislation of Congress must be interpreted as a whole, and administered and executed as Congress has directed. See United States v. Preston, 3 Peters, 66. Acts of Congress, of April 20, 1818, and 3 March, 1819, sec. 3, &c. Statute of Louisiana, 13 April, 1818. Judgment affirmed.

HALL V. BRASHEAR.

To recover money, paid under a commutative contract to a party thereto, the latter must be put in moru.

A PPEAL from the District Court of St. Mary, Boyce, J. Maskell, for the plaintiff. Dwight, for the appellant. The judgment of the court was pronounced by

Rost, J. This suit originated in the same cause of action as that of *Preston*, *Executor*, v. *Brashear*, 9 Robinson, p. 52, in which the court gave judgment against the plaintiff as in case of non-suit. The facts of the case are fully stated in the opinion of the court, to which reference is had.

In the present case, John Hall gave his note unconditionally to the defendant, for the sum of \$1,250, in consideration of a certificate to the following effect: "This is to certify that John Hull is entitled to one quarter of a share in the town of Far West, to be laid off on Berwick's Bay, on the plantation called Golden Farm, now occupied by Walter Brashear, the value of said quarter of a share being \$1,250, payable the 1st of January, 1838, as per subscription list. (Signed) Walter Brashear." The note was transferred by the defendant before maturity, duly paid by the maker, and subsequently transferred by him to the plaintiff, with all his rights against the defendant.

The plaintiff avers that he notified the defendant of the transfer, and that, on the 2d April, 1844, he demanded of him to be and appear at the office of the parish judge of the parish of St. Mary, on the 12th day of the same month, to make to him, the said plaintiff, a title and transfer of a quarter of a share in the town of Far West, which demand the defendant neglected to comply with, whereby he has suffered damages to the amount of \$1,250 and interest, for which he prays judgment.

The defendant answered, in substance, that he had never been called upon by the trustees of the shareholders to convey the land, and that he is ready and anxious to do so when called upon according to agreement, and to fulfil all the obligations imposed upon him by his contract; that should the court be of opinion that he is authorised to make a title to the plaintiff, he is ready to do so, and prays that a reasonable time be allowed him for that purpose. The court below gave judgment in favor of the plaintiff, and the defendant appealed.

We concur with the late court in the case cited, that the party giving his note received what he bargained for, to wit, the certificate of stock. The ultimate establishment of the town was little thought of by either party. This was one of the reckless speculations, so common at the time it took place. The certificate was artfully drawn up, without either mortgage or privilege on the land, or any ultimate warranty whatever to the holder; for the plain reason that, if it had been otherwise, the transfer of it would have subjected the transferor to the warranties stipulated. The certificate was a mere delusion—a thing to speculate with. John Hall played a losing game with it, and courts of justice would be ill employed in assisting him, or those standing in his place, to retrieve the loss. The defendant is not in default, and the plaintiff cannot claim a transfer of his share to himself, by virtue of the contract under which he claims. One-tenth part of the stock only has been subscribed, and no one has ever been authorised to receive the title to the land.

It is said that, since the institution of this suit, the land has been sold by the sheriff, and that it is no longer in the power of the defendant to comply with his contract. We apprehend that, if the subscription list was now filled, as it seems it was intended to be before the land was to be conveyed, it would be an easy matter for the defendant to get back the land; and he cannot be considered in default, as long as that opportunity remains.

John Hall intended for others the loss which the sudden revulsion of 1837 brought upon himself. He bought the cast of the net, and he cannot complain that no fish was caught. It is within the range of possibility, that the defendant may hereafter properly be put in default. We will, therefore, as in the former case, give a judgment of non-suit.

It is ordered, that the judgment in this case be reversed; and that there be judgment against the plaintiff, and in favor of the defendant, as in cases of non-suit, with costs in both courts.

SANDERS v. CARSON, Administratrix.

The correctness of a judgment adjudicating community property to a surviving spouse, rendered by a court of competent jurisdiction, in the absence of any proof of fraud or spoliation, cannot be enquired into collaterally.

SAMOURS V. GARSON. Where community property has been adjudicated to a surviving spouse, and a mortgage retained to secure the price, the administratrix of the deceased spouse cannot seize and sell the property so adjudicated, until the portion of the survivor has been ascertained by a particion and settlement of the community, but upon proof of the existence of debts, and of her having exhausted, by a proper application of them, the funds placed at her disposal for their payment.

A PPEAL from the District Court of St. Mary, Voorhies, J. Maskell, Simon, and Morphy, for the plaintiff, cited Civ. Code, arts. 1265, 1304, 2603. 9 Rob. 83. 12 Rob. 666. Divight, for the appellant. The judgment of the court was pronounced by

Rost. J. The plaintiff obtained an injunction, to prevent the sale, under an order of seizure, of certain property, adjudicated to her as belonging to the community which had existed between her and her late husband, James Sanders. The facts of this case are substantially as follows: James Sanders and the plaintiff were married in 1810. Sanders died in 1839, leaving as the issue of his marriage James Sanders, Mary Sanders, the defendant Mary Carson, and Susan and Eliza Sanders, the two last being minors at the time. In December, 1839, James Sanders was appointed administrator of the succession of his father, and he subsequently convoked a family meeting of the minors, who advised that certain slaves and immovables, stated by them to belong to the community, should be adjudicated to the plaintiff, and that the remainder of the property should be sold. These proceedings were duly homologated, by a decree of the Court of Probates sanctioning the adjudication and ordering the sale. The property not adjudicated to the plaintiff was sold in execution of the decree: In March, 1843, the administrator rendered his account, showing a balance in his hands, after paying all the claims presented against the succession. and also uncollected claims to the amount of \$1,579 26, besides the price of adjudication due by the plaintiff. Mary Carson was subsequently appointed administratrix, and caused an order of seizure to issue on the mortgage retained to secure the price of the adjudication made to the plaintiff.

The plaintiff enjoined the proceedings on various grounds, among which the following are deemed material: 1st. That the slaves and property seized belong to the community which existed between the petitioner and her husband, and have been adjudicated to her as surviving partner of the community and as co-proprietor, and that the administratrix has no right to proceed against her until her portion has been definitively fixed, by a partition and settlement of the community, 2d. That Mary Carson, the administratrix, was also a purchaser at the sale of the succession to the amount of \$1,116, which she is bound to apply to the payment of any claims against the succession, if any are still due, before calling on the petitioner. 3d. That the District Court has no jurisdiction, and cannot compel the payment of the notes as claimed; and that the Court of Probates alone has jurisdiction to fix the part and portion coming to each heir.

The answer denies that the property adjudicated belonged to the community, and avers that the plaintiff is bound to pay the price, as any other purchaser. The plaintiff amended her petition, and alleged that, since the institution of this suit, she and the heirs have sold all the lands and improvements seized to H. Anderson, and that by her obligations in the act of sale, the defendant is bound to dismiss the order of seizure and sale.

The defendant admits the sale, and that she received, in her capacity of administratrix, the sum of \$1,000, out of the price; but she denies that this sale

deprives her of the right to proceed as she has done, and prays that the proceedings may be changed from the vid executivd to the vid ordinarid, and that she may have judgment for the several sums claimed, except the price of the land and improvements. The court below perpetuated the injunction, and the defendant has appealed.

The judgment of adjudication having been rendered by a court of competent jurisdiction, and no fraud or spoliation being shown, its validity cannot be enquired into collaterally; and, for the purposes of this enquiry, we must take it for granted that the property adjudicated formed part of the acquêts and gains made during the marriage, one half of which belonged to the plaintiff. It may be true that the administratrix has the right to collect from the plaintiff a sufficient amount to pay the debts of the community; but she has not shown the existence of those debts. All the claims presented to the former administrator were satisfied by him, and there were left in his hands money and credits which the present administratrix must have received.

In the sale of the land to H. Anderson, to which the administratrix was a party, it was stipulated that she should receive from the purchaser, in part payment of the price, the amount necessary to discharge the debts of the succession, leaving in the hands of the said purchaser the balance of said price, until the final settlement and partition between the heirs according to law. As the administratrix claimed and received one half of the price only under this agreement, we must presume that no more was necessary to pay the debts. If this presumption should be unfounded in truth, the defendant cannot seize the property of the plaintiff till she has exhausted the fund placed at her disposal for the purpose of paying debts, and shown in a proper manner the application of the fund, and the debts remaining unpaid.

Judgment affirmed.

LEDOUX et al. v. Goza.

Where one sucd on an account, the principal item in which is stated to be a "balance of former account, as rendered," excepts to the petition as not sufficiently informing him of the nature of the demand, plaintiffs should not be allowed to proceed without furnishing the items of debit and credit, of which the account producing the balance was composed.

A PPEAL from the District Court of Carroll. Selby, J. The judgment in this case was rendered on the verdict of a jury, in favor of plaintiffs, for part of their claim. They appealed.

R. N., and A. N. Ogden, for the appellants. Dupuy, for the defendant, cited in support of the exception, Code of Pract. art. 172, §3. Sparrow, on the same side. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought by the plaintiffs, who were defendant's factors, to recover from him the sum of \$1,117 86, a balance of accounts, as exhibited by an account annexed to the petition. The account annexed to the petition shows a balance of \$1,117 86, but commences with one item of \$1,020 79, stated as follows: "June 30, 1841, To balance of the former account, as rendered, \$1,020 79." In the petition is an allegation, "that petitioners presented an account current, with the amount due by the said Goza, on or about the 20th July, 1841, which account came duly to the possession of the said Goza, and, on the 20th July, 1841, the said Goza promised to pay the same."

SANDERS S. CARAON. LEDOUE O. Goea. &c. In the account annexed to the petition, the next item to that of \$1,020 79, is an item charged as follows: "July 14, 1841. Our invoice of this date, \$38, 69." By a comparison of these dates and items it is impossible to say, whether the account stated in the petition as rendered is the same as that stated as rendered in the account annexed to the petition. It will also be observed, that the new items form a very trifling portion of the balance claimed.

The defendant excepted to the petition as not sufficiently informing him of the nature of the demand, and we are of opinion that the exception should have been sustained. It is true that our rules of pleading are liberal, but we ought not to extend this liberality so far as to force a defendant to answer, until he is informed, with reasonable certainty, of the items and nature of the plaintiff's claim. The averments of the petition are not sufficiently full and explicit to charge the defendant for the item of \$1,020 79, as upon a balance of a former account rendered, approved and finally adjusted between the parties. The defendant was entitled to information of the items of debit and credit of which the account producing the balance was composed, and, having demanded it by his exception, the plaintiffs should not have been permitted to proceed further in the cause until it was furnished. We may also remark that there is some obscurity in the testimony in this cause, which illustrates the propriety of enforcing a reasonable accuracy and fullness of pleading, before going to trial.

It is therefore decreed, that the judgment of the court below be reversed, that the exception of the defendant be sustained, and that this cause be remanded, with leave to the plaintiffs to amend their petition, and for further proceedings according to law; the plaintiffs paying the costs of this appeal.

Brander et al. v. Cobb et al.

Where a wife, separated in property, by whom a note had been executed jointly with another person, after maturity of the note executes a second note, payable at a future period, for the amount of the original note with interest, and delivers it to the payee to be signed by her co-obligor, taking an obligation from the payee to deliver the first note on the execution of the second by her co-obliger, and her husband, acting as her agent, afterwards gives a receipt to the payee for the first note, reciting therein that the second note had been made in renewal thereof, it is sufficient evidence of his authorising the wife to bind herself by the note, in an action on a note payable at the place of business of the holder, demand at the place of payment need not he allegedor proved, to authorise a recovery against the maker.

A PPEAL from the District Court of Madison, Selby, J. This is an action on a promissory note for \$1,188, signed by Sarah M. C. Cobb and A. J. Loury, payable on 1st December, 1845, to the order of Davenport, agent, at the office of the plaintiffs, and endorsed by the payee to the plaintiffs. The note was dated 29 May, 1845. The petition alleges that the maker of the note had refused to pay, though amicably requested. The defendants pleaded a general denial; S.M. C. Cobb further denying any responsibility on her part, as the note was executed without any authorisation by her husband. The plaintiffs offered the note sued on in evidence. They proved that Davenport was their agent, and that the endorsement was in his writing. A copy of the judgment of separation of property obtained by the defendant S. M. C. Cobb, agains

her husband, was also offered in evidence. Plaintiffs also offered in evidence the following receipt, signed by the husband of S. M. C. Cobb: "Received of W. V. Davenport, agent, Mrs. S.M. C. Cobb and A. J. Lowry's joint note for \$1,100, dated May 19,1844, due on the 1st day of December, 1844, for which they have executed their joint note, dated 29th May, 1845, due 1st Dec., 1845, for \$1,188, and which I have received W. V. Davenport's obligation to deliver the first note on the last note being signed by A. J. Lowry, as it was a joint debt, and which receipt or obligation has been lost or mislaid, and which bore date the 29th May, 1845.

O. B. Corn, Agent."

To the introduction of the note sued on in evidence, defendants' counsel excepted, on the grounds: 1st. That the petition contained no averment of a demand at the place of payment specified in said note. 2d. Because the plaintiffs did not prove a demand of payment at the place specified in said note. Both of which objections the court overruled, and gave a judgment in favor of the plaintiffs for the amount of their demand; from which Mrs. Cobb, and her husband, appealed.

Garland, for the plaintiffs. The assent of the husband is conclusively shown by his receipt. His concurrence in the act subsequently to the execution of the note, made it as obligatory on her, as if it had been obtained at the time of executing it. The Civil Code, art. 1779, declares "that the incapacity of the wife is removed by the authorisation of the husband," without any limitation as to the time when the authorisation may be given. In France, the consent of the husband, or, in his absence, that of the court, may be given before, or after the execution of the unauthorised contract, and any act in writing, from which that assent to acts done clearly results, satisfies the requisites of the statute." The authorisation must be special for all acts to be done, but it may embrace all acts already done, because they are always certain and specific. 13 La. 163.

already done, because they are always certain and specific. 13 La. 163.

As to the exceptions; Where the law, under the circumstances of the case, does not require a presentment of the note for payment at the place indicated, an allegation in the petition to that effect is unnecessary and immaterial. The first ground of exception is involved in the second. As to the second ground; A note made payable at plaintiff's domicil need not be formally presented for payment. The note sued on is payable at the office of the plaintiffs in New Orleans.

In the case of Allain, &c. v. Lazarus, 14 La. 327, the defendant was the maker of several promissory notes to the plaintiffs, which were drawn payable to the order of the plaintiffs, at their counting house in New Orleans, on which suit was brought by them. The defendant, on the trial, excepted to the notes being received in evidence, because no evidence was offered that they had been presented at the place indicated, and no protest was made of the notes.

But the court said: "The maker of the note contracted the obligation to repair to the counting house of the payees, and to make payment; they must be presumed always ready and willing to receive; and when it is shown that the payees are still in possession, the burden ought to devolve on the obligor to show a readiness and offer to pay, or funds placed in the hands of the payee for that purpose, if he wishes to exonerate himself." Wallace v. McConnel, 13 Peter's Rep. 136. In the case of Maurin v. Perot. 16 La. 276, this doctrine is fully confirmed, that a note payable at the plaintiff's domicil need not be formally presented for payment. The principle is clearly announced; but the court further adds, "especially if the defendant had no funds there."

Pepper, on the same side.

Snyder and Shannon, for the appellants. To enable a married woman to make a valid contract, it is necessary that she should have the authorization of her husband or of the judge. Civil Code, arts. 124, 2410, 2411. The authorization is a condition precedent. Neither the husband, nor the judge can, by any act posterior to the contract, render it valid. The instrument of writing which plaintiffs have tortured into a ratification of Mrs. Cobb's obligation upon the note, is simply a receipt in which the note is enumerated in general terms; and neither the plaintiffs, nor Mrs. Cobb's husband, could ever have dreamed that the instrument referred to was intended as a ratification of Mrs. Cobb's act, or they would

BRANDER

never have left the matter in so ambiguous a position. The judgment of the court below is erroneous in not giving a non-suit against the plaintiffs for failing to prove a demand at the place of payment.

The judgment of the court was pronounced by

Rost, J. This suit is brought upon a joint and several promissory note of the defendants. S. M. C. Cobb resists the payment, on the ground that she executed the note, without authority from her husband. It is in evidence that she is separated in property from him, and his authorisation clearly results from the receipt given by him to the plaintiffs' agent.

There is no error in the judgment rendered by the court of the first instance, in favor of the plaintiffs. Judgment affirmed.

BOOTH v. McFARLAND.

An emancipated minor, sued on notes given by him for the price of a steamer, purchased after his emancipation for the purpose of being employed by him in transporting freight and passengers, and which was so employed, he commanding her as captain, cannot be relieved from his obligation on the ground of minority. C. C. 2222.

PPEAL from the District Court of Madison, Curry, J. The facts of this case are stated on the opinion, infrd.

Shannon, for the plaintiff. The contract of sale between the parties was a commercial one, as the boat was purchased for the express purpose of carrying freight and passengers for hire; and the owners of the boat conducting that business, were engaged in a commercial partnership. Civil Code, art. 2796, § 3. Commercial partnerships are such as are formed "for carrying personal property for hire in ships and other vessels." Article 465 shows what is meant by personal property. See also 4 La. 110. 3 Rob. 496. 2 Rob. 182. The defendant admits that after the purchase a commercial partnership existed, and defendant would be then bound by his contracts. If he would be bound after the purchase, the contract or purchase of the means to carry on, or commence business, must necessarily be binding upon the defendant, else an emancipated minor would not be bound by a contract for the purchase of goods, or for a loan of mo-

ney obtained for the purpose of commencing or going into trade.

The defendant, as an emancipated minor, had full authority to make this contract. By article 379 of the Civil Code, the emancipated minor, who is engaged in trade, is considered as having arrived at the age of majority, for all acts which have any relation to such trade. By art. 1867, "a minor who is a banker, factor, trader, or artisan, is not relievable against lesion in contracts made for the purpose of his trade or business." Art. 2222 of the Civil Code declares that, "a minor carrying on commerce, or being an artisan, is not restituable against the engagements into which he has entered in the way of his business or art. Rob. 517 and 513. 5 Mart. N. S. 653. 2 Toullier, p. 436, no 1293. He is necessarily bound, otherwise none would trade with him; he is even permitted to borrow money to obtain his capital, and for securing its re-payment, he can mortgage and hypothecate his immovables. The purchase of the boat on a credit, was the defendant's capital in this case.

Stacy and Sparrow, on the same side.

Snyder, for the appellant. The purchase of a steamboat is not a commercial contract, as the joint owners are not commercial partners; each holds an undivided share, which he may dispose of without consulting the others. Neither can sell the interest of his co-proprietor, without his consent. Byrne v. Hooper, 2 Rob. 229. In all commercial partnerships the acts of one partner, in the name of the firm, bind the others.

Plaintil contends that, under article 379 of the Civil Code, the defendant is liable. If he was sought to be rendered liable for any contract entered into after he had engaged in trade or commenced running the boat for hire, then the article would be properly invoked. BOOTH McFARLAND.

Dunlap, also appeared for the appellant.

The judgment of the court was pronounced by

Rost, J. The defendant being sued upon certain promissory notes pleads minority, and alleges that if he is bound for any portion of the said notes by reason of his emancipation, his obligation cannot exceed the amount of his income, which he alleges to be under one thousand dollars a year. He also alleges various payments on account. The court below gave judgment in favor of the plaintiff, allowing on the first note the payments made by the defendant. From this judgment the defendant has appealed.

There is nothing in the plea of minority. The defendant, being over eighteen years of age, and duly emancipated, subsequently purchased one undivided half of the steamer Daniel Webster, took command of her, and ran her in the river trade. After running her some time he purchased the other half, and the notes sued on are the consideration of both purchases. The purchase of the boat was made in view of the defendant's trade, and a necessary prerequisite to carry it on. He cannot be relieved against it. See Civil Code, arts. 1867, 2222.

This youth must have singular notions of justice, to retain after his majority, as he has done, the property purchased, and to call upon the tribunals of his Judgment affirmed. country to dispense him from paying for it.

BELL v. McFARLAND.

PPEAL from the District Court of Madison, Curry, J. The judgment of A the court was pronounced by

ROST, J. This suit is in all respects similar to that of Booth v. McFarland, just determined; and for the reasons therein given, the judgment in this case is affirmed, with costs.

Shannon, Stacy and Sparrow, for the plaintiff. Dunlap and Snyder, for the appellant.

DOWNES v. SCOTT.

A sheriff, at whose request judicial advertizements have been published, will be liable for the costs of publication, in the absence of proof any agreement by the publisher to look to others for remuneration.

PPEAL from the District Court of Madison, Selby, J. Amonett, for the A plaintiff. Dunlap and Snyder, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiff sues for the amount of an open account for printing and publishing judicial advertisements at the request of the defendant, while the latter was acting as sheriff of the parish of Madison. The defendant denies that he is indebted to the plaintiff, and avers that he is not personally

DOWNER P. BOOTT.

answerable for the charges for printing advertisements, which, in the discharge of his official duties, he was required by law to cause to be published. The cause was tried by a jury, who gave a verdict for the plaintiff, and the defendant has appealed.

In the case of Haile v. Rils, the question now presented, was settled. It was there held that, among the charges which the sheriff, in the exercise of his official duties, must necessarily pay himself or become responsible for were those for printing the advertisements required by law; and when these services are not paid for in cash, that parties rendering them must be presumed to have credited the person by whom they were employed. 9 Rob. 510.

The evidence in the present case, shows that the services were all rendered at the request of the defendant; and no agreement is proved, to look to any other person for remuneration.

Judgment aftirmed.

Goodlos v. Holmes et al.

Actions for damages resulting from offences or quasi-effences, are prescribed by one year from the time when they were committed.

A PEAL from the District Court of Carroll, Mayo, J. This action was instituted on the 26th of May, 1845. The acts complained of as designed to defraud the plaintiff, were committed, as the petitioner alleges, on the 3d of June, and 2d of September, 1843.

Thomas, Prentiss, and Finney, for the appellant. Caldwell, Stacy, and Sparrow, for the defendants. The judgment of the court was pronounced by

Eusris, C. J. This is an action for damages, resulting from alleged quasioffences, committed by defendants to the injury of the plaintiff. The prescription of one year was pleaded; the general issue was also pleaded, and a demand
in reconvention was set up, in which it is charged that the present suit is vexatious and malicious, and instituted for the sole purpose of harrassing the defendants with a troublesome and expensive law-suit, and that they have suffered
actual damages by being put to the expense of employing counsel to defend it
and otherwise, to the amount of \$1,000 each.

There was a verdict for the defendants in reconvention for \$499 each, against the plaintiff, and costs of suit. There was a motion for a new trial, on the ground of the misconduct of the jury after their retirement to deliberate upon the verdict, which was disallowed, and the plaintiff has appealed.

This action is prescribed by lapse of time, and the case ought not to have gone to the jury, so far as relates to the demand of the plaintiff for damages. The conduct of the jury was such as to deprive their verdict of all the weight it would otherwise receive from this court, in a case of this kind. We think it erroneous, and not warranted by the evidence.

The judgment of the District Court is therefore reversed; and judgment is entered for the defendants against the plaintiff in the principal suit, and for the plaintiff against the defendants in their demand in reconvention; the plaintiff paying costs in the court below in the former suit, and the defendants these in the latter; the costs of the appeal to be paid by the appellees.

SMITH, Under-tutor v. DICKBESON, Tutrix.

Defendant, natural tutrix of her minor children, heing about to contract a second marriage, applied to a family meeting to determine whether she should rotain the tutorship, which decided that she should do so, on condition of her executing, prior to her marriage, a bend to the parish judge in a certain sum to secure the rights of the minors, and on that condition early. Having married without executing the bond, the under-tutor instituted a suit for her destitution, to which she answered objecting to the right of the family meeting to require a bond and to the form of the bond required, but alleging her readiness, with her husband, to give security, if required by law. Held, that defendant should be retained as tutrix on giving bond and security, in solido, with her husband, for the faithful performance of her duties as tutrix.

A PPEAL from the District Court of West Feliciana, Boyle, J. Phillips, for the plaintiff. Ratliff and Cowgill, for the appellants, cited Rachal v. Rachal, 10 La. 460. The judgment of the court was pronounced by

EUSTIS, C. J. This is an appeal from a judgment by which the mother has been deprived of the tutorship of her minor children. The reason given by the judge is, that she, being a widow, married her present husband, "without having been retained in her natural tutorship to her minor children by a family meeting."

Article 272 of the Civil Code provides that the mother, the natural tutrix of her minor children, wishing to contract a second marriage, must, before the celebration of the marriage, apply to the judge for the convocation of a family meeting, for the purpose of deciding whether she shall remain tutrix. If she neglect to apply for the family meeting, she is ipso facto deprived of the tutorship, &c. The party defendant, before her second marriage, applied for a family meeting under this article, and the meeting unanimously determined that she should retain the tutorship, notwithstanding her proposed marriage, on condition that she should, prior to her marriage, give bond to the parish judge, in the sum of ten thousand dollars, to secure said minors, and upon that condition only. The under-tutor consented to the homologation of these proceedings without further notice, and it appears that the marriage was celebrated without the bond being given.

The question has been raised as to the right of the family meeting to append this condition to their assent, and also to the form in which the bend is required to be given. In this state of things, we think the judge erred, in decreeing the destitution of the mother of the tutorship of her children, particularly as she, in her answer, and her husband, have declared their willingness to give security for the tutorship, if the law requires it of them.

The judgment of the District Court is therefore reversed, and it is decreed that the defendant Mary Ann Dickerson be retained in the tutorship of her minor children, on her giving bond and security, in solido with her husband, conditioned for the faithful performance of her duties as tutrix; the costs of appeal and of the court below, to be paid out of the estate of said minors.

NEW ORLEANS GAS LIGHT AND BANKING COMPANY V. HILL.

Open accounts against a plaintiff, not acknowledged by him, transferred to defendant by a third person, cannot be pleaded in compensation, in an action by plaintiff on a promissory note.

A PPEAL from the District Court of Madison, Curry, J. Bemiss, for the plaintiff. H. W. Dunlap, for the appellant. The judgment of the court was pronounced by

ROST, J. This is a suit upon a promissory note, against the defendant as maker. He pleaded in compensation various open accounts against the plaintiffs, alleged to have been transferred to him. The court below disregarded the plea, and gave judgment in favor of the plaintiffs for the whole amount claimed, and interest from the day of the protest.

There is no error in the judgment. The accounts set up by the defendant were not acknowledged, and could not be compensated with his note. The protest was in the usual form, and the court did not err in admitting it in evidence.

Judgment affirmed.

Course, Under-tutor, v. Forshey, Tutor.

Where, at the time of appointing a tutor, the property of the minor consisted in an undivided interest in a plantation and slaves, but, by a compromise afterwards made with the co-proprietors, the tutor is authorised to receive a sum of money in cash in-extinguishment of the undivided interest of the minor, the tutor, though appointed by the advice of a family-meeting and expressly executed from giving security under the provision of the stat. of 10 March, 1834, sec. 4, may be required, in consequence of the change in the character of the property, to give security for the sum to be received by him, and the interest which may accrue thereon. Arts. 330, 331, 332 of the Civil Code are not repealed by the stat. of 10-March, 1834, sec. 4.

A PPEAL from the District Court of Concordin, Farrar, J. Shaw, for the plaintiff. Forshey, appellant, pro se. Frost, on the same side. The judgment of the court was pronounced by

Rost, J. The defendant was appointed tutor of a minor, and was dispensed from giving security, under the provisions of the act of 1834. The property of the minor consisted, at the time, in an undivided interest in a plantation and slaves. A compromise was subsequently made with the other owners of that property, by which the defendant was duly authorized to receive the sum of \$10,000, in extinguishment of the rights of his ward. The under-tutor then instituted these proceedings against him, to compel him to give security for that sum and the interst that might accrue on it. The court below ordered the defendant to give security in the sum of \$12,000, and he appealed.

There is no error in the judgment. The change in the nature of the property of the minor, fully authorises the course of the under-tutor. The act of 1834, has not repealed the articles of the Civil Code on which he relies; and tutors may at all times be required to furnish additional security, for the sums that come into their hands, during the continuance of their guardianship.

Judgment affirm

ANSELM v. BRASHEAR.

One who builds a cabin an lands in the pessension of another, and occupies it for less than a year, for the purpose of acquiring a pre-emption right in case the title under which the party in possession held should be annulled, but afterwards abandons the house, having had notice of the adverse title and possession and having declared his intention not to interfere with it, cannot, on the demolision of the house by the possessor, and in the absence of any proof of his having used the materials, recover from him the value of the house.

A PPEAL from the District Court of St. Mary, Voorhies, J. Splane, for the appellant. Dwight, for the defendant. The judgment of the court was pronounced by

Rost, J. The defendant purchased at sheriff's sale an improved tract of land, held under one of the Bowie claims. The plaintiff, being aware of this fact, and under the expectation that the title would be annulled and set aside, built a cabin upon a portion of the land, for the purpose of acquiring a preemption right. He occupied it something less than one year, and then went to reside in another, which he had built on an adjoining section of land. The house was on the cultivated land of the defendant, and, being abandoned and left open, he caused it to be pulled down, leaving the materials on the spot, and, for ought that appears to the contrary, at the disposal of the plaintiff. The plaintiff now seeks to recover the value of the house, which he alleges to have been \$500. Judgment was rendered against him in the first instance, and he appealed.

The bare statement of the case shows that the plaintiff has no right to recover. He had notice of the defendant's title and possession, and stated that he did not wish to interfere with him, as long as his title was held valid.

The judge of the first instance made a correct application of art. 500 of the Civil Code. The house, when it was first put up, was not worth over \$50. It had been abandoned in a dilapidated state, and, as the erection of it was unlawful, the defendant is not liable in damages for having demolished it.

Judgment affirmed.

BRASHEAR v. DWIGHT et al.

After the dissolution of a partnership, and notice thereof by an advertisement in the newspaper of the village where the partnership business was carried on, service of citation upon
one of its members will not authorise a judgment against the rest. In a direct action
against a partner, for dealings had with the firm after its alleged dissolution, the fact that
plaintiffs were in the habit of dealing with the partnership, would render it necessary to
bring notice of the dissolution home to them, otherwise than by notice in a newspaper; but this
fact cannot affect the manner of bringing the partners of a dissolved partnership into court-

A PPEAL from the District Court of St. Mary, Boyce, J. Brent, for the plaintiff, contended that the judgment was correctly annulled for want of citation. C. P. 606, § 4. 1 Mart. N. S. 9. 3 Ib. N. S. 327. 8 Ib. N. S. 145. 1 Rob. 30. After dissolution of a partnership, citation must be served on all the partners individually. 17 La. 42. Dwight, on the same side. Splane, for the

BRASHEAR O. DWIGHT.

appellants, contended that, without personal notice of the dissolution, defendants, being dealers with the firm, could not be affected by it. 1 Collyer on Part. pp. 75, 154. 3 Kent's Comm. 38. Story on Part. ss. 84, 334, 335.

The judgment of the court was prenounced by

Rost, J. The plaintiff, one of the partners of the late firm of Bemiss, Brashear & Co., enjoined an execution issued upon a judgment obtained by the defendants against said firm, on various grounds, among which it is only necessary to notice the following: 1. That the citation in the original suit was served upon Cyrus Eggery, one of the partners, long after the partnership had been dissolved, and the dissolution advertised according to law. 2. That plaintiff never was cited, and was not aware of the proceedings until the sheriff seized his property; and that the judgment is, as to him, an absolute nullity. The defendants filed a general denial, averred that their proceedings were regular and binding upon the plaintiff, and prayed for the dissolution of the injunction with interest and damages: The court below having annulled the judgment and perpetuated the injunction, the defendants appealed.

It is satisfactorily proved that, before the institution of the snit, the partner-ship of Bemiss, Brashear & Co. had been dissolved, and the dissolution advertised in the newspaper of the village where it had been carried on. It is contended that the plaintiffs in the snit were in the habit of trading with the firm, and that notice of the dissolution should have been brought home to them, otherwise than by publications in the newspapers. That ground would be well taken, if the object of the plaintiff had been to make the defendant liable, in a direct action against him, for dealings had with the firm after its alleged dissolution; but it does not affect the manner of bringing the partners of a dissolved partnership into court, and the authorities cited in behalf of the defendants are not applicable to the case. It appears by the notice of dissolution, that the plaintiff remained charged with the affairs of the firm. The entries made by him in its books in 1836, were no doubt made in his capacity of liquidating partner.

We are satisfied that the plaintiff was entitled to personal citation, and that, for want of it, the judgment cannot be executed against him.

Judgment affirmed.

BALLARD et al. v. WALL.

A note made payable in "Mississippi currency," will be taken to mean the lawful currency of the State, that is, gold and silver, in the absence of other proof that it was intended to be payable in the notes of the banks of that State.

A PPEAL from the District Court of Madison, Curry, J. Amonett, for the plaintiffs. A. Pierse, for the appellant. The judgment of the court was pronounced by

Kine, J. The defendant is sued as the maker of a promissory note, payable in "Mississippi currency." He pleads in defence the prescription of five years. The note became due on the 1st. of Nov., 1839, and citation was served in this suit on the 9th of October, 1845, more than five years after the maturity of the note. The prescription pleaded would have accrued, had it not been interrupted by the acknowledgments of the defendant. A witness, to whom the note was

entrusted for collection, says that, several times within the four years last proceeding the commoncement of the suit, the defendant recognized the debt and promised to pay it, and, at one of the interviews, offered to secure its payment by a mortgage.

Battano Walt.

It is contended in this court, that the plaintiffs can only exact payment in the bills of banks of the State of Mississippi, and that these were, at the maturity of the note, at a discount of from twenty to thirty per cent. No such plea is set up in the answer, nor is there any evidence in the record to show that such was the intention of the parties in using the words "Mississippi currency." In the absence of such proof, the terms must be understood to mean the lawful currency of the State, that which would constitute a legal tender, to wit, gold and silver, But giving to the terms used the interpretation most favorable to the defendant, that bank bills current in Mississippi were to be received in payment, still his defence would not avail him under the evidence. It is in proof that no bank bills have been current in that State since 1840, and that officers were forbidden from receiving depreciated Mississippi money, unless specially instructed.

Judgment affirmed.

LOUISIANA STATE BANK v. BARBOW et al.

Attendant and the appropriate payment at any to reflect

The Civil Code has fixed no special prescription for judgments. Debts existing in that form are barred, if by any prescription, only by that of thirty years.

Heirs who have accepted a succession unconditionally, represent the deceased, and stand in his place both as to his debts and obligations, and a prescription which could not have availed him if alive, cannot protect them. C. C. 867, 939.

Where judgment has been obtained against a party condemning him to pay a certain sum with interest at a certain rate from a particular time, and another sum with interest at a lower rate and from a later period, a payment made after judgment must, in the absence of any imputation by the parties, be imputed to the interest and principal of that portion of the debt bearing the highest interest, it being the oldest and most onerous.

A PPEAL from the District Court of West Feliciana, Johnson, J.

Patterson, for the appellants. The defendants in this rule rely on the prescription of ten years. Civil Code, arts. 3442, 3444, 3495. "This prescription has also the effect of releasing the owner of an estate from every species of real rights, to which the property may have been subject, if the person in possession of the right has not exercised it within the time required by law." Art. 3494. 11 La. 59, 259. These cases are decrees rendered on mortgage claims. If this is a real right against the property of the estate, it is prescribed by ten years. 6 La. 31 and 671. This prescription is a perpetual bar to any action to recover. 4 La. 327. C. C. 3422.

If this is a personal action, it is barred by the prescription of ten years. C. C. art. 3508. Good faith not being required on the part of persons pleading prescription, the heirs cannot be compelled to swear whether the debt has been paid or not. Art. 3515. To interrupt this prescription for the whole, it is necessary that they all be served with citation or all acknowledge the debt. Art. 3517.

The judgment of the court was pronounced by

SLIDELL, J. In the year 1829, the plaintiffs recovered judgment against Bennett Barrow, and, in the year 1844, a rule was taken in the cause against the appellants, the children and heirs of Bennett Barrow, who died in 1833, to show LOUISIASA STATE BANK S. BARBOW. cause why execution should not issue against them, for the balance remaining due upon said judgment. The plaintiffs in their application for the execution alleged that, these heirs were the sole heirs of the deceased, and had accepted the succession of their father purely and simply. A credit was acknowledged of \$1,396 48, as paid thereon, about 30th April, 1830. The defendants answered by a plea of prescription.

Our Code has fixed no special prescription for judgments, and, in the absence of any special provision, we are of opinion that debts existing in that form are barred, if by any, only by the prescription of thirty years. But it is contended that this is an action against the heirs, and is subject to the prescription of ten years.

The heir represents the person of the deceased; he is of full right in his place, as well for his rights as his obligations, and no prescription not available to the ancestor, were he alive, can protect the heir. See Civil Code, art. 939; also art. 867. &c.

There is certainly something very extraordinary in this case, when we consider the punctuality and honesty of the ancestor, as shown by the testimony; and also the facts, that no execution appears to have issued on the judgment during his life time, that he was a man of ample means, and that he died leaving an unembarrassed estate. But whatever opinion the mind may form as to the payment of this debt, in the absence of proof of payment and of the lapse of a sufficient time to accomplish prescription, the heirs must be held liable.

The judgment in this case condemns the defendants to pay "\$3,864 25, with interest at the rate of ten per cent per annum, on the sum of \$1,884, from the third day of March, 1825: and interest at the rate of five per cent per annum on the further sum of \$1,957 25, from the 6th March, 1829, subject to a credit of \$1,396 48, made 8th April, 1830." This form of judgment is sufficiently certain, because it can be rendered so by calculation; the form, however, is liable to the objection that it may lead to mistake in its execution. To prevent any future misunderstanding or difficulty in the execution of this judgment, we think proper to say, that the imputation of the credit of \$1,396 48 should be made to the interest and principal of the \$1,884; the balance thus produced to bear a like interest from the date of the payment. This imputation must be made, because that portion of the indebtedness was the oldest and the most onerous.

Judgment affirmed.

COLLINGSWORTH v. COVINGTON.

A manager of slaves employed on a plantation may recover from the owner damages for a wound inflicted on him by one of the slaves under his charge, not caused by any fault of the manager. C. C. 180, 181, 2300. Articles 170, 2299 of the Civil Code relate not to slaves, but to free servants; and the proviso in art. 2299, that responsibility for damage occasioned by servants only attaches where the masters might have prevented the act which caused the damage and have not done it, is confined to cases of free servants.

A PPEAL from the Court of Probates of Tensas, Montgomery, J. Frost, for the appellant, cited Civ. Code, art. 2300. J. Dunlap, for the defendant. The judgment of the court was pronounced by

King, J. This action is instituted to recover damages for a serious wound, alleged to have been inflicted on the plaintiff by a slave belonging to the defen-

dant. The answer denies that the plaintiff has any cause of action against the defendant, and alleges that the former was the overseer and manager of the defendant, and as such was responsible for the good conduct of the slave in Coviscros. question, who was under his charge. During the pendency of the suit the defendant died, and the cause was transferred to the Probate Court, where it was tried, without the intervention of a jury. A judgment was rendered against the plaintiff, from which he has appealed.

The evidence establishes fully that the plaintiff, while in the employment of defendant as an overseer, received from a slave belonging to the latter a painful and dangerous wound, which disabled him for some time, and subjected him to charges for medical treatment. It is further in proof, that the plaintiff was a good manager, attentive to the health, discipline, and good government, of the slaves under his charge, and exercised no unnecessary severity; that Covington had rendered his slaves unmanageable by over indulgence; and that the loose discipline which he maintained on his plantation, was a source of complaint and dissatisfaction among his neighbors. This evidence is uncontradicted, and the veracity of the witnesses, by whom it is given, unimpeached. The judge below has assigned no reason for rejecting the plaintiff's demand, but probably considered, as has been contended by the counsel for the defendant, that masters are not responsible for the damage caused by their slaves, in cases like the present.

In our opinion, the judge erred. Masters are expressly made answerable for the damage occasioned by the offences or quasi-offences committed by their slaves, but with the right reserved to them of liberating themselves from that responsibility, by abandoning the slave. No exception to this rule is established which precludes an overseer or other person, having a slave under his charge, from obtaining reparation in damages for injuries caused by the latter. Civil Code, arts. 180, 181, 2300. Articles 170 and 2299 refer, not to slaves, but to free servants, with regard to whom a different rule is established. By the latter of these articles, the responsibility of the master, resulting from the acts of the free servant, only attaches when he might have prevented the act which caused the damage, and has not done it. Justice, in our opinion, requires that the cause be remanded for the purpose of being submitted to a jury.

It is therefore ordered that the judgment of the District Court be avoided and reversed, and that the cause be remanded for further proceedings; the appellee paying the costs of this appeal.

GASQUET et al. v. ROBINS.

Sheriffs were liable, before the stat. of 7 April, 1896, s. 17, to the party injured, for any damage sustained by their illegal acts or neglect. That statute gives an additional remedy in cases for which it provides; but it cannot be construed as subjecting the sheriff to the payment of the amount for which a f. fa. was issued, as a penalty for a more failure to return the writ on or before its return day. It provides a summary remedy, by motion, after ten days notice, in cases of failure to return writs of f. fa. on or before the return day, or to pay over money received thereon to the party entitled to receive it, or to his attorney, unless good cause be shown for such failure, as the inability of the sheriff to effect a sale before the

GASQUET S. BORING. return day, or that the writ had been enjoined, or payment of the sum collected suspended by order of a competent tribunal

The return on a f. fa., made by a sheriff after the return day, that he had demanded of the debtors money to satisfy it, but that they refused to give either money or property, will not exonerate the officer from liability under the stat. of 7 April, 1826, s. 17. On the refusal of the debtor to satisfy the writ or to give up property, the sheriff should have called on the creditor to point out property. C. P. 726, 727. It is only where the debtor has made a surrender of his property, that this demand becomes unnecessary.

Where a sheriff, by whom a twelve-month's bond has been taken for the price of property sold under execution, neglects to return the writ, and retains the bend in his hands for more than eleven months, and until, in consequence of his failure to return it, it is destroyed, he will be liable to the creditor for its amount. The bond belonged to the creditor, who had a ight to require its delivery upon paying the costs; and the return of the writ would have nformed him that a bond had been taken. C. P. 716.

A sheriff condemned to pay to the creditor the amount of a fi. fc. in consequence of his neglect, is entitled to be subrogated to the rights of the latter against the defendant in execution.

A PPEAL from the District Court of East Feliciana, Johnson, J. This suit was instituted to recover from a former sheriff the amounts for which certain executions were issued in favor of the plaintiffs, the sheriff having failed to return them on or before their return days. There was a verdict and judgment in favor of the plaintiffs for \$4,793 06, from which the defendant has appealed. The material facts of this case will be found in the opinion of the court, infra.

Winter and H. A. Bullard, for the plaintiffs. The right to recover is given by the act of 7 April, 1826, sec. 17. The act of 1826 imposes, as a penalty for neglect to return the writs, the amounts specified in them. It does not merely give an action for damages actually sustained; that remedy existed before. The courts cannot mitigate the penalty, nor enquire what actual damages may have been suffered. The act is highly penal, but it is founded in public policy, and was called for by a great evil. The act of 1826 was passed subsequently to the promulgation of the Code of Practice, and was not repealed by the act of 1828, which abrogated only such rules of practice as existed prior to the adoption of the Code.

Lawson, for the appellant. The sheriff is the agent of the plaintiff. The less sustained by a principal, in consequence of the negligence of the agent, is the measure of the latter's liability. 1 Livermore on Agency, 398-9. Russell v. Palmer, 2 Wilson, 325. Purviance v. Angus, 1 Dallas, 180. Story, Agency, ch. 3, § 164, 165, p. 177. Pothier, Oblig. nos. 159, 160. Shepherd v. Johnson, 2 East. 210. Conard v. Nicoll, 4 Peters, 291. 6 Peters, 282. 2 Wilson's Rep. 325. 3 Martin, 478. Dupuy v. Barlow, 4 Mart. N. S. 243. Clarke v. Wright, 5 Mart. N. S. 124. Stinton v. Buisson, 17 La. 571. Bonnabel v. Bouligny, 1 Rob. 294. Union Bank v. Thompson, 8 Rob. 227. Prior to the act of 1826, the law in reference to the returning of writs was held to be merely directory. See Code of Practice, art. 279. This court say that: "The provisions of the Code of Practice which require the judge to fix the amount of the bonds to be taken on a writ of sequestration, and the sheriff to return it into court, are directory only. They do not authorise a recourse on the sheriff, for neglects from which the plaintiffs receive no injury. See Vawler v. Morgan, 6 Martin's N. S. 46. The act of 1826 was repealed by the stat. of 25 March, 1828, s. 25-See Jemison v. Wamack, 5 La. 494.

The judgment of the court was pronounced by

King, J. The plaintiffs in this action obtained three judgments against parties residing in the parish of East Feliciana, under each of which a writ of fi. fa. was issued and delivered to the defendant, then sheriff of that parish, who failed to return them within the prescribed delay. It is contended that, by reason of this omission, the defendant has rendered himself unconditionally liable for the amount of those judgments, which liability it is the object of this action to en-

GASQUET

force. The defendant denies that the plaintiffs have sustained any injury from his acts, and avers that the defendants in execution, against whom one of the writs was directed, were notoriously insolvent at the date of the writ; that under each of the other writs, a twelve-months' bond was taken, which bettered the condition of the plaintiffs. There was a judgment against the defendant, in the court below, from which he has appealed. After the appeal the defendant died, and his administrator has made himself a party to this proceeding.

It appears that under one of the writs in question there was no seizure made or money collected, and that it was not returned until after the expiration of the return day. It is admitted in the defendant's answer, that under each of the other writs, twelve-months' bonds were taken, on the 16th of April, 1838, both of which, it appears, were lost by a fire which destroyed the court house of the parish, in March, 1839, nearly a year after they were received. In neither of these cases, was the execution returned.

In 1841, the defendant, Robins, made the affidavit authorised by the special statute of the 20th March, 1840 (Sess. acts, p. 62, §4), that under the writ issued in the case of Gasquet, Parish & Co. v. M. & E. Boatner, property had been seized and sold, and a twelve-months' bond taken; that both the writ and bond had been destroyed by the fire of March, 1839; and that M. Boatner, one of the judgment debtors, was not a party to the proceedings under the execution; whereupon, a fieri facias was issued against M. Boatner, and a twelve-months' bond was taken for the amount of the judgment.

The section of the act of 1826, under which the defendant is sought to be rendered liable, is as follows:

"It shall be the duty of each of the sheriffs of the different parishes in this State, to return all writs directed to them, into the clerk's office from which they issued, on or before the return day mentioned therein, and also to pay over any moneys received thereon to the party entitled to the same, or to his attorney; and in default of any of the duties imposed on him in this section, he shall be come liable to the party or parties entitled to the benefit of said writ, for the full amount specified therein, which shall be recovered, on motion, before the District Court, in the parish in which the said sheriff acts and resides, after ten days' notice having been given to said sheriff, of such intended motion. Bul. & Curry's Dig. p. 435.

The right to an action for damage actually sustained in consequence of the acts or negligence of the sheriff, existed before the enactment of this statute. The legislature, no doubt, intended to grant a remedy to plaintiffs in execution, in addition to that which previously existed. But considering that statute, in connexion with principles well recognized, both before and since its passage, in regard to the powers and duties of sheriffs, we cannot yield our assent to the position assumed by the counsel for the plaintiffs, that it is to be construed as imposing the amount specified in the writ as a penalty for the mere failure of the sheriff to make a return within the legal delay. Such an interpretation is inconsistent with the well settled jurisprudence of the State, both prior and subsequent to the act of 1826.

It has been repeatedly held, both before and since the date of that statute, that, if the sheriff levy upon property before the return day of the writ, he may sell after the expiration of that day. It is the duty of that officer, when he has

GASQUET ...

made a legal seizure, to complete what he has commenced; and until a sale is effected, or the writ has been otherwise satisfied, he can make no return, without the consent of the plaintiff, which would release the property from the seizure. Any act of the sheriff, after a legal levy, prejudicial to the rights which the creditor acquires in virtue of his seizure, would render that officer liable for all losses resulting from his act. Such being the duties of the sheriff, how can he be answerable, unconditionally, for the mere failure to return a writ, which, under certain circumstances, he may be bound to hold or to execute.

3 Mart. N. S. 496. 1 Rob. 540. 12 Ib. 12.

The object of the statute appears to have been, to remedy the evil of a 'failure or refusal of the sheriff to execute writs of fieri facias, or to return those which had been executed, or to pay over the sums made under execution. In such cases, a summary remedy is given against the sheriff, who, after ten days notice, may, upon motion, be made liable, unless he can show good cause why no return has been made, or why money collected under the writ has not been paid. The sheriff may, in answer to such notice and motion, show that, in the exercise of due diligence, he has made a levy, but has been unable to effect a sale; that the writ has been enjoined; or that the payment of a sum collected has been suspended by an order of a competent tribunal; and this showing would excuse his failure to make the return within the prescribed delay, and exonerate him from liability. We consider that the defendant has shown circumstances, which discharge him from responsibility under one of the writs. In regard to the other two, his conduct is without excuse, and he must be held answerable to the plaintiffs.

On the writ issued in the case of Gasquet, Parish & Co. v. Ripley & Thorn, which was returnable on the third monday of February, 1838, the following return was made: "Received this fi. fa. December 28th, 1837. This day, January 2d, 1838, I demanded of the defendants in this fi. fa. the money to satisfy it. They paid no money, and refused to give me property to satisfy it. This fi. fa. having expired, I return it, no money made. March 1st, 1838.

(Signed) Thos. J. Robins, Sheriff."

"Returned and filed, March 18th, 1838. T. HARDESTY, Clerk,"

It is clear, from this return, which was made sometime after the expiration of the writ, that the sheriff failed to perform his duty, which was, upon the refusal of the debtor to give up property to satisfy the writ, to call on the creditor to point out property. Code of Pract. arts. 726, 727. 4 La. 301. The alleged insolvency of the defendants in execution, did not excuse him from making this call. They had made no surrender, and the creditor might havbeen able to designate property to be levied upon.

On the execution which issued under the judgment against Boatner, no return was made. A bond was, no doubt, taken; but it was retained by the sheriff for more than eleven months, and until, in consequence of his neglect, it was destroyed. It belonged to the judgment creditor, who could have required its delivery to him upon paying the costs, and the return of the writ would have informed him that the bond was taken. C. P. art. 716. The loss of the bond is imputable to the lackes of the sheriff, for which he is answerable.

Under the judgment against M. & E. Boatner, the plaintiffs availed themely of the benefit of the statute of 1840, already referred to, and issued a new execution, under which, a twelve-months' bond for the whole amount of

their judgment, was taken. This was an approval of the defendant's act in GASQUET relation to this writ, and a waiver of recourse against him. The amount of this bond, which is \$3,474 78, must be deducted from the judgment rendered by the court below.

The defendant asks, in the event of a judgment being rendered against him, to be subrogated to the rights of the plaintiffs, and this he is entitled to claim.

It is therefore ordered, that the judgment of the District Court be avoided and reversed. It is further ordered that, the plaintiffs recover from the successsion of Thomas J. Robins, deceased, the sum of \$1,318 28, and that, upon the payment of that sum, the plaintiffs subrogate the said succession to all their rights resulting from their judgments against Ripley & Thorn, and against Elias Boatner, numbered 998 and 1032, on the docket of the District Court of East Feliciana: the appellees paying the costs of this appeal, and the appellant those of the court below.

MAGEE et al. v. ROBINS.

Where a sheriff fails to return a fi. fa. directed to him and put into his hands, and shows no thing which can excuse his failure to execute or to return the writ, the plaintiff in execution will be entitled to judgment against him for the amount for which the writ was issued. An allegation that the debtor was insolvent, where no surrender had been made by him, is not of itself sufficient to excuse the neglect.

PPEAL from the District Court of East Feliciana, Johnson, J. Winter and H. A. Bullard, for the plaintiffs. Lawson, for the appellant. The judgment of the court was pronounced by

KING, J. This is an action to recover from the defendant the amount of two writs of fieri facias, which were directed to him as sheriff, and which he failed to return within the legal delay. The defendant denies his liability, and alleges that the defendants in execution, against whom one of the writs was directed, were insolvent when it issued, and that under the other a twelve-months' bond was taken, by which the condition of the plaintiffs has been bettered. The cause was submitted to a jury, who found for the plaintiffs, and the defendant has appealed. After the appeal the defendant died, and his administrator has made himself a party to the proceedings.

The defendant admits that one of the executions went into his hands, and the evidence satisfied the jury that he received both. Neither was ever returned, and no facts are shown which excuse the failure to execute the writs, or to make due returns. The alleged insolvency of the debtors in execution, against whom one of the writs was issued, is not of itself sufficient to excuse the neglect of the sheriff. Those parties had not made a surrender, and it was incumbent on him to show diligence in the execution of the writ directed against them.

The record affords no proof of a bond having been taken under the remaining writ, other than the averment in the defendant's answer.

The judgment of the District Court is therefore affirmed with costs; reserving to the defendant the right of requiring a subrogation to the plaintiffs' rights, on making payment.

DEES, Administratrix, v. TILDON et al.

The sale of the property of a succession does not amount to a partition among the heirs and widow in community. The sale is only a preliminary step to a partition; from its proceeds the debts and charges are to be deducted, and the residue is to be divided.

An administrator may be appointed, though the property of the succession has been sold, and a part of the heirs are of age and have accepted unconditionally. For such of the heirs as were minors the succession could only be accepted with benefit of inventory; and in such cases the Civil Code expressly authorises the appointment of an administrator to manage the succession until a partition is made. C. C. 1040.

In an action by an administratrix against the purchaser, for the price of property of the succession sold per aversionem, proof of an agreement by the administratrix and the heirs of age to make a deduction from the price in proportion to an alleged deficiency in the quantity, is inadmissible. Per Curiam: The sale being per aversionem, the administratrix could make no such agreement in her representative capacity; nor could the heirs of full age affect the interests of the minors by such a contract. Any agreement by these parties, would be an obligation personal to themselves.

A co-heir who purchases at the sale of the hereditary effects, is not bound to pay the surplus of the purchase money over the portion coming to him, until his portion has been definitively fixed by a partition. C. C. 1265. But this right is personal to the heir, and does not extend to a purchaser at a succession sale who subsequently acquires the interest of one or more heirs, or has made payments on account of the shares of other heirs. The amount which he will be entitled to receive as the purchaser of the rights of the heirs, being uncertain, and only capable of being determined upon a final partition, after payment of the debts of the succession, cannot be pleaded in compensation of a demand for the price of the property of the succession bought by him, the object of the demand being to collect the assets for legal distribution. On the final liquidation of the succession, the purchaser will be entitled to receive the portions of the heirs acquired by him, and the sums paid by him on account of the shares of others.

In an action for the price of property purchased at the sale of a succession, evidence on the part of the purchaser of payments by him of debts of the succession, is inadmissible. Per Curiona: Those debts could only be paid in due course of administration, by authority of the judge, and constitute no offset against the plaintiff's demand. C. C. 1056.

The surety of a purchaser at a judicial sale is not bound in solido with the principal.

A PPEAL from the District Court of East Feliciana, Johnson. J. The facts of this case are stated in the opinion of the court, infrd.

Z. S. Lyons, for the plaintiff. 1. There never was any partition of the estate of Dees. There is no judgment of partition. McCullom v. Palmer, 1 Rob. 514. C. C. arts. 1261 to 1291. 2. Courts of Probate have exclusive jurisdiction over all matters concerning successions. 17 La. 238, 248. 15 La. 56. 3. The succession of Dees, being in the course of administration, must remain under the control and superintendence of the Court of Probates and its officer. It is apparent that there are creditors, minor heirs, and major heirs, interested. 3 Mart. N. S. 563. 5 La. 386. 17 La. 500. 7 Rob. 27. 4. Heirs and legatees can claim nothing from the succession until there has been a liquidation of the estate, an account rendered by the administrator, debts paid, commissions and other lawful expenses deducted, and the balance to be paid over ascertained. C. C. arts. 1056 to 1061, 1066. Harrell v. Harrell, 17 La. 376. 5. The administratrix was without any authority to bind the estate, or to contract so as to diminish its amount. 1 Rob. 129.

Merrick. for the appellants. 1. As the widow in community and the major heirs had accepted the succession purely and simply, and had made a partition by a sale of the effects, it was instantly known how much belonged to each: and as they had rendered themselves personally responsible for their virile portion of the debts, so they had acquired their portion of property in the estate absolutely, and it could not be divested, nor could an administrator subsequently appointed,

DEES v. Tildox

or any other persion, take it from them. The widow in community could only represent her own interest and that of the minor heirs, who alone had the right of administering, with the benefit of inventory, the portion coming to them. C. C. 1002. Halletters of administration been granted to the plaintiff on the succession, the administration would have terminated as to the heirs of age accepting the succession as soon as the partition had been made: C. C. art. 1040. An administration granted after partition cannot confer any power over the portions of the heirs, ascertained to belong to them by the partition. C. C. arts. 1129, 1130, 1042. See also arts. 1046, 1049, 1050 and 1055. Act 15 March, 1828. 2 Mart. N. S. 486. 2. The court below erred in refusing Tildon the right to prove, that the administratrix and heirs of full age had agreed to allow him a credit for a deficiency in the quantity of land. 3. The court below also erred in excluding the evidence of payments to the heirs of full age, and the tutor of the minor, and also in excluding the notarial acts of transfer to the defendant, Tildon. The heirs of full age who transferred their interest in the succession to the defendant, Tildon, by the very act of transfer (if they had not previously done so by making partition,) accepted the succession purely and simply. Code, 988. Tildon, by accepting the transfer made by the heirs to him, becomes ipso facto released of so much of the debt, for confusion instantly takes place. Civ. Code, 2214, 2215. 4. The court erred in refusing to allow defendants to prove that there were no debts due by the succession, and that the heirs of full age and widow and tutors had made an arrangement, by which the interests of certain heirs were to be paid and the estate settled. 5. The court below erred, in rendering a judgment, in solido, on a contract of suretyship. See C. C. arts. 2089, 3014, 3022. 3 Rob. 258. 6. Should the foregoing positions be overruled, yet the judgment ought to have reserved to the defeudant. Tildon, the right to claim the payments he has made to the heirs, and the interests he has purchased in the succession.

The judgment of the court was pronounced by

King, J. This is an action to recover from Stephen Tildon, as principal, and Watkins, as surety, the price of a tract of land adjudicated to the former at a sale of the property of the succession of James Dees. The land has passed into the hands of Mrs. Tildon, subject to the mortgage retained in favor of Dees's succession, and the plaintiff asks to enforce the judgment prayed for in this suit, upon the hypothecated property in her possession.

The defences set up are, that the succession of "Dees has been partitioned among his widow and heirs; that it has been accepted purely and simply by the heirs of full age and the widow; that the appointment of the latter as administratrix, after a partition, was irregular, and conferred upon her no authority to prosecute this suit, for more than her share of the community and the shares of the minors. It is further alleged that large payments have been made on account of the price; that there is a deficiency in the quantity of the land, for which the plaintiff, as administratrix, agreed to make a reduction; that the defendant, S. Tilden, has purchased the interests of two of the heirs in the succession, and has made payments on account of the shares of two others, which should be imputed to the price; and that he has paid a number of debts of the succession; which should also be compensated against the plaintiff's demand.

The court below rendered a judgment in favor of the plaintiff for the sum claimed, after deducting the payments made on account, and refused to allow, as offsets, the shares of the heirs purchased by Tildon, and the debts of the succession paid by him, from which the defendants have appealed. The defendants contend that when a sale of the property of Dees was made, the respective portions of the heirs and widow in community immediately became fixed and known, and that this was in effect a partition. The position is clearly untenable. The sale was only a preliminary step towards a partition. From its proceeds are to be deducted the debts and charges, and the residue is to be divided among the

DEES ... TILDOS. heirs. That debts exist in the present instance is fully shown by the defendant Tildon himself, who offers in compensation several which he has paid.

The fact that a sale of the property of the succession had been made, and that a part of the heirs were of full age and had accepted unconditionally, offered no objection to the appointment of an administrator. Several of the heirs were minors, for whom the succession could only be accepted with the benefit of inventory; and in such cases the Code specially authorises the appointment of an administrator, upon whom the management of the succession devolves, until a partition be made among the heirs. Civ. Code, art. 1040. As administratrix, the plaintiff represented the entire succession; and had full authority to collect all its dues, for the purpose of paying the debts and partitioning the residue, if any, among the heirs, or their representatives.

The court below refused to admit of proof of an agreement of the heirs of full age and the plaintiff, to make a deduction from the price of the land proportioned to an alleged deficiency in the quantity, to which the defendants excepted. The court did not, in our opinion, err. The sale was per aversionem, and the administratrix was without authority to make such an agreement in her representative capacity, for a reduction of the price; nor could the heirs of full age affect the interests of the minors by such a contract. Any agreement made by these parties, is an obligation personal to themselves. 8 Mart. N. S. 451. 1 Rob. 119.

Tildon offered testimony to show, that he had purchased the interests of two of the heirs in the succession, and that he had made payments to two other heirs of the supposed amount of their inheritances, with a view of applying the sums thus paid towards the extinguishment of the plaintiff's demand. The evidence was rejected, and we think correctly. The co-heir of age, who purchases at the sale of the hereditary effects, is not bound to pay the surplus of the purchase money, over the portion coming to him, until his portion has been definitively fixed by a partition. C. C. art. 1265. This right is personal to the heir, and does not extend to the purchaser at a succession sale, who subsequently acquires the interest of one or more of the heirs. The amount which the defendant will be entitled to receive in his representative capacity is uncertain; it can only be determined upon a final partition, after the payment of the debts, and cannot be offered in compensation against the demand of the plaintiff, the object of which is to collect the assets for legal distribution. C. C. 1066. On the final liquida. tion of the succession, the defendant will be entitled to receive the portions of the heirs whom he represents, and the sums which he has paid on account of the shares of others.

Evidence offered by the defendant to show the amount of debts which he had paid for the succession, was also excluded. The judge did not, in our opinion, err. Those debts can only be paid in a due course of administration, with the authority only of the judge, and constitute no offset against the plaintiff's demands. C. C. art. 1056.

The judgment of the court below is in solido, against Tildon and Walkins. In this respect it is erroneous, and must be corrected. The obligation of these parties is not joint and several.

It is therefore ordered, that the judgment of the court below be amended, so that, instead of a judgment in solido against the defendants S. Tildon and Wat kins, there be judgment against said Tildon, as principal, and said Watkins, as surety, and in other respects that said judgment be affirmed; the appellee paying the costs of this appeal, and the appellants those of the court below.

GRAHAM et al. v. BURCKHALTER.

In proceedings by attachment all the forms prescribed by law must be strictly observed, under pain of nullity.

Where an attachment is obtained in an action in which plaintiff claims a certain sum, with interest from a date anterior to the institution of suit, a bond for a sum exceeding by one-half the principal, exclusive of interest, is insufficient; nor can the defect be cured by subsequently furnishing bond for a sufficient amount. Per Curium: A sufficient bond was a condition precedent to issuing the attachment. C. P. 245.

A PPEAL from the District Court of Washington, Jones, J. Plaintiffs attached certain slaves belonging to the defendant, a non-resident. The latter obtained the dissolution of the attachment, on the ground that the interest claimed by plaintiffs had been omitted in calculating the amount of the bond. The amount of the bond given was that fixed by the clerk in the order of attachment. The plaintiffs, on the application of the defendant for the dissolution of the attachment, tendered an additional bond, in a sum sufficient to supply the deficiency of the first. The court refused to receive it, and the plaintiffs appealed.

Halsey, for the appellants. 1. The atmehment was good under the order. 2. Until the order had been set aside, plaintiffs were in time to complete the bond. Plaintiffs gave the bond required by the order of attachment. In this, the present case differs from those cited by the defendant. In the latter the attachment was made under a writ issued on a bond for a less sum than that required by the order, and was necessarily void. For the bond, being made a condition precedent by the court, until it had been given the order did not become absolute. Hence a writ issued without it, would want the authority of the court. Here the writ was authorised by the court, for the plaintiffs gave the bond fixed by the order. The plaintiffs complied with the requisites of article 245 of the Code of Practice, when they supplied the deficiency of their first bond by the one tendered. They obeyed both the letter and intention of the law. The defendant was secured, in the sum, and manner, required by the Code.

was secured, in the sum, and manner, required by the Code.

J. R. Jones and Childress, for the defendant. The amount in controversy, including principal and interest on the day of suing out the attachment, was \$1,714 97. The amount of the attachment was only \$2,180 08. According to art. 245 of the Code of Practice, the order and attachment bond should have been for \$2,572 45. This article is peremptory, and cannot be evaded. See 4

Mart. N. S. 430, 2 La. 85. 3 La. 58. 13 La. 306. 17 La. 437.

The judgment of the court was pronounced by

King, J. This suit was commenced by attachment. The plaintiffs claimed \$1,453 39, with eight per cent interest, from the 17th of April, 1843. The clerk granted an order, that the writ should issue upon bond being given by the plaintiffs in the sum of \$2,180 08, which is one half over the principal debt, exclusive of interest. The counsel appointed to represent the absent defendant, moved to dissolve the attachment, on the ground that the plaintiffs had not given a bond for a sum exceeding by one-half the amount claimed and sworn to. The plaintiffs then moved for leave to amend their proceedings, by filing an additional bond for \$1,000, which was tendered. This motion was overruled, and the attachment dissolved. The plaintiffs have appealed.

The judge, in our opinion, did not err, in refusing the application of the plaintiffs to amend. It has been uniformly held that, when the remedy by attachment is resorted to, all the forms prescribed by law for that proceeding must be strictly observed, on the pain of nullity. One of the pre-requisites to issuing the writ is that the plaintiff shall annex to his petition a bond in favor of the defendant, for

GRAHAM

a sum exceeding by one-half that which he claims; and the amount sworn to, has been held to fix the amount for which the bond is to be given. The order granted in the present instance on an insufficient bond was void, and under it no attach" ment could legally issue. This radical defect, which vitiated the proceedings in their inception, could not be cured by subsequently furnishing an additional bond. A sufficient bond was a condition precedent to issuing the writ. C. P. art. 245. 3 La. 18. 17 La. 437. Judgment affirmed.

THE UNION BANK OF LOUISIANA v. BRADFORD.

Where a mortgage stipulates that on the mortgagor's failure to pay the debt the property may be seized and sold for cash, without appraisement, but, in the petition for an order of seizure and sale, the right to sell without appraisement "is not claimed, and the petitioner prays that the property " may be seized and sold as the law directs," and the judge directs that "an order of seizure be issued as prayed for and the property sold as the law directs," but in the writ issued by the clerk on this order, the sheriff is directed to sell for cash, with. out appraisement, and the property is sold accordingly, and purchased for an inconsiderable price, the sale will be null. The stipulation for a sale for cash, without appraisement, was waived by the party for whose benefit it was made, by his claiming a seizure and sale according to law—that is, by observing the formalities ordinarily required in proceedings visit executive, one of which is the appraisement of the property. The clerk was not authorised under this order, which was made in accordance with the prayer of the petition, to direct the sale to be made without appraisement.

PPEAL from the District Court of Washington, Jones, J. The facts of this case are fully statated in the opinion of the court, infra.

Halsey, for the appellants. The Code of Practice, article 745, provides that, "When the sheriff sells property which he has seized conformably to the provisions contained in this chapter, he must cause the same appraisements to be made, and observe the same delays and formalities, as are prescribed for the sale of property seized in execution. The defendant relies upon a renunciation of appraisement, made by the mortgagors in the act of mortgage. They renounced the benefit of all laws requiring property seized in execution to be appraised. This was a renunciation on the part of the mortgagors. It did not impose an obligation on the plaintiffs, but conferred a right, which the plaintiffs could abandon or enforce at pleasure. The petition for the order of seizure and sale does expressly allege the renunciation of appraisement. The petitioners prayed that the property might be "seized and sold as the law directs," and the court granted the order "as prayed for," and directed that the property might be seized and sold as the law directs."

As the petitioners did not allege or prove the renunciation of appraisement, the court could not direct a sale without appraisement. In this respect the rules are the same in suits by executory process as in suits by ordinary process. C. P. arts. 63, 95, 98, 170, 734, 172, nos. 3, 5. The judgment must conform

to the prayer. 4 La. 242. 6 La. 66.

The order required an appraisement. The court decreed a sale "as the law directs, that is, with the observance of all the formalities prescribed by the Code of Practice. C. P. 745. The order should have been obeyed, without regard to the agreement of the parties. "A judgment derives its force and effect from what is decreed by the court, and not from the admissions of the parties." 8 Mart. N. S. 465.

J. R. Jones, and Childress, for the defendant. The sale was provoked by plaintiffs, and made for their benefit. They cannot take advantage of any

irregularities in their own acts.

The judgment of the court was pronounced by

King, J.* The plaintiffs have instituted this action to annul a sale of a tract Union Bank. of land, made by the shoriff under an execution issued at the suit of the plaintiffs against Mapes & Singleton. The alleged nullity is, that the sale was made for cash, without a previous appraisement, in consequence of which the land was sold at a sacrifice, to the prejudice of the plaintiffs' rights. The defendant avers that the sale was legal, and that it was made without appraisement, at the request of the plaintiffs. There was a judgment for the defendant in the court below, and the plaintiffs have appealed.

It is shown by the evidence that Mapes & Singleton mortgaged the tract of land in question to the plaintiffs, to secure the repayment of a loan of money. The act contained the following clause: "They, the said appearers agreeing and hereby consenting that if the said sum of \$1,000 shall not be paid when the same becomes due, that then the said president and directors, their attorney or assigns, may obtain an order of seizure and sale, and cause the above described mortgaged property to be sold to the highest bidder, for cash, without appraisement, after thirty days' advertisement." Upon this act, which is authentic in form, the plaintiffs presented a petition to the district judge praying for an order of seizure and sale, in which no reference was made to this stipulation, and the right to sell without appraisement was not claimed. The prayer of the petition is, that an order of seizure and sale may issue as the law directs; that the property, on which petitioners "have a special mortgage for the payment of said sum, or so much thereof as may suffice, be seized and sold as the law directs," &c. Upon this petition the judge made the following decree: "It is ordered that an order of seizure and sale issue as prayed for; that the property upon which petitioners have a special mortgage, or so much thereof as may suffice to pay plaintiffs' demand, be seized and sold as the law directs. In the writ, which was issued by the clerk upon this order, the sheriff is directed to seize and sell for cash, without the benefit of appraisement, the following property, &c.; and, in conformity with this direction, the sheriff advertised the property for sale on those terms, and adjudicated it for cash, without previous appraisement, to the present defendant, for \$13.

It is manifest that the sale was not made in conformity with the order of the judge. The stipulation in the act of mortgage was one made for the benefit of plaintiffs, which it was discretionary with the bank to have enforced or to renounce. It was virtually waived by claiming a seizure and sale according to law, the true intendment of which is, that the proceedings were to be in conformity with the rules which govern seizures and sales under executory process. The order was in accordance with the prayer of the petition, and no sale could have been legally effected under it, without observing the formalities required in ordinary cases under executory proceedings, one of which is, that the property shall be previously appraised. The clerk was not authorised, under the order granted by the judge, to direct that the sale should be made without appraisement. His act was null, and conferred no authority on the sheriff to dispense with the observance of a formality, which was so essential as the result proves, to the protection of the plaintiffs' rights.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that the adjudication and sale made by the sheriff of the parish of Washington to the defendant, James A. Bradford, on the 6th day of

^{*} Eusris, C. J., being interested in this case, did not sit on its trial-

USION BANK July, 1844, of a tract of land situate in said parish of Washington, containing 640 agree, being section no. 44, township no. 3, range no. 8, with the improvements thereon, seized at the suit of the Union Bank of Louisiana against Thomas Mapes and wife, and Robert Singleton and wife, be cancelled and annulled. It is further ordered, that the appellee pay the costs of both courts.

factor of the following the standard

all religion li

THE UNION BANK OF LOUISIANA v. MORGAN.

No tamentally become paid to be price to man he had not a bourt

uses are necessary, to render authentic an actexecuted before a notary by a blind man. C. C. 2231.

A power of attorney executed before a notary, in the presence of two witnesses, by a blind peron, though not an authentic act, will be admissible in evidence as an act sous seing privé, n proof of the signature by one of the subscribing witnesses, corroborated by circumstances. C. C. 1775, 9231, 9939/

A power of attorney authorised the attorney to collect debts, give acquittances, compound, compromise, &c.; " for and in the name of the principal, to sign any band, obligation, contract, or agreement, or other paper whatsoever; to draw and endorse promissory notes; to draw and accept hills of exchange"; to buy and sell all kinds of property; " and, for the principal and in his name, to do all such other acts, matters and things, in relation to his property, estate, affairs, and business of every kind or nature whatsoever, as he might or could do if personally present and acting therein; it being his intention to commit to said attorney the entire management, care, and disposition of his property and affairs, as fully and absolutely as he has now the management, care and disposition of them, and that this power should beunderstood and taken in its most comprehensive sense ?" Held, that the power was sufficient to authorise the attorney to waive notice and protest of notes endorsed by the principal.

Where a note is payable at a bank, a demand made of the president of the bank, is a sufficient demand.

It is no objection to a netarial protest and certificate of notice, that the notary was himself the maker of the protested note. There is no conflict in such a case between the official duty of the notary and his personal interests, he being primarily liable as maker whether the ondorser was discharged or not; and he acts against his interest in certifying his own default.

Under the stat of 13 March, 1987, the original protest and certificate of notice of the protest of a bill, or the duplicate original kept by the notary, are admissible in evidence, though the protest was not transcribed in any book, nor any record book was kept by him as required by the stat. of 14 February, 1821.

Where a note held by a bank, payable at its office, was in the hands of the cashier at the time that demand of payment was made of him by the notary, it is no objection that it does not appear that the notary himself had the note in his possession when he presented it for payit. Aliter, had the bank not been the holder, and the place of payment not at the bank.

Notice of protest addressed to the endorser of a note at a village, the post office in which was nearest to his residence, mentioning the parish and State, is a sufficient compliance with the stat of 13 March, 1827, s. 2, requiring the notice to be addressed to the party, "at his domicil or usual place of residence."

One who endorses a note, for the accommodation of the maker, which is afterwards discounted in bank and the proceeds applied for the benefit of the latter, cannot protect himself from liability in case of non-payment at maturity, on the ground of want of consideration. He had no right to have the proceeds of the note placed to his credit.

A PPEAL from the District Court of St. Tammany, Jones, J. The plaintiffs appealed in this case from a judgment in favor of the defendant, who was sued as endorser of several promissory notes. The facts material to a correct understanding of this case, will be found in the opinion of the court, infraHalsey, for the appellants. 1. The Code does not exclude the blind from Contracting. Art. 1775. It does not require an authentic act to give validity to their contracts. A power of attorney may be given by private act. C. C. Manage. 2961. An act which is not authentic avails as a private act, if it be signed by the

C. C. 2232.

2. The introduction of the protests and certificates of notice are objected to on three grounds. First, that the notary who made the protests being the maker and payer was incompetent to make a demand (because he could not pay and receive at one and the same time), nor make protest or give notice. This resson might affect the demand, but it did not render the notary incompetent to give notice, nor does it affect the demand, as the notes being payable at a particular place, no personal demand was necessary. 3 Kent, 97. 2 Peters,

14 La. 327. 16 La. 276.

The second objection is, that no regular record of the protests and certificates of notice was made by the notary in a separate book, in the presence of two witnesses, as required by the act of 1821. This record was unnecessary under the act of 1827, which in this respect has repealed the act of 1821. B. and C. pp. 41, 43. The act of 1827 does not declare that protests and certificates of notice made under it must be recorded, either expressly or by implied reference to the act of 1821. Under the act of 1821, the holder of the note was obliged to furnish the original declaration of the notary; hence it necessarily passed out of the notary's hands. Under the act of 1827 a certified copy of the protest and certificate of notice is received as evidence; hence the notary retains the original. The record of the declaration under the act of 1821 was required, because the declaration itself passed into the hands of the holder of the note, to prevent falsification. But this reason for the record ceases under the provision of the act of 1827, which makes the notary guardian of the original protest and certificate of notice. Ratione cessante, cessal et ipsa lex.

The third objection is, that the address of the notices to the appellee, at Madi-

sonville, parish of St. Tammany, was improper—that the words "at his domicil

or usual place of residence" should have been added, is untenable.

3. The testimony proves that the notes were discounted in renewal of other notes, held by the plaintiff against the maker, and that the appellee endorsed them for this purpos

4. It is contended that the agent had not sufficient power to bind the appellee by his waivers of protest, &c., and that the power to execute such acts must be

special.

Admit that the effect of the waiver would be such, and that the power so to

bind the principal must be given specially, the requisite power is given in the act.

The only question to be asked is, was the obligation by these waivers contracted in relation to the affairs entrusted to the agent. The attorney is authorised to sign any obligation, contract or agreement whatsoever in relation to his property, estate, affairs and business of every kind or nature whatsoever. This interpretation, giving the fullest effect to every expression of the act, is not only reasonable, but is required by this further clause in the act: "This power shall

be understood and taken in the most comprehensive sense."

A. Hennen, for the defendant. The power of attorney under which the waiver of protest, &c., was made, contains the most general and extensive powers. No general power can be more full; yet, in it, nowhere is the express power given to waive protest and notice of promissory notes which the defeud-ant had drawn and endorsed. The question then is, what is the extent of this power; and did it authorise the attorney to waive the protest and notice of the notes on which the defendant is sued as enderser? If not, judgment must be affirmed, as to those notes. It is evident that this power was not sufficient:

1st. To make a donation of slaves or real estate. "Quelque étendue que soit une procuration générale, elle ne donne pas au procureur le pouvoir de dis-poser par donation, d'aucune chose des biens dont on lui a donné la gestion."
Pothier, Mandat, no. 164.

2d. Nor to give a gratuitous discharge of any right, nor to discharge a mortgage. "C'est une conséquence de ce principe, que le procureur omaium bono-rum n'a pas le pouvoir de faire une remise gratuite de quelque droit qui appar-tiendrait au mandant; une telle remise, lorsqu'elle est gratuite, étant une véritable

"C'est sur ce fondement que Gaîns décide qu'un procureur omnium consentement valable pour la peut pas, s'il n'a un pouvoir spécial, donner un consentement valable pour la

ramise d'un droit d'hypothéque qui appartient au mandant: Videamus, si procurator omnium bonorum consensit, an tenent consensus; et dicendum est non cesse, nisi hoc specialiter mandatum est." Pandect, lib. 20, tit. 6, 1. 7, § 7. Po-

thier, Mandat, no. 164.

3d. Nor to make any contracts but those which, in good faith, the formey believes to be useful to his principal; for he cannot favor the interests of third persons, nor his own. "En fin, quelque étendue que le mandant ait donné à an procuration, le procureur n'a le pouvoir de faire d'autres contrats, que ceux par lesquels il croit, de bonne foi, faire utilement les affaires du mandant ; et il n'est pas douteux qu'il excède les bornes de son pouvoir toutes les fois que, pour favoriser des tiers, et en frande des intérêts du mandant, il dispose des biens per les parties de la contrat de la c dont l'administration lui a été confiée. Il n'est pas douteux aussi q'un procureur omnium bonorum, quelque étendue que soit sa procuration, en excède les

Padministration." Pand. lib. 17, tit. 1, 1. 60. § 4. Pothier, Mandat, no. 166.

Our Code, article 2966, requires an express and special power for the following, among other purposes: To encumber (that is, "to load with debts." Webster's Dict. The french text says, "engager," i. e., "mettre en gage, donner on gage; lier par quelque obligation; accumuler les dettes." Dictionary of the Franch Academy): to accept ar reject e recognition to ack provided as a debt; to French Academy); to accept or reject a succession; to acknowledge a debt; to compromise or refer a matter to arbitration; to make a transaction in matters of tion; to make a judicial confession. Art. 2270. As none of these special powers are enumerated in this power of attorney, none of them can be exercised under it, however extensive and general the words used in it, and though it is "to be taken in the most comprehensive sense."

Our Code does not pretend to give all the cases requiring a special power : it states, however, that a general procuration or mandate "for all affairs," which vests an indefinite power to do whatsoever may appear conducive to the interest of the principal," and "conceived in general terms," "confers only a power of administration." Arts. 2963–2965.

The old Civil Code, page 422, arts. 8-11, is in general accordance with the present Code; but enumerates another case not yet mentioned: "To sue for restitution in inlegrum with regard to an act," as requiring a special power; because such an action implies a change of will. Domat, part 1, liv. 1, tit. 15,

The articles of our Code are in fact taken from the Code Napoléon, arts. 1987— 1989, which, we are informed by Duranton, intended to put an end to the controversies among the doctors, on the extent of a general mandate, according to the roman law. 18 Duranton, 224, art. 228. See also, Pothier, Mandat, no. 145. It appears that Duaren, one of the earliest and ablest interpreters, Doneau, the rival and equal of Cujas and Vinnius, contended for the strict interpretation of the mandate; giving to the general power, however extensive and unlimited, only the power of administration, and requiring a special authority for every other act. Pothier considered the reasoning of Vinnius as plausible; but did not dare to decide against the common opinion to the contrary, and left the decision to be decided against the common opinion to the contrary. the decision to his readers, "lectoris erit judicium." Pothier, Mandat, no. 145. The Spanish law, of which the old Code professed to be a digest, settles the controversy completely. The doctrine of the Spanish authors was, that no procuration, however general, gave any other power than that of administration, and cut off the controversies which might arise under the Codes of Louisiana and and cut off the controversies which might arise under the Codes of Louisiana and that of France. "En todos los poderes suelen insertar los escribanos los claúsulas siguientes: la. Que el poderante confiere poder á su apoderado con libre, franca y general administracion: 2a. Que se lo da para que, en su virtud, haga todo lo que el harín y podria hacer por si mismo hallandose presente......Nada aprovechan en la practica, y solo se admite el poder en lo que terminantemente contiene. Así dichas claúsulas se ponen solo por mera costumbre." 2 Tapis, 378, cap. 14, no. 14. "En la práctica solo se admite el poder en lo que suena porque las dos claúsulas se ponen por estilo, y por seguír la formula introducida." 3 Febrero Adicionado, 223-4, part 1, cap. 14, no. 19.

These authorities would settle this case fully, if it is tested by them; but it is contended that the jurisprudence of Louisiana is in opposition to them. Two

contended that the jurisprudence of Louisiana is in opposition to them. Two cases are quoted in confirmation, Hestres v. Petrovic, 1 Rob. 119. De Lizardi v. Pouverin, 4 Rob. 393. These cases give a rule of construction different from that for which I contend. Yet, if correct, they will not help the plaintiffs. The

DE 10 6613

attorney held powers from persons who were residing out of the State; on the ground of absence and non-residence the reason of the decisions is based. But here, the principal and attorney both resided in the same parish, and both were present at the time. See also Story on Promissory Notes, § 309. These two cases are in direct opposition to two others of an earlier date. Montillet v. Duncan, 11 Mart. 334. Louisiana State Bank v. Ellery, 4 lb. N. S. 87. In the first, it is true, the principal was present, when the notice of protest was served on his attorney; but in the last, the principal was residing out of the State, yet no reliance was placed on this absence. These cases show that here, as in France, "rien n'est plus variable que la jurisprudence de la Cour de Cassation." 3 Troplong, Privil. et Hypo. 79. This court must choose between the two sets of cases, and determine which is correct; they appear clearly irreconsistate.

cilable. But these contradictory cases turned only on the power to receive the notice of the protest of a note. Here the question presented is, could the attorney waive the protest and notice? There the attorney was passive. He received notice after protest. There is assuredly a difference between action and inaction. What is the amount of the waiver of a protest and notice of a note, which is to render the endorser liable for its payment? Is it anything short of the acknowledging of a debt? Without this waiver no debt is created; the endorser's lin bility is only conditional; without a protest and notice, he cannot be legally bound to pay the amount of the note which he has endorsed. It is only on the waiver, the debt is sought to be created; on that alone it can be supported. See Marshall v. Overbray, 10 La. 161. Wallace v. Gwin, 15 La. 223. The Civil Code says (article 2966): "The power must be express and special, to acknowledge a debt." Without the acknowledgment made by the attorney, in waiving the protest and notice of the note, the defendant is entitled to judgment, because by it only he became a debtor; therefore his attorney acknowledged a debt, to

do which he had no power. On this principle an attorney has not the authority to waive prescription which has accrued against a debt, or to make an acknowledgment of the debt. Durnford v. Clark, 3 La. 199.

But what is it to waive? "To relinquish a right, claim, or privilege." Webster's Dictionary. This power was not given by the general words of the procuration, as already proved by the quotation above, from Pothier, Mandat, 164. The defendant had the right to require a protest of the notes, and notice. His attorney could not waive this right, without an express power. The privilege belonged to the defendant to claim an exemption from the payment of his endorsements, upless this waiver has precluded him. The whole current of decisions has been that the power must be special, to give the attorney the power to alienate, or do any act of ownership. Every such act which he may do, "must be specified in the procuration." The Code is positive, article 2965. None but the owner can relinquish or waive a claim, a right, a privilege.

No such act of ownership was authorised by the defendant, and none such could be exercised by his attorney: "Diligenter fines mandati custodiendi sunt; nam qui excessit, aliud quid facere videtur." Pandect. lib. 17, tit. 1, 1. 5.

To the notes, which were protested by a notary public, there are objections

1st. The owner of a promissory note who hands it over to a notary to demand payment, make protest, and give notice of non-payment to the indorsers, charges him with a mandate which must be governed by the general principles of the

The notary who undertook this mandate, was the maker of the notes, of which payment was to be demanded. Any other person might have made the demand. Harrison v. Bowen, 16 La. 282. Follain v. Dupré, 11 Rob. 454. This mandate could not be performed by the maker of the note. 'The maker of a promissory note indersed by the payee to a third person cannot make a presentation for payment and legal demand of himself, acting as a notary, so as to charge the enderser by notice. Such a presentation, demand and notice involves an absurdity; there can be no mandate to do an absurd or nugatoy thing.

"Il fant que ce soit une affaire qu'on puisse supposer pouvoir se faire par le mandataire. Il est évident que pour qu'un mandat soit valable, l'affaire qui en est la matière doit être une affaire qu'on puisse supposer pouvoir se faire par le mandataire; autrement le mandat est nugatorium et derisorium mandatsm, qui ne produit aucune obligation. Par exemple, si j'ai donné commission à un

UNION BANK

docteur agrégé, qu'un catarrhe sur la langue a privé entièrement de l'usage de la parole, de faire pour moi mes leçons aux écoles; quoiqu'il ait répondu par aignes qu'il se chargeait de la commission, un tel mandat est nul, et ne produit aucune obligation, nugatorium et derisorium est mandatum, parceque l'affaire qui en est la matière est une affaire qui est impossible, per rerum naturam, que le mandataire tasse." Pothier, Mandat, no. 12.

"Il faut encore, pour la validité du mandat, que l'affaire qui en est l'objet, soit telle qu'on puisse supposer que le mandataire peut la fuire. Ainsi, dans le cas où un colonel aurait donné commission à un conseiller au parlement d'aller commander son régiment, et que ce conseiller eût accepté sa commission, le

mandat n'en serait point moins nul, parcequ'il s'agirait d'une chose que le mandataire ne pourrait pas faire." Merlin, Rép., verbo Mandat.

"L'achat de la propre chose du mandataire est une affaire qu'on ne peut, sans absurdité, supposer pouvoir se faire par le mandataire, étant impossible, per rerum naturam, que quelqu'un achète sa propre chose; sua rei emptio non valet. Il est donc évident que l'achat de la chose du mandataire ne peut pas être la matière d'un contrat de mandat." Pothier, Mandat, no. 14.

"Negotium quod mandatur, tale esse debere ut in personam mandatarii ca-

dere possit. Ex hac regula sequitur, non posse consistere mandatum emendæ rei quæ esset mandatarii propria." Pothier, Pandect. Justinian lib. 17, tit. 1, no. 10. "Notarius non potest esse procurator in ea causa in qua officium suum præstitit." 6 Mulleri Promptuarium, 113, no. 18.

These authorities show conclusively the incapacity of the notary to perform the mandate with which he was charged; and if, in the nature of things, he could not make a demand of himself, there has been no legal protest, and the defendant is discharged of his indorsement. Union Bank v. Fonteneau, 12 Rob. 120.

2d. Supposing that this demand could be made by the maker of the note, on himself; it should appear, from the protest, that the notary had the note in his possession, and then presented it for payment. This does not appear. "The note itself must be ready for surrender, when the demand for payment is made; and in default of it, the demand will be insufficient to fix the endorser." Eastman v. Potter, 4 Vermont Rep. 313. Warren v. Briscoe, 12 La. Rep. 472.

3d. And though the note is payable at a particular place, it is evident, if the maker is present at the place when demand of payment is made, that it must be made of him personally, and not of another person. Here the maker was the notary himself, and if he could make the demand, the maker was the person nearest to him, and of him he should have made it. But the protest states positively, that demand was made of the cashier of the bank, but not of any other person. This was insufficient.

If a notary goes with a note to the domicil of the maker, and finds him there, but does not present it to him and demand payment from him, but from the holder or owner who happened to be there at the same time, will it be contend-

ed that this was regular and sufficient to fix the indorser?

4th. The protest has not been made agreeably to the statute of 1821, which requires that "the notary shall keep a separate book, in which he shall transcribe and record, by order of date, all protests, &c." The evidence shows that all the protests of this parish judge were in a loose bundle, not transcribed in a book, and without any regard to order of date. The plaintiffs cannot avail themselves of these protests, to charge the defendant.

5th. Furthermore, the notices were not given in accordance with the terms of the statute; for they were not "addressed to the endorser at his domicil, or usual place of residence." Duncan v. Sparrow, 3 Rob. 164.

6th. The defendant should have judgment on the plea of want of consider-

The notes were discounted by the plaintiff on the endorsement of the defend-ant, and the proceeds thereof regularly and legally belonged to him; and could not be placed to the credit of a third person without his consent, which nowhere

Halsey, in reply. 1. In Fullertonv. Bank of United States, 1 Peters Rep. 615, (an action against an accommodation endorser, on a note given in renewal of one which the defendant had endorsed,) the court said: "With his consent it might be applied to the satisfaction of another note for which he was endorser without his checking for the amount, and his consent may be implied from circumstan-"In strictness the note renewed is not passed to the credit of the

drawer alone, for the endorser has in effect a equal relief from the application of URION BARK

It is contended that it should appear from the protest that the notary had the note in his possession, and presented it for payment. But it is presumed that a notary does his duty, and hence that he has the note with him when he makes the demand. Hart v. Taylor, 7 Rob. 32. Union Bank v. Penn, 7 Rob. 81. Union Bank v. Lee, 7 Rob. 75. 16 La. 311. 15 La. 375.

Union Bank v. Lee, 7 Rob. 75. 16 La. 311. 15 La. 375.

2. No demand of the maker was necessary.

The maker of a note, payable at a bank, must expect that demand will be made of the cashier. It was his duty to offer payment without any demand. He was in default by not offering. In 6 Mass, 525, the court said, "if the holder is at the bank on the prescribed day, ready to receive the meney if the maker be there, it is enough." In Woodbridge v. Brigham, 12 Mass. 418, "the contract of the endorser was that the promiser should appear there at the day appointed for payment, and take up the note, if the proper officer of the bank should be there ready to receive the money. No demand of the promissor is necessary to charge the endorser, it being sufficient that the officers were ready to receive the money.

Here the maker went to the holder for the purpose of protesting the notes. This undertaking on his part was, virtually, a declaration to the holder that he would not pay. It will not be said, where the payer, on meeting the holder on the day and at the place of payment, tells him he will not pay, that a demand is yet necessary to put him in default. In 6 Wheaton, 171, the court said: "If the note was there, it was a presentment; and if the maker had no funds in the bank, it was a refusal of payment, according to the legal acceptation of those terms, under such circumstances." And "the presumption is that a note payable at a bank will, if it is the property of the bank, be found there at its maturity." Story on Notes, s. 243. 18 Pic. Rep. 63. 6 Mass. Rep. 524. 1 Wheaton, 171. 1 H. Black's Rep. 509. 6 Mass. Rep. 524. Fullerton et at. v. Bank of United States, 1 Potors's Rop. 604, 606. Bank of United States v. Carneal, 1 Potors's Rop. 543. The court, in Allain v. Lazarus, 14 Ln. 337, expressly recognized the general rule, that demand must be made at the place of payment, but considered that case an exception to the rule. In the cases in 1 Rob. 327, 1 Rob. 311, 14 La. 180, 10 La. 552, and 3 Mart. N. S. 423, where conformity to the general rule was held to be indispensable, the notes were not payable at the domicil of the holder. In Smith v. Robinson, 2 La. 405, the plaintiff failed to prove that the note was held at maturity, at its place of payment, the office of the owner's agent. The only cases where the notes were payable at the holder's domicil, are Allain v. Lazarus, 14 La. 331, and Murin v. Perot, 16 La. 276, and in these 16 La. 276, and in these, as we have seen, the court considered the formal presentment and demand unnecessary. In Fullerton et al. v. Bank of United States, 1 Peters, 604, 606, the court said: "Modern decisions go to establish, that if the note be at the place on the day it is payable, this throws the onus of proof of payment upon the defendant. This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts." In Bank of United States v. Carneal, 2 Peters, 543: "If the bank has funds of the maker in its hands, that might furnish a defence to a suit brought for non-payment. But this is properly matter of defence to be shown by the party sued, like any other payment, and not matter to be disproved by the bank by negative evidence.

3. As to the sufficiency of the power of attorney, to authorise the agent to re-

ceive notices of protest:
In Louisiana State Bank v. Ellery, 4 Mart. N. S. 87, the act of mandate aurised the agent "to transact the following concerns in and with the Louisiana State Bank," among others to endorse notes. Under this power, the agent had endorsed the note sued on. It was argued, that the power to endorse includes that of receiving notice. The court said, "the power is a special one, and cannot be extended beyond what is expressed in it." "The power to receive notice, is not necessarily included in that of endorsing."

In Montilletv. Duncan. 5 Mart. 394, the plaintiff relied on an act of mandate and the testimony of his agent and others. The act appointed the agent "to transact the following concerns in and with all the banks in New Orleans," specifying them; and concludes "thinding myself to all the act of my said attorney

cifying them; and concludes, "binding myself to all the acts of my said attorney touching the premises." The court said: "The power produced does not con-

Tuesday Bask fer on the attorney in fact, anthority to receive notices," In this case the mandate was special, it did not express a power to receive notice of protest, and, being special, it could not be extended beyond what was expressed in it.

In the case of DeLizardi v. Pouverin, 4 Rob. 393, and Hestres v. Petrovic, 1 Rob. 119, the acts of mandate contained, besides a certain special power, a power of administration. The power to receive notice of protest was not expressed. The court said, in DeLizardi v. Pouverin, "notice to an attorney in fact is, in our opinion, sufficient, although the procuration does not specially confer upon him the power to receive notices of protest, if it gives general powers to transact the business of the principal, he being abroad." Judge Story gives the same rule : "Notice to a known general agent will be equivalent to notice to his principal." Story on Notes, ss. 307, 309. These authorities settle the rule, that the power

to receive notice of protest can be given by a general mandate.

4. But the defendant argues that he is not within the reason of these decisions. That they are based on the ground of absence of the principal. Absence is not the only circumstance which can enlarge the administration of a general agent. The defendant was blind. His blindness rendered the employment of an agent necessary. And his employment of an agent under this necessity, implied his intention to entrust the management of his business entirely to the agent. Pothier says : " Quand même une procuration générale ne contiendrait aucune clause particulière, je crois qu'elle peut, par les circonstances, recevoir plus au moins d'étendue. Par exemple, lorsque celui qui a donné à quelqu'un une procuration générale pour gérer ses affaires, demeure sur le lieu ou dans un lieu peu éloigné de celui ou se fait la gestion de ses affaires, je pense qu'il est ordinairement présumé en ce cas n'avoir voulu comprendre dans sa procuration générale de ses affaires courantes et ordinaires; et que si, depuis sa procuration, il survénait quelque affaire extraordinaire, qui n'eut pas été prévue lors de la procuration, cette affaire ne devait pas y être facilement presumée comprise. Le procureur omnium bonorum étant en ce cas à pertée d'en instruire le mandant avant que de l'entreprendre, ne doit pas l'entreprendre sans l'avoir informé, et sans avoir récu de lui pour cela un pouvoir spécial." Mandat, sec. 147. What the general power of attorney cannot include, when the principal is at hand, must be something extraordinary. The defendant knew that the maker of these notes was insolvent, and must have expected that at their maturity he would either be called on to renew his endorsements, or see the notes protested. Hence, under the rule given by Pothier, this mandate included the management of whatever the defendant's interest might require at the maturity of these

The judgment of the court was prenounced by

SLIDELL, J. This suit is brought on several promissory notes, drawn by Briggs and endersed by the defendant. All these notes stipulated interest from maturity, at the rate of seven per cent per annum. They were all payable at the office of the bank at Covington. All these notes are proved to have been discounted by the bank for the benefit of the maker, the endorser having endersed for his accommodation. It is also proved that Briggs was insolvent at the maturity of the notes. The endorser was blind at the time of endorsing these notes and of the execution of certain other instruments, which will be noticed hereafter; but the genuineness of all his signatures is incontestibly proved, and there is no evidence in the record to show that any fraud has been practiced upon him in obtaining the signatures. Morgan had been for many years, and before he became blind, an accommodation endorser for Briggs, and the notes sued upon were renewals of previous notes, upon which Morgan was endorser. Various points have been presented by the counsel for the defendant, which we proceed to notico.

Upon three of the notes, on the respective days of their maturity, there was endarsed an agreement, by which the endorser declared that he waived the formality of protest, and held himself bound as though the note had been legally protested and he duly notified. One of these agreements further states expressly, that he waives the formality of notice. The legal effect of all Union Bark these agreements is the same, and if binding at all, place the endorser in the same position as if formal protest had been duly made, and due notice given. These agreements, however, were not signed by Morgan, but by his son John Joseph Morgan, as attorney of the defendant; and two questions are here presented is the execution of the power of attorney proved, and, if so, did the instrument creating the agency authorise the attorney to sign such agreements?

The power of attorney was executed before a notary public and two witwesses, and on its face purports to be an authentic act. But its admissibility, as an authentic act, was destroyed by the plaintiffs' acknowledgment that, at the date of the act, Morgan was blind. The court properly refused to admit it in evidence as an authentic act, under article 2231, which declares that "the authentic act, as relates to contracts, is that which has been executed before a notary public, or other officer authorised to execute such functions, in presence of two witnesses, free, male, and aged a least fourteen years, or of three witnesses, if the party be blind." Upon this refusal of the court, the original act was produced, the signature of Morgan was proved by one of the subscribing witnesses, and it was then received in evidence, the defendant excepting, "that if it could not be received as an authentic act, for the want of a sufficient number of witnesses, a fortiori it could not be received as a private act." The court did not err. The blind are not declared by our law incapable of contracting. "All persons have the capacity of contracting, except those whose incapacity is specially declared by law. These are persons of insane mind, slaves, those who are interdicted, minors, married women." Civil Code, art. 1775. Article 2231 is expressly affirmative of the capacity of the blind to contract. The requisition of three witnesses touches only the authenticity of the instrumentits competency as proof per se. The article of the Code immediately following declares: "That an act which is not authentic through the incompetence or the incapacity of the officer, or through a defect of form, avails as a private writing, if it be signed by the parties." Here the act was signed by the party; his signature is incontestibly established by the subscribing witness; and there is no proof, and not even a suggestion, of fraud or mistake. It must also be observed that the execution of the power cannot be considered as resting upon the testimony of a single witness. Various circumstances established by the evidence in this cause corroborate the proof of execution; and not the least of these is the action of his own son, as the father's attorney. To disbelieve the execution of the instrument would involve, as a necessary consequence, that the son had attempted the commission of a fraud upon his father. We can hardly suppose that counsel, had they viewed the matter in this light, would have presented an argument which, if sustained, would save the parent by the dishonor of his child.

Considering the execution of the power of attorney as duly established, what is its legal effect? Did it authorise the son to sign the agreement of waiver above stated? The power is very full and comprehensive. After conferring the usual authority to collect debts, to give acquittances, to compound, compromise, &c., it contains these words: "Also for him and in his name to sign any bond, obligation, contract, or agreement, or other paper whatsoever; to draw and endorse promissory notes, to draw and accept bills of exchange." Then follows an authorisation to buy and sell all kinds of property, "and also, for him and in his name, to do all such other acts, matters and things, in relation to his property, MORGAN.

Usion BANK estate, affairs, and business of every kind or nature whatsoever, as he might or could do, if personally present and acting therein; it being his intention to commit to the said John Joseph Morgan the entire management, care and disposition of his property and affairs, as fully and absolutely as he has now the management, care, and disposition of them, and that this power should be understood and taken in its most comprehensive sense." We are of opinion that this power fully authorised the agreements in question. The authority to sign any bond, obligation, or agreement whatsoever, standing side by side with the authority to make even a new note, and fortified by the broad declaration that the whole power should be understood in its most comprehensive sense, comprehends, if language has any force, the agreement of waiver made with regard to notes already executed by the party himself; and any other interpretation would make such powers of attorney, instruments of deception. It cannot be said that, in the present case, there was even an indiscreet exercise of the power of the agent. Briggs was insolvent, and the waiver of the formality of protest and notice was a saving of expense to the principal-

> A portion of the notes sued upon were protested, and notices were given by Lyman Briggs, parish judge and ex officio notary for the parish of St. Tammany; and the protest and certificates of notice, signed by Briggs, in his official capacity, being offered in evidence, they were objected to, as appears by the bill of exceptions, on the ground that Briggs was incapable of so doing, because he was the maker of the notes and could not pay and receive at one and the samo time, and was also incapable of giving notice. So far as the question of presentment is concerned, the bill of exceptions and the argument of the learned counsel upon it, are based uopn the erroneous assumption that a presentment to Briggs personally was necessary; and, these premises being assumed, it is contended that Briggs could not make a demand of himself, and that the mandate to do so was a vain and void mandate. When a note is made payable at a bank, it is a good demand if made upon the cashier of the bank, as was done in this instance.

> In support of the general position of the incapacity of a public notary to certify his own personal default, the learned counsel has exhibited no textual provision of law, and the analogy in a case in which the Code has expressly treated of the subject is against him. Even in the graver duties of the judiciary, a judge is not incapacitated by his personal connection with the cause. If he be interested in the cause, he may be recused, or may recuse himself; but the law does not absolutely incapacitate him. The public officer and the individual are not identical. There was, in this case, no conflict of the official duty of the notary with his private interest; for whether the endorser was discharged, or held on the note, was immaterial to him as maker and primarily liable. As to Briggs himself, he was acting against his own interest in recording his own default.

> Another ground of exception to the admissibility of the protest and certificates of notice was, "that there was no regular record of the protests and notices, made in a separate book, and recorded in the presence of two witnesses by said notary, as is required by the statute of 1821." It appears by the bill of exceptions, "that the parish judge was called upon to produce the book of protests, and thereupon brought into court a large bundle, amongst which were three sheets containing exact duplicates of the three offered in evidence; these were loose sheets, not arranged in the order of their dates, but some that purported to be protests of the year 1842, were placed in the bundle after others that were

dated in the year 1844; the whole tied in bundles, and placed between two Union Bank pasteboards, which had the appearance of the binding of a book."

Mongan.

The act of 1827 does not require the keeping of a separate book for transcription and record; and under it the original protest and certificate of notice given to the bank, or the duplicate original kept by the notary, was competent evidence.

It is objected that it does not appear from the protest of the notary, that he had the note in his possession when he demanded payment. It is manifest, not only from the evidence of the cashier but from the protest, that the notes were held by the bank at maturity. The notary declares in each protest that he went to the bank on the day of maturity, at the cashier's request; and he declares that the cashier was the holder of the note, of which the copy annexed to the protest is a true copy. These declarations show that the note was in the hands of the cashier at the time, and that the notary must have taken a copy of it, and we are at a loss to see the difference between the cashier's showing the note to the notary and asking him to protest it, and putting the note formally into the manual possession of the notary before he made the demand. If the bank had not been the holder, and the place of payment had not been at the bank itself, the objection would have been material.

The notices were mailed at Covington, in the parish of St. Tammany, addressed to the endorser, at Madisonville, parish of St. Tammany, La. *Morgan* lived about two miles from Madisonville. It was the post office nearest to his residence, and the actice was properly thus mailed and addressed.

Morgan had no right to have the proceeds of the notes when discounted passed to his credit, it being shown that he was the accommodation endorser for Briggs, to take up whose protested paper, endorsed by Morgan, the notes were discounted.

It is therefore decreed that the judgment of the court below be reversed; and it is decreed that the plaintiffs recover of the defendant David B. Morgan, the sums following, and interest thereon, at the rate of seven per centum per annum, from the respective dates bereinafter mentioned, until paid, to wit: the sum of \$600, with interest at said rate thereon from the 21st day of June, 1842; the further sum of \$220, with interest at said rate thereon, from the 27th day of June, 1842; the further sum of \$1,450, with interest at said rate thereon, from the 30th day of July, 1842; the further sum of \$450, with interest at said rate thereon, from the 15th day of August, 1842; the further sum of \$140, with interest at said rate thereon, from the 22d day of August, 1842; the further sum of \$380, with interest at said rate thereon, from the 19th day of October, 1842; and the further sum of \$460, with interest thereon at said rate, from the 29th day of October, 1842; and costs in both courts.*

SAULET v. TREPAGNIER et al.

Where a defendant dies pending a suspensive appeal taken by him from a judgment in favor of plaintiff for a community debt, and his widow is appointed administratrix of his succession and accepts the community, but is not made a party to the appeal except as tutrix of her minor children, and the judgment below is affirmed in general terms without any reference to the parties, the judgment will be binding only on the minors, and have no effect against

^{*} Everie, C. J., did not sit in this case, being interested.

BAUCET TREPAGNIES the community represented by the administratrix, nor against her personally; and the surety having signed the appeal bond when there was a judgment against the original defendant, binding on the community, the failure of the creditor, on the death of the principal dobtor, to make the proper parties, so as to maintain the judgment in its integrity, and to enable him to subrogate the surety to all his rights under it, will destroy his recourse against the surety pro tanto. Nor will it make any difference in such a case that an execution on the judgment so affirmed, was afterwards issued against the widow, with her consent, for the balance remaining due after exhausting the property of the heirs, and that all that could then be made out of her property was received under it, where there is no evidence affording any ground for believing that any part of the debt would have been lost, had the original judgment been maintained on the appeal against the community. Per Curium: The execution issued against the widow without any judgment against her, must be considered as illegally issued; and the surety is only bound by legal proceedings against the debtor.

A surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of them be lost by his wilful neglector want of due diligence, the surety is, to that extent, discharged.

Art. 3030 of the Civil Code which declares that "the surety is discharged, when, by the act of the creditor, subrogation to his rights, mortgages and privileges, can no longer be operated in favor of the surety," must be understood as comprehending under the word act the omissions or neglects of the creditor.

A PPEAL from the District Court of the First District, Buchanan, J. Buisson and Roselius, for the plaintiff, cited C. C. art. 3035, et seq. Alley v. Hawthorn, 1 Ann. R. 122. Josephs, for the appellants. The judgment of the court was pronounced by

Eustis, C. J.* This case was before the Supreme Court, in June, 1845, and is reported in 11 Robinson, 267. The suit is against the widow and heirs of the late François Trepagnier, who had been surety on an appeal bond for the late Pierre Trepagnier, against whom the plaintiff recovered judgment for \$15,000, with interest, which judgment was affirmed in the Supreme Court, in June, 1843. 2 Rob. p. 358. Pending the appeal Pierre Trepagnier died, leaving a widow in community and several children, some of whom were minors. The widow was appointed administratrix of his succession and accepted the community, but was never made a party to the appeal, except as the tutrix of her minor children, who were made parties by an order of the Supreme Court. There was an appearance by counsel, and the judgment appealed from was affirmed in general terms, without any reference to the parties.

The proceedings antecedent to this appeal are stated in the report of the case in 11 Rob. 267. It was then determined that the present plaintiff had no recourse against the defendants, until such proceedings were taken against the widow in community and the property of the succession of her husband in her hands, as the condition of the appeal bond required. The plaintiff in this case had judgment for \$2,881 40, with legal interest, being for the balance due on the original judgment against *Pierre Trepagnier*, and the defendants have appealed.

It appears that, on an execution issued on the original judgment, in 1842, against the heirs of *Pierre Trepagnier*, the sum of \$8,517 88 was made; that, in 1845, by an order of the District Court in which the judgment was rendered an execution was issued against the widow in community, on which the sum of \$5,646 48 was made. This is all that can be made against the parties by execution.

Rosr, J. did not sit in this case, having been of counsel.

The principal ground of defence is, that the sureties to the appeal bond are released by the omission of the plaintiff to make the widow of the original deb. TREPAGNIER. tor, Pierre Trapignier, a party to the suit then pending on the appeal. She had accepted the community, and became liable for one half of the debts. The heirs were made parties, and became bound by the judgment; but it does not appear that any proceedings were taken to make her a party to the appeal, except in her representative capacity of tutrix to her children.

It is apparent, by the opinion delivered by the court on the appeal, that she was not a party, and that she ought to have been, in order to render the judgment operative against her as such. It follows, of course, that, so far as the sureties are concerned, the execution issued against her without any judgment being rendered against her, must be considered as illegally issued. How far her consent to the issuing of this writ may be implied, it is not necessary to consider, for the surety is only bound by legal proceedings against the debtor, and not by the equities between him and the creditor.

It remains to consider the law applicable to this state of facts. The condition of the appeal bond is, "that the above bound Pierre Trepagnier shall prosecute his said appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of his estate, real and personal, if he be cast in the appeal; otherwise that the said François Trepagmer, his surety, shall be liable in his place."

Pierre Trepagnier left an estate worth, by the inventory under which his widow accepted the community, \$87,971 50. His debts amounted to \$54,000. He died in 1838. The debt on which the judgment was rendered was a community debt, originating in a sale of a plantation and slaves from the plaintiff to the deceased, as far back as 1829. Thus it appears that by the neglect to make proper parties on the appeal, there is no judgment against the community represented by the administratrix, nor against her personally. The judgment appealed from was affirmed without any reference to either.

It would seem to be a necessary consequence of the principles of the law of suretyship, that the surety is entitled to the benefit of all the securities in the hands of the creditor; and, if any of them be lost by his willful neglect or want of due diligence, the surety is to that extent discharged. Pitman on Principal and Surety, 204. Theobald on Princ. and Surety, § 176, and cases cited. Law Library, vol. 30, p. 138. By article 3030 of the Code the snrety is discharged, when, by the act of the creditor, the subregation to his rights, mortgages and privileges, can no longer be operated in favor of the surety. Article 2037 of the Napoléon Code is to the same effect; and the Court of Cassation has more than once decided that, the term act of the creditor applied to omissions, or neglects of the creditor, and consisted in omittendo as well as in committendo. Case of Galy, Sirey's Reports, 30, 2, 89. Case of Adema, Ib. 26, 2, 57. Also, case of Dumesnil Dubuisson, Ib. 28, 2, 121. Our own jurisprudence we consider well settled on this subject. McDonogh v. Relf et al. 19 La. 143. When the surety on the appeal bond in this case signed it, there was a judgment against Pierre Trepagnier, and the community existing between him and his wife was bound by it. The judgment rendered on the appeal, though it affirmed the judgment of the court, only bound those who were parties, to wit, the heirs of Pierre Trepagnier. There is to this day no judgment against the community. The creditor was bound to make the proper parties on the demise of the principal debtor, so as to maintain the judgment in its integrity. If, by his neglect,

BAULET 9. TREPAGNIER. it has been impaired, so that a subrogation to the rights under the original judgment is impossible, his recourse against the surety, pro tanto, is lost. There is no evidence before us which affords any ground for believing that any part of the debt would have been lost, had the original judgment been maintained on the appeal against the community, as well as against the heirs of Pierre Trepagnier.

We have assumed throughout that the wife was not a party to the suit, by the appearance of the husband. He, as the head and administrator of the community, was the defendant in the suit, and through him alone was the community in court. On his demise the community ceased to be represented, and no proceedings could be taken against it binding on the surety, without its being regularly represented by the proper party. We have been furnished with no adjudicated cases on this point of practice; but, on general principles, though the community is bound by the judgment rendered against the husband in his life time, yet we see no reason which should exempt a case of this kind from the operation of the universal rule, which confines the effect of judgments, as such, to those who are parties to the record. The disabilities under which women are placed by our laws, and the necessity imposed on them of entrusting their business to others in most cases, give them strong claims to the benefit of any general rule, which is established for the protection of parties against mistake, surprize or injustice.

The judgment appealed from is therefore reversed; and judgment is rendered for the defendant, with costs in both courts.*

THE PLANTERS BANK v. BASS.

The Supreme Court may make new parties in cases pending on appeal, whenever it becomes necessary to do so, from the death, insolvency, or bankruptcy of a party, or in consequence of the forfeiture of its charter by a litigant corporation. The power to do so is indispensable to the exercise of its appellate jurisdiction, and is not prohibited by art. 63 of the consiltation, which declares that the jurisdiction shall be appellate only. When, in the exercise of this power, a contest arises as to facts, the ascertaining of which is indispensable to the action of the court, the issue should be sent down to be tried by the court of the first instance; but when the question is one of law, it would be idle to remand the case.

Where a judgment of the highest tribunal of another State, has declared a statute of that State to be unconstitutional, the question of its constitutionality will be regarded as settled.

2. It is admitted that a judgment rendered against the husband, during the existence of the community, is binding on his surviving widow on his death, if she accepts the community. If this be true, the judgment rendered in this case by the District Court, is binding on the widow of Pierre Trepagnier. The appeal taken by the husband did not annul the judgment, nor did it extinguish the debt.

Rehearing rejused.

^{*} Roselius, for a re-hearing. 1. When an appellant dies during the pendency of the appeal, it is the duty of his heirs or legal representatives to make themselves parties, or, in other words, to presecute the appeal, or the bond will be forfeited. Art. 579 of the Code of Practice, provides, "that in the appeal bond, it must be set forth in substance, that it is given as surety that the appellant shall prosecute his appeal, and that he shall satisfy whatever judgment may be rendered against him," &c. One of the main conditions of the bond, which both the principal and his surety subscribed, was that the former shall prosecute the appeal. This obligation is as binding upon the heirs and widow in community of the appellant, in case of his death, as on himself. The rule in the Supreme Court of the United States is, that the appeal will be dismissed unless the legal representatives of the appellant present themselves within a given period to prosecute the appeal.

2. It is admitted that a judgment rendered against the husband, during the existence

Trustees, appointed under a law of another State to take charge of the assets, collect the debts. &c. of a dissolved corporation, may sue a debtor of the corporation in this State.

The small excess of interest gained in calculations of interest, by considering the year as

consisting of only 360 days, is not usurious.

In an action against the endorser of a note protested in another State, the testimony of the notary by whom the protest was made, or that of other witnesses, will be admissible to prove the fact of his being a notary. Per Curian: The atrong presemption arising from the undisturbed exercise of a public office that the appointment to it is valid, renders it, in general, unnecessary to prove the written appointment of public officers. All who are proved to have acted as such are presumed to have been duly appointed, until the contrary appears. There is an exception to this rule, where the officer, being plaintiff, avers his title to the office, or the mode of his appointment.

Where in an action by a bank established in another State, on a note discounted by it and payable at its office, it is proved that the notary by whom the note was protested had died before the trial, and that he was the agent usually employed by the bank to make demands and give notices of protest, the protest made by him will be admissible as a memorandum

of his acts, and will be evidence of them.

Notice of protest to an endorser residing in a parish in this State, addressed to him at the postoffice nearest to his residence, though in another State, in the absence of any proof of his
being in the habit of receiving his letters and papers at a more distant office, is sufficient,
though his domicil be not mentioned in the address.

A PPEAL from the District Court of Concordia, Curry, J. The facts of this case are fully stated in the opinion of the court, infra.

R. N., and A. N. Ogden, for the plaintiffs. 1. As to the right to make parties, see C. P. 903. 3 Wendell, 667. 21 Ib. 253. 10 La. 437. 6 Whea-

2. The question involved in the exception to the deposition of the notary, on the ground that his capacity as notary could not be established by his own evidence, and that his commission, as the best evidence, should have been produced, was settled in Las Caygas v. Larionda's syndics, 4 Mart. 287. See also Jacob v. United States. 2 Brock. C. C. R. 520. 2 Peter's Dig. 218. "A memorandum made by a person in the ordinary course of his business, of acts which his duty in such business required him to do for others, is, in case of his death, admissible evidence of acts so done." A fortiori the acts of a public officer are so admissible. Nichols v. Webb, 8 Wheat. 326; 5th Condensed R. 521. Webb v. Rarnett. 15 Mars. R. v. 380.

521. Welsh v. Barnett, 15 Mass. R. p. 380.

3. The notice to the endorser is objected to on the ground that it was not directed to him at his domicil, and the case of Duncan v. Sparrow is relied on as authority. That case is not authority. If authority, it can have no application to this case. We rely on long and well established usage, and on the rules of commercial law. Rodney was proved to be the nearest post-office to the residence of Bass, and the notice was properly sent there. Harrison v. Bowen, 16 La.

282. Follain v. Dupré, 11 Rob. 454.

4. It is not necessary that the notice should contain a formal allegation that payment was demanded at the elected domicil of payment. It is sufficient that it state the fact of non-payment of the note, and that the holder looks to the

endorser for indemnity. Mills v. U. S. Bank, 11 Wheat. 431.

5. The defence of usury, on the ground of excess of interest of \$13 34, on a loan of \$20,000, can have no weight. The Supreme Court of Mississippi, on this very note, in a suit against another endorser, overruled that defence. Planter's Bank v. Snodgrass, 4 Howard's R. 573. To constitute usury there must be an intention to take usurious interest; a corrupt agreement will not be enforced. Bank of the United States v. Wagner, 9 Peter, 378. The mode of calculating interest was adopted by the bank for convenience, and has been long sanctioned by universal usage. The case from Howard is conclusive on the point. See also Walden v. City Bank, 2 Rob. 197.

Stacy, Sparrow, and Prentiss, for the appellant. 1. This court, having only appellate jurisdiction, cannot determine originally the question of the right of the trustees to make themselves parties. Oakley v. Phillips. 6 Mart. N. S. 306. Baron v. Kingsland, 5 La. 379. Taylor v. Jeffries, 10 La. 438. Brown v. Williams, 12 La. 614. State v. Bermudez, 14 La. 481. Sess. Acts of 1846.

PLANTERS BANK V. BASS. PLANTERS BANK V. BASE. p. 161. 2. The trustees cannot make themselves, or be made, parties. 6 Binney, 359. 5 Cranch, 287. 12 Wheaton, 361. 1 Har. & McH. 236. 2 16. 463. 2 Johns. 3. 20 lb. Story's Confl. of Laws, § 565. Taking them as administrators appointed in Mississippi, they cannot ane here. Story's Confl. of Laws, § 512, 513. 4 Mart. 571. 16 La. 670. 8 La. 508. 9 Wheat. 565. 6 Smedes & Marshall, 529. 3. There is no proof that payment of the note was demanded at the place of payment. The notarial protest, if legal and regular, makes no proof of demand of payment. Waldron v. Turpin, 15 La. 564. H. & H.'s Digest, p. 609, sec. 33. The alleged protest is not authenticated in the manner required by the laws of Mississippi. Tickner v. Roberts, 11 La. 16. H. & H.'s Digest, p. 434, sec. 36. Parol evidence was improperly admitted to prove the capacity of the notary. It should have been proved by the certificate of the governor, under the great seal of the State. 3 La. 148. 13 lb. 284, 362. The protest is not admissible as a memorandum of a deceased person, to make proof of the demand. By the laws of Mississippi (H. & H.'s Digest, p. 609, s. 33), notaries are bound to make out and certify on oath true records of their protests and notices. Hyde v. Planters Bank, 17 La. 562. 4. Notice of protest was insufficient, being directed to Rodney, Mississippi, and not to the parish of Concordia, the domicil of Bass, the enderser. Duncan v. Sparrove, 3 Rob. p. 164. 5. The contrast between the bank and the makers of the note, by which the former discounted the note, was usurious and void. By its charter the bank was allowed to take, on notes like this, interest or discount at the rate of seven per cent per annum only. This note had eight months to run. The interest or discount on it for that time, with the three days grace added, was \$955. The amount of interest taken or reserved was \$968 34, being an excess over the legal rate of \$13 37, and making a rate of seven and one-tenth per cent per annum. The bank obtained this excess, by calculating interes

The judgment of the court was pronounced by

SLIDELL, J. In the year 1836, the plaintiffs brought suit upon a note for \$20,000, against Elias Bass, as endorser, who died pending the action; his widow was made party in his stead, and, in 1842, a judgment was rendered in favor of the plaintiffs. In 1843, an appeal was taken by the defendant. After the case came to the Supreme Court it was set for argument, heard, and taken under advisement of our predecessors; but not having been decided, it was again set for argument before this court. When called for argument the appellant placed on record a suggestion and plea, to the following effect: That since the appeal was taken, the charter of the plaintiffs had been adjudged by the High Court of Errors and Appeals of the State of Mississippi to be forfeited; that the said corporation was declared dissolved, and was perpetually enjoined from further exercising any of the franchises, liberties and privileges conferred by said charter, in proof of which was exhibited a duly certified copy of the suit and judgment of forfeiture, which was pleaded as a perpetual bar to the further prosecution of this suit: That the trustees appointed to liquidate the affairs of said dissolved corporation by the Circuit Court of Adams county, upon pronouncing said decree of forfeiture, are deprived and divested of all legal authority to sue for or collect any debt due to the said Planter's Bank. That the only power they possess is to sell, under an order of court, all the property

and evidences of debt heretofore belonging to said bank, and which have come into their possession. In proof of which they exhibit to the court an act of the legislature of the State of Mississippi, approved Feb. 28th, 1846, entitled "An act to amend an act entitled an act to prescribe the mode of proceeding against-incorporated banks for a violation of their corporate franchises, &c., approved July 26, 1843," which act so amended is also exhibited. That the appellant pleads the above statutes in bar of any prosecution of this suit by the trustees so appointed. It was further pleaded that any authority conferred upon the trustees, either by the acts of the legislature or by the court of that State, is strictly territorial, and cannot be extended or recognised without the limits of

Thereupon the trustees, Galbraith & Cooper, appointed by the court in Mississippi, entered their appearance in this cause, and filed a petition praying to be permitted to become parties to the suit. At the same time and by the same counsel, an appearance was also entered for Walworth, Montgomery, and Mandeville, who claimed to be owners of the debt due by the defendant by virtue of a deed of assignment and trust, said to have been executed by the Planters Bank to them, in trust for creditors, prior to the decree of forfeiture. These last named trustees we shall at present leave out of view.

the jurisdiction of that State.

The petition of Galbraith & Cooper having been filed, the appellant filed an answer, in which he reiterates the matters pleaded in the suggestion and plea above stated, and asks that the cause be remanded to the District Court for the trial and decision of the issues thus presented. He contends that this court has no right to consider them originally.

There is no doubt that this suit belongs to that class of cases in which our jurisdiction is appellate only. Constitution, art. 63. It is also true that all the matters presented by the suggestion and plea of the appellant, and by the petition of the trustees and the answer made to it, are new matters, and which have never been submitted to the consideration of the inferior court. The controversy in question has originated in the appellate tribunal, and the principle is undoubted that by virtue of our constitutional powers as an appellate court we cannot create a cause.

There are, however, some subjects which an appellate court can take cognizance of, and act upon, originally. They are those which are indispensable to the exercise of its appellate jurisdiction. Of these the one of most frequent occurrence is that of making new parties, on an appeal pending, in case of the death of a litigant. Without proper parties a case perhaps cannot, or at least ought not to, be heard; and were there no means of making them, the appellate functions of the court would be arrested on the one hand, while on the other hand the cause would remain withdrawn by the appeal from the jurisdiction of the inferior tribunal. Our legislation on this subject is very meagre; but what we have is inconsistent with the idea that an appeal abates by the death either of the appellant or the appellee. Although but a single case is expressly stated in the Code of Practice in which the authority to revive is granted, our predecessors appear to have considered the authority as existing inherently in the Supreme Court, by virtue of its constitutional organization and the purposes of its creation. From the earliest existence of a Supreme Court in Louisiana down to the present time, and under both constitutions, the Supreme Court has constantly exercised this power of making parties. It has not been considered as limited to the case of natural death. Syndics, assignees in bankruptcy, comPLANTERS BANK U. Bank

missioners of banks of this State whose charters have been forfeited, have been ordered to be made parties, or permitted by the court on their own motion to come in. In every such case the court has acted on a new matter, and originally; yet its authority to do so has not been doubted, where the fact was undisputed that the party proposed to be made, or offering to come in, possessed the quality of heir, executor, syndic, &c. This view of the inherent power of an appellate court, as springing from the nature of its functions and the purposes of its creation, is not peculiar to ourselves or our predecessors. The Supreme Court of the United States, we think, acted under that view of its appellate powers, in the case of Green v. Walkins, 6 Wheaton, 263, and in the rules which it then took occasion to frame to save the dismissal or abatement of writs of error. But when, in the exercise of this power, there arises a contest as to facts, the ascertainment of which is indispensable for the action of the court, then it is the duty of the court to remand an issue to be tried by the inferior court, to the end that the necessary facts may be there ascertained. In the present case, which is to all intents and purposes a question of revival, there is no such contest as to facts. The facts are clear and undisputed; they are those which the appellant himself, who asks the remanding to the inferior court, has placed before us, and which he cannot and does not gainsay. They are, the record of proceedings for forfeiture, the judicial appointment of the trustees, and the Mississippi statutes of 26th July, 1843, and 28th February, 1846. Upon these we are to determinine whether the trusteecs are competent to stand in judgment here, as the legal owners of the claim against Bass, in the place and stead of an extinct corporation, to whose rights of property they claim to have succeeded. It would be an unnecessary and idle form to remand the cause to the court below, for its opinion on a pure question of law. As wellmight it be said, when an executor appears in this court and offers himself as a party to an appeal taken by or against the deceased, and his quality is not disputed, that we should remand the cause to the district judge, to enquire whether an executor duly appointed is capable of representing the succession of his testator. It does not form an objection to our examination of this subject originally, when presented under such circumstances, that in reality it involves and practically determines the future right of the trustees to execute such judgment as we may render. It is true the right of executing the judgment is involved, but it is an unavoidable incident of the question of revival; for it would be a vain thing for this court to render a final decree, if that decree, when rendered, could not be executed.

Are these trustees then competent to have this suit revived in their names, and to stand in judgment as the successors of the bank? For the proper consideration of this subject, it is necessary to notice briefly the circumsuances of their appointment. In July, 1843, the State of Mississippi passed an act entitled, "An act to prescribe the mode of proceeding against incorporate banks for a violation of their corporate franchises, and against persons pretending to exercise corporate privileges under acts of incorporation, and for other purposes." The constitutionality of this law has not been questioned in argument, and we have only to consider its meaning and effect.

Under this statute proceedings were instituted against the *Planters Bank*, which resulted in a decree of forfeiture and the appointment of trustees. These trustees, in obedience to the provisions of the statute, were authorised by

PLANTER BANK v.

the decree to take charge of the assets of the company wherever the same may be found, either in the hands of the officers of the bank or its agents, trustees or attorneys, to sue for and collect all debts due to the company, and the proceeds of the debts when collected and the property when sold to apply, as thereafter might be directed by law, to the payment of the debts of the company. Under this statute and the decree of the court adjudging the forfeiture and appointing the trustees, we consider the trustees as clothed with the legal ownership of the assets of the bank—as the successors of the bank for the benefit of creditors. Being clothed with the power to sue, they must be considered as authorised to have suits revived in their names; and so the courts of Mississippi have considered their title and authority, and have repeatedly recognised their right to revive, as may be seen in the very able and unanswerable opinion of Chief Justice Sharkey, in the recent case of the Commercial Bank v. Chambers.

But it is said in argument that, the authority of the trustees to prosecute suits, and by consequence to revive for their benefit suits instituted by the bank before their appointment, has been taken from them by the statute of Mississippi of 28th February, 1846; that this act applies, by its express terms, to trustees theretofore appointed, and is a positive and inflexible command to the trustees to sell all the assets of the extinct corporation; that the prosecution of suits and their collection, in the usual course of law, is inconsistent with this imperative command. When this argument was presented, there seemed to us in the legislation of 1846, much of the hardship and injustice asserted by the opposite counsel; and we feared that the delicate and disagreeable duty would be unavoidable, of comparing these two statutes of a sister State, and determinging whether that of 1846, by its conflicting legislation, repealed certain portions of the act of 1843, material to our present enquiry, or whether the act of 1846 was, pro tanto, unconstitutional and woid. We have been relieved, since this cause was taken under advisement, from a duty so delicate and a responsibility so grave, by the decision on the very point, by the highest tribunal of the State whose legislation we were required to interpret. That court, upon an elaborate examination, in the case already cited, and with a logic which seems to us unanswerable, has declared the act of 1846 unconstitutional and void, so far as it attempted to curtail or impair the rights of the trustees, appointed before its passage under the act of 1843, to prosecute and collect claims due to the bank; and permitted the trustee of the Commercial Bank, on suggestion of the dissolution of the corporation, to revive in his name, as trustee, a suit brought originally by the bank, in which their was judgment for the defendant in the court below, and from which a writ of error had been sued out by the bank, pending which the forfeiture of its charter was decreed. The trustee then offered in support of his motion, the judgment of forfeiture and his own appointment, and admitted that he had been ordered to sell under the act of

Having referred to the decision in that cause, it is not necessary that we should recapitulate at length the reasoning of the High Court of Errors and Appeals of the State of Mississippi; but the following is a brief summary of the opinion: That by the statute of 1843, and the judicial appointment of the trustees under that statute, the debts due to the bank were preserved in full vigor. That the legal ownership of those debts vested in the trustees, but that the property thus placed in their hands was a trust fund in favor of the creditors of the bank, who had a vested beneficial interest in it. That these creditors,

PLASTERS BANK V. BANK having an equitable interest, had also a remedy in chancery, to compel the trustees to discharge their duty by collecting the debts. That subsequent legislation could not produce a total change in the rights thus acquired by the parties, by taking away entirely the remedy of the creditor, and compelling the trustees to sell their legal title. That by the act of 1846, these rights were attempted to be swept away. That such attempt was unconstitutional. That therefore that portion of the act of 1846, relating to the sale of the property and assets of banks, cannot operate as to the banks whose charters had been forfeited and trustees appointed under the act of 1843, prior to the passage of the last act. That the motion to revive must consequently be sustained.

But it is contended that whatever rights of revival the trustees might have in Mississippi, they have none here; that an extra territorial operation of the laws of Mississippi cannot be recognized. The rule adopted by many of the tribunals of this country, that the laws of a foreign country, such as bankrupt laws, &c., whose action is in invitum, cannot operate a legal transfer of property in our country, is a rule which, if its correctness be conceded, is not apposite to the present enquiry. When a contest arises in our forum between one of our citizens, a creditor of the bank, and these trustees claiming title by the operation of the statute of 1843, the decree of forfeiture and their judicial appointment, it will be time enough to consider the rule invoked. Here is no such contest. The parties litigant are the trustees and the debtor. So far as these parties are concerned, the title of the bank has passed to the trustees; and whether it be the legal or equitable title, is unimportant in our forum. In most of the cases in which assignments under foreign bankrupt laws have been denied to give title against attaching creditors, it has been distinctly admitted that the assignees might maintain suits in our courts under such assignments for the property of the bankrupt. See Story's Conflict of Laws. See also Holmes v. Remsen, 20 Johnson, 267. Milne v. Moreton, 6 Bin. 369. Will any one say that the rule of comity should be more gracious towards a foreign country, than towards a sister State? If there be any difference it should be more favorable to the latter, when we consider the fraternal ties which bind the States of this Union together as members of one great political family, and the deep interest which each has in the welfare of the others. When this subject of comity between the States was before the Supreme Court of the United States, in Earle's case, Chief Justice Taney said: "The history of the past, and the events which are daily occuring, furnish the strongest evidence that they have adopted towards each other the laws of comity in their fullest extent." We have always permitted the corporations of other States, who are creatures of the laws of those States, to sue in the courts of Louisiana; with what reason can we refuse our jurisdiction to these trustees, who derive from the same source their authority to sue? If there were a struggle for priority and preference by a creditor of the bank against these trustees, there might be some plausibility in asking for the application of the doctrine invoked by the appellant: but as this case stands, we are virtually solicited to disgrace the administration of justice in this State, by permitting one of our own citizens, upon a barren fallacy, to repudiate his just obligation.

We are therefore clearly of the opinion that the trustees have the right to be made parties in this cause, and to prosecute it in the place and stead of the extinct corporation; and shall now proceed to the consideration of the alleged errors in the judgment of the court below.

It is said that the note on which this suit was brought, was endorsed to, and came into the hands of, the makers, and that this extinguished it as to all the parties but themselves. The allegation in Bass's answer is a sufficient reply to this defence. He admits that it was discounted by the plaintiffs, and that he endorsed it for the accommodation of the makers, and for the purpose of enabling them to obtain a loan of money from the bank, by way of discount of the note. It is said the bank discounted the note at an usurious rate, having calculated the interest according to Rowlett's tables, which gave a small excess to the bank. The Supreme Court of Mississippi overruled this defence, in the case of this same plaintiff against Snodgrass. 4 Howard, 573. It is unnecessary to do more than to refer to the opinion in that case.

The note was payable at the bank's office at Port Gibson. To prove presentment and demand at the place of payment, a notarial protest was offered. The instrument purported to be signed by one Pope, who styles himself therein a notary public, dwelling in Port Gibson, duly commissioned. This person was examined as a witness under commission some years previously to the trial of the cause, and then deposed that he was a duly commissioned notary at the date of the protest, and that he protested the note, as notary, on the day of its maturity; but he did not state in his deposition the particulars of the demand. Another witness, examined at the trial of the cause, proves the death of Pope, the genuineness of his signature to the protest, and that he acted during the year 1836, as a notary public in Mississippi; that Pope was the person usually employed by the bank to make demands of payment of its notes and bills of exchange, and notify endorsers; and that he believed him to be regular and correct in his business habits. By the law of Mississippi it appears that the protest by a notary of a bill or note is available as evidence, per se, there, to prove presentment, demand and refusal, as is the like instrument signed by a notary of this State in our courts. The defendant objected to this evidence to prove Pope's official capacity, and also to the admission of the protest; both which objections the court below overruled. From the strong presumption arising from the undisturbed exercise of a public office that the appointment to it is valid, it is not in general necessary to prove the written appointment of public officers. All who are proved to have acted as such, are presumed to have been duly appointed to office until the contrary appears. There is an exception to this rule where the officer, being plaintiff, avers his title to the office or the mode of his appointment. See Greenleaf on Evidence, § 92. Las Caygas v. Larionda's syndic, 4 Martin, 287. In that case a power of attorney executed before a notary in Cuba was offered in evidence, and a witness was offered to prove the signature and capacity of the notary. The court there said, that if the controversy had any relation to his right to fulfil the duties of the office claimed by him, a certificate under the national seal would be the proper evidence, but, for all other purposes, proof of his being a notary de facto would suffice. Upon these authorities we are of opinion that the court below properly admitted the testimony of witnesses to show that, at the date of the protest, Pope was a notary public in Mississippi.

Whether after this evidence, and proof also that in the courts of Mississippi the instrument would, per se, have made proof of the presentmentand non-payment, the protest was admissible with the like effect in our courts, is a question not now necessary to be decided. Assisted by proof that the notary had died before the trial of the cause, and that he held towards the bank the rela-

PLANTERS BANK V. BASS. tion of an agent usually employed by the bank to make demands and give notices, we think the paper was duly received after his death as a memorandum of acts so done, and forms evidence of them. Memoranda of a notary, in a shape less formal than the document in question, were recognised as admissible evidence, in the case of Nichols v. Webb, 8 Wheaton, 326. In that case it would seem from the language of the court that, under the laws of Tennessee, the protest was not an official act, which would have constituted evidence, per se, in a court of Tennessee; yet it was deemed good evidence of the demand, as were the memoranda in the notary's book of notice. See also Chitty on Bills, 642.

Bass lived in the parish of Concordia at the time of the protest, and the notice was seasonably mailed at Port Gibson, addressed to him at Rodney, which was the nearest post office to his residence. It was about eleven miles from his residence; the Natchez post office was about twenty-three miles from his residence. It does not appear that, at the time, there was any post office in Concordia. There was a memorandum on the note, which the judge below says he ascertained, by comparison of hand-writing with Bass's endorsement, to be, as to the name, in his hand-writing, in which it was said that "Bass will acknowledge notice at Rodney post-office;" this fact of hand-writing does not, however, appear to have been proved at the trial. Aside from this, however, and in the absence of proof that the bank had been notified that Bass usually received his letters at the more distant post office at Natchez, we think the notice was properly addressed.

We find no error in the judgment of the court below.

As to the assignees Walworth, Montgomery and Mandeville, we have not before us the assignment under which they claim, nor the means of expressing any opinion as to its validity. If they have any rights they can be presented by third-opposition, in the court below.

It is therefore decreed that the judgment of the court below be affirmed, with costs, in the names of the said trustees, James D. Galbraith and William Cooper, as plaintiffs: the said Galbraith and Cooper, trustees, being hereby recognized as the successors of the president, directors and company of the Planters' Bank of the State of Mississippi, the original plaintiffs in this cause, and, as such trustees, the judgment creditors of the said appellant Sarah Morris, in the place and stead of the said original plaintiffs.

MCKIERNAN v. FLETCHER.

The registry of an act of sale in the office of a parish judge, in the book in which both sales and mortgages were recorded, will preserve the privilege of the vendor, where, at the time of its registry, no separate book was kept for recording mortgages.

A purchaser at a judicial sale of the effects of a bankrupt, acquires no greater rights than the bankrupt himself had in the property sold.

Defendant sold certain lands, taking the notes of the purchaser for the price, and caused the act of sale to be registered. The purchaser re-sold the lands, and notes given to him for the price were subsequently, on his application to be declared a hankrapt under the act of Congress of 1841, surrendered to his assignee, and purchased by plaintiff at the sale of the

bankrupt's estate. The bankrupt was discharged, though opposed by defendant. Held, McKirran that the land not having formed part of the assets of the bankrupt, and his discharge being merely personal, defendant's privilege as vendor, which was preserved by the registry of the sale, was unaffected.

PPEAL from the District Court of Concordia, Curry, J. The facts of this case are stated in the opinion, infra.

H. W. Dunlap, for the appellant. The discharge of the bankrupt extingnished all debts due by him to creditors who proved or claimed in the bankrupt court. 6 Taunton, 75. 2 Howard, 209. 3 Howard, Christy's case, p. 308. 5 Rob. 27, 49. City Bank v. Houston, ante p. 114. Cullen on Bankruptcy, pp. 445, 149. The debt being extinguished, the security fell with it; sublate fundamente cadit opus. Fletcher's claim was transferred to the proceeds of Green's assets. When the notes of the Collins, which were the price of land, were sold, the purchaser acquired the vendor's privilege attached to them. Fletcher's claiming under the bankruptcy, was a relinquishment of

Snyder, on the same side, cited 4 Rob. 5. 5 Ib. 49.

Frost, for the defendant. The discharge of Green was merely personal. Act of Congress of 19 Aug. 1841, s. 2. The land was not surrendered by the bankrupt; had it been, the assignee could not have sold it free from the vendor's privilege. Act of 1841, s. 5. The registry of the act of sale was sufficient. 1 Gill and Johnson, 270. 4 Bin. 148.

The judgment of the court was pronounced by

SLIDELL, J. In January, 1837, Fletcher sold a tract of land in the parish of Concordin, to Soule and Green. In March of that year, Soule sold his interest to Green. In 1838, Green sold to Bean, and in the same year Bean sold to J. C. and W. C. Collins. The two last conveyances purport to be for cash, and recite the original sale of Fletcher. It appears that J. C. and W. C. Collins exscuted certain notes, which notes it is alleged were given for their purchase of land; and these notes went into the hands of Green, who subsequently became a bankrupt, and, by the surrender of his assets in the United States Court, they came into the hands of his assignee in bankruptcy, who, under order of court, sold the notes at marshal's sale, and the plaintiff became the purchaser of all the bankrupt's assets, being a nominal amount of \$, for the sum of \$30. Mc-Kiernan then brought suit upon the notes against the maker, obtained a judgment with privilege on the land, seized it in execution, and finding himself embarrassed in effecting a sale, by the outstanding vendor's privilege in favour of Fletcher for the price of the land, took a rule upon Fletcher and the recorder of mortgages, to show cause why the mortgage in favour of Fletcher should not be cancelled. Fletcher relies, in answer to the rule, on the notes originally given to him for the price, and the registry, in January, 1837, of his privilege as vendor. There was judgment for the defendant Fletcher, and the plaintiff has appealed.

The pretensions of the plaintiff are utterly unfounded. Fletcher's privilege was preserved by the registry of the act of sale in the proper office. It is objected to this registry that, it was not in a book specially kept for the registry of mortgages. At that time there was no special book for mortgages kept in the parish judge's office. Sales and mortgages were recorded in the same book. It was not until some months afterwards that the parish judge began to keep a separate book. While there was but one book kept no person making search in the office could be deceived. It was only when separate books were opened by the parish judge, that parties could be led astray by an improper registry. We have already considered this subject, and see no reason to change our opinion.

McKiernan v. Pletonen. But the question of registry is not important in this case. Aside from that, the plaintiff has no color of right. The vendor's privilege was good against *Green*, without registry. The plaintiff, who stands before us as the transferee of *Green*'s rights in the notes of *J. C.* and *W. C. Collins*, by judicial purchase, has no greater rights than *Green*. He represents *Green*, and the claim to cancel the privilege in favour of *Fletcher* is as unfounded as if made by *Green* himself.

The plaintiff contends that, as Green received his discharge in bankruptcy notwithstanding the opposition of Fletcher, who appeared in the bankruptcy for that purpose, the discharge of his personal liability discharged the vendor's claim and privilege upon the land. The land was not an asset of the bankrupt, and was never administered in the bankruptcy. The discharge of the bankrupt was merely personal.

Judgment affirmed.

DICKERMAN et al v. REAGAN.

The separate property of a married woman is liable for debts contracted during marriage for her individual use, or for the improvement of her separate property, or for marriage charges which she is bound by law to bear, though the debt was created while her paraphernal property was under the administration of her husband, and during the existence of the community of acquêts and gains. Art. 2372 of the Civil Code, which declares that debts contracted during marriage must be acquitted out of the community property, applies to the parties alone, regulating their rights, as between themselves, on the settlement of the community.

The authorisation of the husband is not required to acts of the wife, necessary in the administration of her paraphernal property.

A PPEAL from the District Court of Concordia, Curry, J.

T. P. Farrar, for the appellants.

Frost, for the defendant, contended that the debt sued for was one of the community, for which the wife was not hable, citing 7 Mart. 465. 7 lb. N. S. 64. 8 lb. N. S. 692. 9 La. 583. 10 La. 147. 3 Rob. 329. 4 Rob. 115, 511. 7 Rob. 257. 12 Rob. 583. The husband was the usufructuary, and, as such, bound let the expenses of the property. C. C. 572.

'I he judgment of the court was pronounced by

Kine, J. This is an action to render a wife liable for articles of merchandise, alleged to have been furnished for the use of herself, her, family and plantation, during the existence of her marriage. The defence opposed to the demand is, that the property of the defendant is all paraphernal; that it was under the administration and control of the husband, between whom and herself there existed a community of acquets and gains, at the time that the account was contracted; and that the debt is due by the community, and not by the defendant. There was a judgment against the plaintiffs in the court below, from which they have appealed.

The plaintiffs' account is fully proved, and appears to have been contracted, with the exception of articles amounting to \$14.20, for clothing for the defendant, her family and slaves, for supplies of various kinds for the use of her plantation, and for merchandise purchased by persons who had rendered services on her plantation, whose accounts were assumed, and whose demands were thus extinguished

partially or in full. Some time before the commencement of this suit, the DICKERMAN account was presented to the defendant, who admitted it to be correct, and promised to pay it. The plantation and slaves were her separate paraphernal property, to the administration of which she was entitled by law; and, if at any time, she committed the administration to her husband, she could have resumed it at will. The husband appears to have had no pecuniary means. Some of the witnesses state that he had the exclusive control of the defendant's proporty; others, that he managed her affairs as her agent. Whatever may have been the character of his authority, the defendant could not, by surrendering to him either the partial or entire administration, exonerate herself from liability for debts incurred for her individual use, or for the purpose of rendering her separate property productive, or in supporting those marriage charges which she is bound by law to bear. It is true, that debts contracted during the marriage enter into the community of gains, and must be acquitted out of the common fund. C. C. art. 2372. But this provision applies to the partners alone, and regulates their rights between themselves, upon a settlement of the community at its dissolution. It has no application to creditors, and does not deprive them of their recourse against the wife, during the marriage, for debts contracted for her separate advantage, and for which she is individually liable.

It is objected that the acknowledgment of the wife that the account was correct, and her promise to pay it, were made without the authorisation of her husband. The authority of the husband was not requisite to give validity to the acts of the wife, necessary in the administration of her paraphernal pro-

By the statute of the State of Mississippi, in evidence, where the debt was contracted, the plaintiffs are entitled to six per cent interest. The testimony leaves it somewhat uncertain at what time the account became due. The defendant's acknowledgment of its correctness was made in 1844, and we adopt the middle of that year as the date when interest commenced to run.

It is therefore ordered that the judgment of the District Court be reversed, and that there be judgment for the plaintiffs against the defendant Nancy Reagan, for six hundred and ninety-three dollars and thirty-eight cents, with six per cent interest thereon, from the first day of July, 1844, until paid; the defendant paying the costs of both courts.

BACON et al. v. SMITH et al.

When a negotiable note is endorsed in blank, an action may be maintained on it by the holder, in his own name, though the note be held by him, in fact, as a trustee. He need not allege the nature of his possession.

Proof that the amount of a note sued on had been attached by a third person in the hands of defendant, will not throw upon the plaintiff the burden of showing that the attachment has been discharged. The defendant must prove that it is still in force, if he desires to avail himself of it.

The mere announcement by the maker of a note of his readiness to pay, made to the holder, and the refusal of the latter to receive the amount, on the ground that it had been attached at the suit of a third person, is not a legal tender, and cannot stop interest. C. P. 407, 415.

PPEAL from the District Court of West Baton Rouge, Burk, J. G. S. Lacey, for the appellants. Plaintiffs sue as holders of a promissory BACON V. SMITH- note, endorsed in blank. Banks v. Easton, 3 Mart. N. S. 291. Shaw v. Thompson, 3 lb. N. S. 392. They are entitled to interest, there being no legal tender of payment. C. P. 407. 6 La. 16. Starkie on Ev. p. 107, note q, and p. 1067 note, citing 4 Dallas, 325. Starkie on Ev. pp. 1059, 1070, note k.

Elam, for the defendants.

The judgment of the court was pronounced by

Kine, J. The defendants are sued as the maker and endorser of two promissory notes, and plead in defence that the plaintiffs are not the owners, and have never had the actual possession, of the notes sued on; that the possession of the plaintiffs was only constructive, as the assignces of the Bank of the United States, the actual possession being in W. W. Frazier; that the notes were attached at the suit of the United States, as belonging to the Bank of the United States, and thereby taken from the control of the plaintiffs; and that by no subsequent proceeding have the petitioners been re-invested with authority to enforce their payment. There was a judgment of non-suit rendered in the court below, and the plaintiffs have appealed?

The plaintiffs are in the actual possession of the notes, which were produced on the trial; and it has been repeatedly held that the holder of a negotiable instrument, endorsed in blank, as is the case with those sued on, may maintain an action in his own name for its recovery. There is no allegation that the transfer to the plaintiffs was not made in good faithf nor that the defendants have equitable defences to oppose to the true owners, of which they have been illegally deprived. The defendants show that the notes were regularly assigned to the plaintiffs as trustees, by the Bank of the United States, and that they have been notified to pay them to no other person than to the plaintiffs, or their attorney, Frazier. It was not necessary that that the plaintiffs should have averred that they held the notes as trustees, if such be still the nature of their tenure. Their possession is sufficient to authorise the action. It appears that the defendant, Smith, offered to pay the amount of the notes to Frazier, which the latter refused to receive, stating that the notes had been attached at the suit of the United States against the bank. It is urged that the plaintiffs have not shown, that the notes have been liberated from the attachment; and that this offer to pay relieves the defendants from the payment of interest. It was not incumbent on the plaintiffs to show that the attachment had been discharged, nor that their capacity to receive had been restored, but it devolved upon the defendants to prove that the proceeding was still in force, if they desired to avail themselves of that fact in defence. The announcement by the defendant Smith, of his readiness to pay the notes, was not a legal tender, and had not the effect of arresting interest. C. P. arts. 407, 415. 6 La. 17.

It is further ordered, that the plaintiffs recover of the defendants, in solido, the sum of five hundred and twenty-four dollars and eighty-eight cents, with ten per cent yearly interest thereon, from the 14th day of November, 1842, until paid; and the further sum of five hundred and sixty-six dollars and five cents, with like yearly interest, from the 14th day of November, 1843, until paid, with nine dollars and sixty cents, the costs of protest. It is further ordered, that the defendants pay the costs of both courts.

MULFORD v. WIMBISH.

Actions to rescind or annul agreements on account of error, fraud, or violence, are prescribed only by ten years; to be calculated, in cases of error or fraud, from the day on which either was discovered, and, in cases of violence, from the day on which the violence ceased. C. C. 2218. Article 3507 of the Code applies only to cases not included in art. 2218.

PPEAL from the District Court of West Feliciana, Burk, J.

A Ratliff, Muse and Merrick, for the plaintiff. Prescription commenced to run against plaintiff's action only from the time when the fraud was discovered. C. C. 2218. The burden of showing when the fraud was discovered is on the party pleading prescription. Gasquet v. Johnson, 2 La. 514. 3 La. 282. 13 La. 461. Thompson v. Lobdell, 7 Rob. 369. 15 Peters, 554. T. G. Morgan, for the appellant, contended that the action was prescribed

under art. 3507 of the Civil Code, more than five years having elapsed since the date of the contracts which plaintiff seeks to annul.

Paterson, on the same side.

The judgment of the court was prenounced by

EUSTIS, C. J. This is an action originally instituted by two of the children and heirs of the late Sarah Brashear Bingaman against Wimbish, in which recourse is sought against him for having fraudulently possessed himself of the whole estate of their mother during her life time; and it is charged that, for the purpose of defrauding them, he retained the same after her death, reported her to have died insolvent, and practised various frauds for the purpose of concealing his doings, &c. There was a verdict for the plaintiff for \$3,251 55, with interest from judicial demand; and by the judgment of the court, two acts transferring property, one dated the 13th of July, 1829, and the other the 4th of March, 1834, were avoided and annulled.

The only point which we deem it necessary to notice is, the plea of prescription filed by the defendant. It is contended that the plaintiff's action is barred by the lapse of five years, under art. 3507 of the Code; that the action is based on the frauds alleged to have been perpetrated in certain contracts, and that the prescription invoked applies to them.

We have come to a different conclusion, and consider the prescription applicable to cases of this kind is that provided by article 2218. This article relates to the action of nullity or of recision of agreements, and provides that in all cases in which either action is not limited to a shorter period by a particular law, it may be brought within ten years. In cases of error or deception, the time of prescription only commences from the day on which either was discovered; in cases of violence, from the day on which the violence has ceased.

The prescription established by this article relates to cases of error, fraud, or violence in agreements, which are expressly included in it. If article 3507 embraced the same class of cases there would be two terms of prescription, applicable to them by the same legislation, in the same Code. and one of these articles must be to that extent held to be inoperative, as they would be inconsistent with each other.

But we do not give such an interpretation to article 3507. We consider it applicable only to cases other than those provided for by article 2218, and thus give effect to both articles. It will be observed that such appears to be the MULFORD

O.

WINDION.

evident sense of article 2218, which pre-supposes other provisions concerning the prescription against the action of nullity and of recision of agreements than that which it establishes. Article 3507 contains other important provisions, which we do not deem it material to the question under consideration to examine.

The conclusion to which we have come, as to the prescription in cases of fraud, is in harmony with the most obvious reasons of justice and sound policy. To enable a party who is in fraud to prescribe against the injured party for the time in which he may be enabled to keep him in the dark as to his rights, is to give a license to deception, and enable the wrong doer to triumph by the continuance of his evil deeds.

On the merits, we think the case is with the plaintiff.

Judgment affirmed,

SLATTERY v. THE POLICE JURY OF CONCORDIA.

Where in an action on a contract made with the commissioners of a particular district or subdivision of the parish, acting under an ordinance of the police jury, for the erection of certain levées, the evidence shows that the contractor did not contemplate that the parish should be responsible in the first instance for the cost of the levées; and the failure to obtain payment from the source originally contemplated, is attributable to the negligence of the creditor, the latter cannot recover.

A PPEAL from the District Court of Concordin, Curry, J. Frost, and H. A. Bullard, for the appellant. Poindexter, Stacy and Sparrow, for the defendants. The judgment of the court was pronounced by

Rost, J. The petition alleges that James Riley, James Behan, and the petitioner contracted with the commissioners of the Rifle Point levée district, who acted under an ordinance of the police jury of the parish of Concordia, for the construction of certain portions of the Rifle Point levée, and that said contract was let out, after public advertisements, as required by the ordinance; that these parties faithfully executed their portion of the contract, and that their work was accepted by the commissioners, in the year 1837; that the said contractors subsequently transferred their claims to James R. Kane, which transfer was accepted by the commissioners, and that said Kane has since re-transferred those claims to the petitioner, who is now the owner and holder of the same. The petition concludes with a prayer that the police jury be cited and adjudged to pay the petitioner the amount of the claim and interest.

The defendants deny all the allegations contained in the petition. They aver that the commissioners have paid to the contractors employed by them all the moneys to which they were entitled, and plead those payments in compensation against any amount the plaintiff may show himself entitled to recover from them. They specially deny the liability of the parish, and plead the prescriptions of one year and of three years, and prescription generally. The court of the first instance gave judgment in favor of the defendants, and the plaintiff appealed.

We do not think that the plea of compensation, as made by the defendants, admits their indebtedness. That plea does not contradict the general denial in this case. The defendants admit the liability of the Rifle Point district, and allege payments made by the commissioners. If they should be liable them-

selves, those payments must necessarily be deducted from the amount of the claim.

SLATTERY V. POLICE JERY

For the proper understanding of this case, it is necessary to premise that, the general laws of the State in relation to roads and levées are not enforced in the parish of Concordia. The section of the act of 1829, concerning roads and levées, declares that the provisions thereof shall not apply to that parish, except such as may be adopted by the police jury, and "that the said police jury shall have plenary and unlimited power to make such enactments in regard to roads and levées as they may deem necessary and proper, &c., including the power to authorise the assessment and collection of taxes which they may deem necessary, on the private land claims within any levée district established by them; to cause the expenses of levéeing any public land included in such district, or other necessary work or expenses authorised by any ordinance, &c."

The grant of these unusual powers appears to have been rendered necessary by the peculiar topography of the parish, and the vast quantity of levées to be made across bayous, and over lands belonging at the time to the public domain. The police jury, in the exercise of them, have divided the parish into levée districts, and passed ordinances for the distinct assessment, in each district, of the taxes necessary to make and keep in repair the levées thereof.

Those districts were, until the year 1842, represented by three commissioners appointed in each by the police jury, with power to sue and be sued, and to execute the ordinances concerning roads and levées. When the assessments made by them for the erection of levées became final, they were to deliver them to the sheriff of the parish, who was directed to collect them, and to pay the proceeds into the hands of the parish judge. If the amounts assessed were not . paid on demand, it was made the duty of the sheriff to deliver the claims against the delinquents to the judge, who was directed to enter judgments upon them, and to cause those judgments to be satisfied out of the property of the said delinquents, by preference over all other claims. The ordinance under which the levée in this case was adjudicated had exclusive reference to the Rifle Point district, and provided for the assessment and collection on the inhabitants thereof of a tax sufficient to pay for the work. The contract sued upon was entered into with the commissioners of the district, and the bonds for its performance were given to them. One of them has testified that he never supposed the parish to be bound, and that soon after the work had been commenced, he apprised the contractors of the manner in which they were to be paid. They appear to have made no objection to this, and, when the work was completed and they had received a part of the sum due them in the manner contemplated by the commissioners, they transferred the remainder of their claim to James R. Kane, by an instrument which is in these words:

"Natchez, 16th March, 1838.

** To Messrs Charles Crosgrove, Walter Byrnes and Tobias Gibson, Commissioners of the Rifle Point levée district, of the parish of Concordia:

" Gentlemen :

"Please pay to Mr. James R. Kane the amount that may be due us as contractors, for such works as was completed by us upon said levée, upon a settlement of accounts.

Respectfully your ob't serv'ts,

" James Beahan.

his

" James ⋈ Riley.

mark,

" Witness, JAMES D. COYLE.

"JAMES SLATTEBLY."

SLATTERT ...

This transfer was accepted by the commissioners in the following words:

"Accepted, payable to Mr. James R. Kane, from the funds due by the Rifle Point levée district, for labor done by the within drawers, when collected."

The commissioners delivered to Kane, at his request, all the papers establishing the sums remaining due by the inhabitants of Rifle Point district, and after retaining them six years in his possession, without taking any steps against the delinquents, he assigned the transfer he held to the plaintiff, without warranty, and in consideration of the sum of \$70. That claim, while in his hands, was payable from the funds due by the Rifle Point levée district, and it is not easily perceived how it could give the plaintiff a claim against the parish.

This transfer and acceptance, taken in connection with the ordinance under which the contract was entered into, the testimony of Crosgrove, and the usual and authorised mode of paying for the erection of levées in the parish of Concordia, satisfy us that it was not in the contemplation of the parties, at the time, that the parish should be responsible in the first instance, and that, if any responsibility on their part has since accrued, it must have resulted either from the want of means in the Rifle Point district to pay the consideration of the contract, or from the omissions and negligence of the police jury in the collection of those means. The evidence sustains neither hypothesis.

It was the duty of Kane, after he received the transfer, to throw no obstacle in the way of the collection of the claims in the manner provided by the ordinance. Instead of this he undertook to collect them himself, and appears to have collected a part of them. It has been alleged in argument that he could not collect more, because the debtors refuse to pay on account of informalities in the advertising of the levées by the commissioners. The evidence does not establish that fact, and Kane himself contradicts it. He did not collect more because he did not follow the proper course; he did not cause the delinquents to be sued, and their property to be seized and sold. It is proved that the lands assessed were much more than sufficient to pay the tax, and the mode of collection provided by the ordinance was certain. If that security has been lost, the loss is to be attributed exclusively to the negligence of Kane, for which the police jury cannot be held responsible.

Judgment affirmed.

TUCKER V. THE AGRICULTURAL BANK OF MISSISSIPPI.

No decision will be given in an action against an absent defendant, where it does not appear from the record that the curator ad hoc appointed to represent him had accepted the appointment. The case will be remanded to be tried below contradictorily with the curator ad hoc.

A PPEAL from the District Court of Concordia, Curry, J. Frost, for the appellant. T. P. Farrar, for the opponents. The judgment of the court was pronounced by

SLIDELL, J. This litigation comes before us in a form so irregular, that we are unwilling to express any definitive opinion upon the rights of the parties, and must remand the cause for further proceedings.

The plaintiff obtained an order for executory process upon a judgment obtained in Mississippi. A curator ad hoc was appointed to represent the absent

defendants, but whether he accepted the appointment does not appear. He has made no appearance, either in the court below or in this court.

TUCKER V. AGRICULTURAL BANK.

This order of seizure is stated by the sheriff's return to have been levied on three promissory notes, drawn by one Jesse Guice, to the order of the bank, amounting to about \$8,000; but it appears from the sheriff's testimony that he never got possession of the notes. Pending the so called seizure, Brown, Brothers & Co. filed a third opposition, alleging that they had a privilege as pledgees upon the notes, and praying that the proceeds of the sale when made might be paid ever to them. They asked the citation of the plaintiff but not of the defendants. The plaintiff accepted service of this third opposition.

Soon after an adjudication of the Guice debt was made, at sheriff's sale, to James Brown, one of the third opponents, at twelve months' credit. This sale seems to have been irregularly conducted. The advertisement, so far as we can judge from the return, does not state whether the notes were protested at maturity, a matter of importance with reference to the question of interest, nor make mention of the mortgage by which they seem to have been secured. The appraisement was made by one appraiser, and the notes which this appraiser, named by the plaintiff, had estimated at \$8,000 and upwards, were struck off at \$2,020.

After the sale, the third opposition was tried without any representation of the defendants. There was judgment for the third opponent; the absent defendants were condemned to pay the costs, and the plaintiff has appealed.

Questions of great importance are presented in this irregular manner. The validity of a pledge in favor of Brown, Brothers & Co., to secure an indebtedness of \$500,000; the constitutionality, and effect, if constitutional, of a statute of Mississippi, inhibiting the transfer of their assets by the banks of that State; the validity of judicial sales of credits belonging to absentees, in the apparently loose and informal manner already noticed; and, in the discussion of subjects of so great importance to the absent defendants, they have been entirely overlooked.

The necessity that the bank should be a party to this litigation is too obvious to require comment, and demands that this cause should be sent back to the lower court to be there tried in a proper manner. If the curator ad hoc declines the appointment, the court should make a new one.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for a new trial, after due citation of the curator ad hoc already appointed, and for further proceedings according to law; the third opponents paying the costs of this appeal.

Smith et al. v. Smith.

The privilege given to overseers for their salaries by art. 3184 of the Civil Code, and that for necessary supplies furnished to any farm or plantation, are not included among those privileges which authorise a provisional seizure. A sequestration may be obtained whenever the creditor has a lien or privilege upon the property, on complying with the requisites of law, by previously giving bond, &c. (Act 7 April, 1836, s. 9. C. P. 276); but the writ of provisional seizure is restricted to certain enumerated cases of privilege, and issues without a bond.

SMITH.

A PPEAL from the District Court of St. Mary, Voorhies, J. This was an action to recover the amount of advances made to the defendant in cash, for the payment of the wages of his overseer, and the price of horses and oxen purchased for the use of his plantation, and for necessaries furnished for its use. The defendant's crep was provisionally seized, on the allegation that he was about to remove beyond the jurisdiction of the court, and that plaintiffs had a privilege on it. There was a judgment below in favor of the plaintiffs for the amount claimed, but no privilege was allowed to them, and the provisional seizure was set aside at their cost. The plaintiffs appealed.

Maskell, for the appellants. Plaintiffs are entitled to a privilege. C. C. 3184. Acts of 1843, p. 44. 6 Rob. 486. A provisional seizure may be sued out in all cases in which plaintiffs have a privilege, and they are not bound to give surety. C. P. 284. 7 Mart. N. S. 154. 5 Rob. 131.

T. H. Lewis, en the same side. No counsel appeared for the defendant.

The judgment of the court was prenounced by

SLIDELL, J. This case has been brought before us on appeal taken by the plaintiffs, who centend that the court below erred in setting aside a writ of provisional seizure, which was executed upon the defendant's crop. The crop was bonded by the defendant.

By a careful examination of the provisions of the Code of Practice, and the acts amendatory of it, it will be found that there is a distinction between the remedies of sequestration and provisional seizure. The former may be obtained by a creditor "in all cases where he has a lien or privilege upon property, upon complying with the requisites provided by law." Act of 7 April, 1826, § 9. One of these requisites is the condition precedent, of giving a bond to the defendant in the sequestration, with one good and solvent surety, residing within the jurisdiction of the court, in such sum as the court shall determine, to be responsible for such damages as the defendant may sustain, in case such sequestraition should have been wrongfully obtained. C. P. art. 276. The writ of provisional seizure is restricted to certain enumerated cases of privilege, which the law seems to have regarded with peculiar favor, and is permitted to issue without giving bond. The privilege claimed in the present case was that conferred by article 3184 of the Civil Code, and the amendatory act of 1843. Sess. acts, p. 44. It is not one of the privileges for which the remedy by provisional seizure is given, and the proper remedy was a sequestration.

Judgment affirmed.

RICHARDSON v. PUMPHREY.

Where the affairs of a partnership formed for the purposes of planting were exclusively managed by one of the partners, who also acted as an overseer of the plantation, his failure to keep any regalar account of his receipts and expenditures, will not be regarded as a badge of fraud, the education of such persons not generally qualifying them to do so.

Where one of the slaves put into a particular partnership was afflicted, at the time, with a chronic disease, of which he afterwards died, the partnership will not be chargeable with the loss. A stipulation in the contract of partnership that, in case any of the slaves should die, the owner should be paid therefor at the valution fixed by the articles of partnership, does not apply where the slave perishes by the badness of his quality.

A PPEAL from the District Court of St. Mary, Overlon, J. Maskell, Magill and Muse, for the plaintiff. T. H. Lewis, for the appellant. The judgment of the court was pronounced by

Rost, J. This suit is instituted for the settlement of a partnership, enter- RICHARDSON ed into in January, 1836, between the plaintiff and the defendant, for the purpose of planting. The plaintiff claims \$10,000, alleged to be due him by the defendant for his portion of the crop of sugar and molasses, and for the loss of slaves, who died during the partnership. The defendant denies the indebtedness, and alleges that he is not bound to pay for the slaves of the plaintiff who died during the continuance of the partnership, because they were unsound when they were put into it. The defendant has appealed from a judgment rendered against him for the sum of \$2,097 30, with legal interest from judicial demand, and he asks that it be amended in his favor.

The defendant was the sole manager of the concern, and as he has kept no regular account of his receipts and expenditures, the settlement between him and his partner can only be made by approximation. With men of a different class, we would be disposed to consider the omission to keep books as a badge of fraud; but it is not so with overseers and persons who follow their avocations. Their education does not generally qualify them for the task.

The calculation of the plaintiff's counsel as to the proceeds of the crops ap pear to us sufficiently accurate, and we will take those proceeds to have been \$20,003 57. The defendant has paid plantation expenses amounting to \$7,508 03, and the further sum of \$800, the value of the slave Viney, who died during the partnership, is, according to the terms of the contract, to be added to those expenses. The defendant has offered in evidence three notes given by the plaintiff for the price of the land on which the partnership was carried on. amounting together to \$7,400. The defendant had assumed to pay one-half of said notes, but he alleges that he has paid the whole, and claims the amount as a partnership debt satisfied by him. We think he has made out his claim. The notes are in his possession. Wm. B. Lewis, who received payment of the first, states that it was paid by the defendant. The account of Lane, Fontaine & Co. shows the second to have been satisfied out of the proceeds of the crops of the partnership, and it is not denied that the defendant paid the last.

The claim of the defendant for overseer's wages was properly rejected. He was bound, under the partnership agreement, to manage the place himself. The slave Dennard when put into the partnership by plaintiff, was afflicted with a chronic disease, of which he died. He perished by the badness of his quality, and the partnership is not bound to account for the loss. The sums for which the defendant is entitled to be credited, amount together to \$15,708 03, which deducted from the proceeds of the crops as already stated, will leave a balance of \$4,295 54, for one-half of which the plaintiff is entitled to a judgment, with interest from judicial demand.

It is therefore ordered that the judgment in this case be amended; and that the plaintiff recover from the defendant the sum of \$2,147 77, with interest at the rate of five per cent per annum, from the 1st April, 1841, until paid, and costs in both courts.

BIRDSALL, Curator, v. Bemiss et al.

The tortions conversion of the property of a succession by a commercial firm, will render the members liable in solido.

Where the pleadings and evidence are too incomplete to enable the court to pronounce a final judgment, the case may be remanded, with leave to the parties to amend.

BINDSALL 9. BYMIN. A PPEAL from the District Court of St. Mary, Boyce, J. Dwight, for the appellant. Gibbon, for the defendants. The judgment of the court was pronounced by

Rost, J. The plaintiff, in his capacity of curator of the estate of Wm.'S. Barr, claims from the defendants the sum of \$3,000, on account of acceptances and other obligations, as will be made to appear by reference to their books. The defendant R. B. Brashear alone answered, and filed a general denial. Judgment was rendered in his favor, and the plaintiff appealed. It has been stated in argument that the defendant R. B. Brashear was curator of Barr's succession, and that he took the notes and property of the succession, and put them into the firm of Bemiss, Brashear & Co., of which he was a partner.

Under the view taken by this court, in the case of the New Orleans Draining Company v. Lizardi et al., ante p. 281, the tortious conversion of succession property by the firm, would undoubtedly render the members of it liable in solido to the plaintiff. But the pleadings and evidence are too incomplete, to authorise us to render a final judgment. The petition gives no notice to the defendants of the nature of the claim, and he has not had a fair opportunity to disprove the grave charges which it implies. We think justice requires that this case should be remanded, with leave to both parties to amend.

The judgment is therefore reversed, and the case remanded for further proceedings, with leave to both parties to amend; the defendant and appellee paying the costs of this appeal.

BRASHEAR v. Hudson, Sheriff.

Where a house and lot, which had been for some time in the hands of the sheriff under seizure, and from which he had received an amount in money for rent, is advertised for sale, and sold "with all the rents and revenues accruing thereon," the advertisement must be considered as referring to the rents accruing after its date. The purchaser cannot claim the rent previously received by the sheriff, which was money in his hands to be credited on the execution. Per Ciriam: The object of judicial sales is to convert property into money. The sale by a sheriff of money in his hands under seizure, is a proceeding unheard of.

A PPEAL from the District Court of St. Mary, Boyce, J. Dwight, for the appellant. Gibbon, for the defendant. The judgment of the court was pronounced by

Rost, J. The sheriff of the parish of St. Mary advertised a town lot to be sold under execution, with all the buildings and improvements thereon, together with all rents or revenues accruing on it. The french advertisement says, "les rentes et intérêts en provenant." The lot had been at that time two years in the custody of the sheriff, and he had received rents upon it amounting to \$420 28. The lot, together with the improvements thereon, was valued by the appraisers at \$3,000; but they took no notice of the rents received by the sheriff. The plaintiff alleges that the property advertised was adjudicated to him by the sheriff for \$2,000, and he now claims from him the amount received for rent previous to the sale, together with twenty per cent damages per annum thereon, for the unjust detention of that sum. The defendant filed a general

denial, and the case having been decided in his favor in the court below, the plaintiff appealed.

BRASHEAR S. HUDSON.

The plaintiff has not produced the title under which he holds, but he has introduced witnesses to prove its loss, and also that the adjudication was in conformity with the advertisement. Supposing these facts to be established, he is not entitled to recover. The sums collected by the sheriff for rents were money in his hands, which he was bound to credit on the execution. The object of judicial sales is to convert property into money. But the advertisement and sale by the sheriff of money in his hands under seizure, is a proceeding unheard of.

The advertisements clearly referred to the rents accruing after their date.

The appraisers understood it so, and took no notice of the back rents.

If the judgment under which the property was sold has been satisfied, the defendant in execution may be entitled to recover the amount thus received by the sheriff. The plaintiff in this suit has no claim to it.

Judgment affirmed,

Nimmo v. Allen et al.

The title of a person who claims to be the owner of property cannot be contested by one who has no title to it.

Where the creditors of a vendor wish to annul a sale on the ground of fraud, they must resort to a direct action.

A right to be paid by preference out of the property of an insolvent, must be established contradictorily with the other creditors.

By a sale of a plantation with the improvements thereon, whatever is immovable by destination or the object to which it is attached, passes to the purchaser. Gathered corn, staves, materials for building which though upon the place and prepared for use have not been actually used, and furniture not permanently attached to the house, are moveables, and do not pass to the purchaser.

A PPEAL from the District Court of St. Mary, Voorhies, J. Dwight, for the appellant. Maskell, Splane, Simon, and Morphy, for the defendants. The judgment of the court was pronounced by

Rost, J. The defendants purchased at a sale, made under execution by the marshal of the United States, a plantation and slaves with the improvements thereon, and a sugar mill and kettles then on the land. The plaintiff now claims from them the restoration of certain moveable property, which she alleges was taken possession of by them under that sale, and converted to their use, or the value thereof. The defendants claim title under the marshal's sale. They allege that the sale under which the plaintiff claims is frudulent and collusive, and to the injury of creditors. They ask to be maintained in their possession. There was a judgment against the plaintiff in the court below, and she has appealed.

The plaintiff sets up no claim to the land, and the ascertainment of what passed with it under the marshal's sale, is the only question presented by this controversy. Unless the defendants have acquired a title to the property claimed they are without capacity to contest that of the plaintiff, while it is admitted to be valid by Edward L. Nimmo, her vendor. If that title was made in fraud of the creditors of Edward L. Nimmo, those creditors, or their repre-

NIMMO V. ALLEN. sentatives, must resort to a direct action to set it aside; and if the defendants are entitled, as they allege, to be paid by preference, that right must be established contradictorily with the other creditors of the insolvent. All that was immovable passed to the defendants, under the judicial sale of the land and improvements.

The Civil Code defines the things, which are immovable by their destination and the objects to which they are applied. C. C. arts. 454, 456, 457, 459. These dispositions of law include all the articles which the plaintiff claims, except the corn, the staves, and the building materials. These last are expressly excluded by art. 468 of the Civil Code.

Toullier, commenting upon a similar disposition of the french Code, says: "Les matériaux qui n'ont point encore été employés, quoique amenés sur le lieu, quoique taillés, conservent leur nature de meubles, jusqu'à ce qu'ils aient été employés et posés dans le batiment." 3 vol. no. 19. The same rule applies to household furniture not attached permanently to the house. In this case no furniture is claimed except a stove, which appears to have been attached to the house and in use.

The defendants have acquired no title to the corn, the hogshead staves, the covering boards and pickets, the grate bars, the cypress logs, the sugar house frame, the brick, the oyster shells, the coolers, troughs and the timber for a mill bed, not in use at the time of the sale.

The defendants have converted this property to their own use, and its aggregate value is proved to be \$566. For this sum the plaintiff is entitled to a judgment, with legal interest from the day of the conversion. See the case of the New Orleans Draining Company v. Lizardi et al., lately determined, ante p. 281.

It is therefore ordered that the judgment be reversed, and that the plaintiff recover from the defendants the sum of \$566, with interest at the rate of five per cent per annum, from the 19th September, 1844, till paid, with costs in both courts.

HILL v. Bowden et ux.

Where a plaintiff, who had obtained judgment against the defendant, appeals from a judgment in favor of an intervenor, but executes an appeal bond in favor of the defendant, the appeal must be dismissed. An affidavit that the failure to make the bond payable to the appellee was an error committed by the clerk in preparing the bond, will not entitle the appellant to relief. In such a case the clerk acts as agent of the party, and no relief can be given against his errors or omissions.

A PPEAL from the District Court of Madison, Selby, J. Snyder, for the appellant. Amonett, for the defendants and intervenor. The judgment of the court was pronounced by

King, J. The appellee has moved to dismiss this appeal, on the ground that the appellant has not furnished the bond required by law. The only appeal bond in the record is in favor of nominal parties. There is none in favor of the appellee Copley, the party really in interest. An affidavit has been filed, stating that a blank bond, signed by the appellant and a surety, was given to the clerk, to be by him properly filled up, and that the latter, through error, inserted in the blank the names of the nominal parties, instead of that of the party in interest.

HILL E. BOWDEN.

It is not the duty of the clerk to make appeal bonds, and when he undertakes to prepare them, he acts only as the agent of the parties, and not in his official capacity. We are not authorised to grant relief against his errors or omissions in such cases.

Taking an appeal by motion in open court, dispenses with citation of appeal or other notice to the appellee, but not with a bond in favor of the party against whom the appellant wishes to prosecute his appeal. Such party may insist on a bond, before being compelled to appear in the appellate tribunal and litigate with his adversary.

Appeal dismissed.

DAVIS v. HOOD.

Where the transcript of an appeal is not filed within three days after the return, and the failure does not result from any act or neglect of the clerk or other officer, the appeal must be dismissed. Such a case is not embraced by the act of 20 March. 1839, s. 19.

A PPEAL from the District Court of Carroll, Curry, J. Willson, Prentiss, Finney, Stacy and Sparrow, for the appellant. Thomas, for the defendant. The judgment of the court was pronounced by

King, J. The appellee has moved to dismiss this appeal, on the ground that the transcript was not filed on the day when it was returnable, nor within three days thereafter. The appeal was made returnable on the second monday of January; no extension of time was granted for bringing it up, and the record was not filed until the 11th of February following. The transcript was delivered to the plaintiff in ample time to have been filed before the day fixed in the order, and appears to have been mislaid, while in the hands of the counsel or commission merchants of the appellant.

The failure to file within the time fixed, has not been in consequence of any act or negligence of the clerk or other officer, and falls within none of the provisions of the act of 1839, which authorise us to give relief.

Appeal dismissed,

BARROW v. THE BANK OF LOUISIANA.

Where in a petition for an injunction to stay an order of seisure and sale, plaintiff acknowledges the existence of the mortgage on the land in controversy, but pleads prescription,
and praya, as a third possessor of the land, that the mortgagee may be condemned to discuss other mortgaged property, he will not be allowed to amend his petition by declaring
that the land had never been mortgaged. Such an amendment would be inconsistent with
the previous pleadings and the party's own allegations.

A purchaser of property, subject to a mortgage duly recorded, and containing the pact de non alienando, stands, with regard to the mortgagee, in the position of the mortgager, and can make no objection to a seizure and sale by the mortgagee which the mortgager could not make.

The question whether the directors of a bank, which was authorised by its charter to lend money upon mortgage on lands only where they are in a state of cultivation, have exceeded their authority by making a loan upon unimproved property, is one which concerns the State and the stockholders only. Third persons cannot set up the objection, that the loan for which the mortgage was given, being on unimproved property, was illegal.

BARROW BARK OF LOUISIANA. The statutes of 25 March, 1831, s. 3, and of 29 March, 1833, s. 3, are importative, as to the condemnation of the plaintiff and surety to the payment of "interest at the rate of ten per cent a year on the amount of the judgment," on the dissolution of an injunction arresting the execution of a judgment. The court has no discretion as to the allowance of interest.

A PPEAL from the District Court of West Feliciana, Boyle, J. Paterson, for the plaintiff. Bowman and Ratliff, for the appellants. The judgment of the court was pronounced by

SLIPELL, J. In the year 1836, the Bank of Louisiana took a mortgage from one Overbay, upon a tract of land described as follows: "A certain tract of land and plantation, situated in the parish aforesaid, in Barker's settlement, on Dry bayou, containing 640 arpents, with the improvements thereon and thereto belonging; bounded on the north by vacant lands, on the north-east and east by lands belonging to William Barker's estate, vacant lands, and the estate of Joseph Young; on the south-east and south, by vacant lands and Dry bayou; and on the north-west by vacant lands; being the same tract of land and plantation on which Matthew Joiner lately resided." The mortgage contained the pact de non alienando.

In 1838, Overbay sold this tract of land to one Purl, and in this deed the vendor declared that the land was subject to the above mortgage to the Bank of Louisiana. The date of the notarial act of mortgage was recited, and the vendee reserved the right of applying his instalments of price to its payment. In the same year Purl sold to Varney, by an act in which the purchaser waives the mortgage certificate, required by the Code to be obtained by the notary. The deed from Overbay describes the land as a tract of 640 acres, or thereabouts, fronting on Dry bayou, &c.; the deed from Purl to Varney describes it as a tract fronting on the river Mississippi, containing 640 acres, "being the same bought by Purl of Overbay."

In 1841, one Slaughter, upon an execution against Varney, caused to be seized and advertised a tract of land described in the marshal's returns as, "Varney's upper Barker place, adjoining the upper side of the Young place, and contain ng 640 acres, or thereabouts, together with all the buildings and improvements thereon." In the marshal's deed the land thus sold is described as a certain tract or parcel of land containing 640 acres, or thereabouts, lying and being situated in that part of the parish of West Feliciana, known as Barker's settlement, and bounded as follows: "On the upper or north side, by vacant lands, or lands belonging to Wm. D. Ray; on the east aide, by vacant lands; on the lower or south-east corner, by the lands formerly owned by Robert Young, deceased, and known as the Young place, fronting on Dry beyou, and lying near the Mississippi river."

Joiner died before the mortgage was given to the bank. The tract of land on which he once lived fronted on the Mississippi, and was quite dissimilar in form and boundaries to the property in question. The accuracy and correctness, in the main, of the boundaries set forth in the bank's mortgage, as compared with those of the land claimed by the plaintiff, are not questioned by the plaintiff, and the evidence in the case satisfies us that Overbay mortgaged, and that the plaintiff bought, the same tract.

The principal argument advanced by the plaintiff, to sustain the injunction taken out by him to restrain the order of seizure by which the bank attempted to enforce its mortgage, is founded on an alleged misdescription in the act of mortgage, to wit, that the land is described as the same tract of land, or plan-

tation, on which Matthew Joiner lately resided; whereas the evidence adduced at the trial shows, that Joiner never resided on this tract, but on another tract about a mile and a half distant; that the land was not in cultivation when mortgaged by Overbay; and that one of the boundaries is erroneously stated to be the lands of William Barker.

BARROW U. BANK OF LOUISIANA.

What might be the effect of these variances as against a subsequent bond fide purchaser, under other circumstances than those presented in this controversy, it is unnecessary now to consider; the plaintiff is completely estopped, by his own petition, from raising any such objections. The petition formally recites his chain of title, as above stated, from Overbay, Purl, and the marshal's sale, giving the dates of the several notarial acts and marshal's deed, thus identifying the lands as the same mortgaged to the defendants; declares that they have been seized at the suit of the bank; pleads prescription of the bank's claim; asserts himself to be a third possessor as regards the bank; declares that, besides the mortgage of the land so seized, the bank has also a mortgage upon certain slaves, which it should first discuss, and to which discussion he, as a third possessor, is entitled. There is not only no denial that the bank had a mortgage on the land seized, but a substantial averment that it had such mortgage; nor is there an approach to an averment that Barrow, when he bought, was ignorant of the bank's mortgage.

This petition, so far as the bank's original right of mortgoge was concerned, should have been dismissed on the party's own showing. In fact the only possible pretext for an injunction, upon the face of the petition, was the charge of prescription, and the claim of discussion, which we will hereafter consider.

This petition was filed, and an order of injunction obtained, in December, 1844, but not served on the bank till March, 1845, up to which time the cashier, upon whom it was served, deposes, that he had no knowledge of the order of injunction. After obtaining the order, the plaintiff had a conversation with the cashier, in which he urged him to have the negroes sold, and on frequent occasions told him that he would pay the bank's debt, if the negroes were sold. The reason assigned by Barrow was, that the negroes might be carried off; an apprehension which, it appears, was subsequently realised; the bank, however, declined to enforce a sale of the slaves.

On the 9th of December, 1845, being about one year after the original petition for the injunction was filed, after issue had been joined and the cause fixed for trial, the plaintiff obtained leave, notwithstanding the opposition of the defendants, to file an amended petition, in which he avers that the land seized had never been mortgaged to the bank, and that he had not discovered this fact until the previous day. This amendment should not have been permitted. It was utterly inconsistent with the previous pleadings, and the party's own allegations.

The party, being fully estopped by his own judicial acknowledgments from disputing the original validity of the mortgage to the bank, it remains to consider the effect of the refusal and neglect of the bank to enforce its mortgage upon the slaves. The bank held a mortgage, with a pact de non alienando. By reason of this fact, duly recorded, Barrow stands in no better position than did the original mortgagor. Overbay could not dictate to the bank the prior enforcement of its mortgage, by the sale of the slaves; much less avail himself of the fraudulent withdrawal of that portion of the mortgage property. Barrow, claiming title through Overbay, is precluded by this fact from raising any such objection.

BARROW OF LOUISIANA

See Donaldson v. Maurin, 1 La. 39. Nicolet v. Moreau, 13 La. 315. Murphy v. Jundot, 2 Rob. 379. The plaintiff could have acquired a recourse upon the slaves, by paying the bank, and thus obtaining a subrogation.

That the bank was required by its charter to loan upon mortgage of improved lands, is an objection which the plaintiff is not permitted to raise. It is a question of duty, which concerns the State and the stockholders. The plea of prescription is not tenable under the evidence.

Under the imperative terms of the acts of 1831 and 1833, we are obliged to grant the defendants in injunction, interest; but considering the indifference they have exhibited with regard to the prompt enforcement of their rights, we shall exercise the discretion permitted by the statute, and refuse damages.

It is therefore decreed that the judgment of the court below be reversed; that the injunction be dissolved, and the defendants permitted to proceed in the execution of the order of seizure and sale; and it is further decreed that the defendants recover of the plaintiff, and of David Barrow, his surety in injunction, the sum of \$1.015 13, as interest on the amount of the judgment enjoined, from the date of service of the injunction till the disselution thereof, this day; and that the plaintiff pay the costs in both courts.

THE LOUISIANA STATE BANK v. HARALSON et al.

Where judgment has been obtained against the maker and endorsers of a note, an agreement to suspend execution for a short time against the maker, will not discharge the endorsers.

A judgment is not extinguished by the lapse of ten years.

A PPEAL from the District Court of West Feliciana, Boyle, J. Ivor, for the appellants. Haralson, for the defendants. The judgment of the court was pronounced by

King, J. The plaintiff obtained a judgment against Haralson, as the maker, and Pope and Young as the endorsers, of several promissory notes. A part of the judgment was paid. Young subsequently died; and the plaintiffs have taken this rule upon his widow and heirs, who have accepted his succession, to show cause why the judgment should not be rendered executory against them, and they be condemned to pay each their virile portion of the debt. In answer to this rule they plead the prescriptions of five and ten years, and further aver that they have been discharged from liability to pay the debt, by the act of the plaintiffs in granting indulgence to the principal debtor, Haralson. The rule was discharged in the court below, and the plaintiffs have appealed.

Upon the judgment obtained by the plaintiffs, an execution was issued against the defendants. Haralson thereupon requested the plaintiffs' attornies, by letter, to suspend the execution of the writ for a few days, and promised, if this indulgence were granted, to satisfy the debt. The plaintiffs' attorneys, upon the receipt of this application, addressed the following note to the sheriff: "The sheriff will please file this letter, and give a stay of one week or seven days, believing that Mr. Haralson will comply with the promise contained above, and that, if he does, it will be best for the bank."

HARALSON.

This indulgence to the principal debtor, it is contended, has discharged the defendants, whose ancestor was the endorser of Haralson. The authority of Stats Bank the attorneys to grant the delay has been brought in question by the plaintiffs, but it does not become necessary to enquire whether or not they exceeded their powers; for if the indulgence had been specially authorised by the plaintiffs, still it would not have operated the discharge of the defendants. "Even a valid agreement to give time to the maker, or to a prior endorser, will not discharge a subsequent endorser, or affect the rights of the holder, when the indulgence is granted, or agreed to be granted, after such subsequent endorser has been fixed with a final judgment against him on the note, at the suit of the holder." Story on Prom. Notes, § 417.

The prescriptions pleaded can not avail the defendants. Judgments are not extinguished by the lapse of ten years.

The judgment of the District Court is therefore reversed. It is further ordered that the defendants in the rule pay each their virile portion of the sum remaining due upon the judgment obtained by the Louisiana State Bank against Haralson, Pope and Young, in the suit numbered 464 of the District Court of the parish of West Feliciana; the appellees paying the costs of both courts.

THE COMMERCIAL BANK OF NATCHEZ v. KING.

Where by making a loan in depreciated bank notes to be repaid at their par value, the effect of the contract will be to enable the lender to obtain more than legal interest, the contract is usurious.

The effect of a stipulation for usurious interest must be determined by the law of the place where the contract was made.

PPEAL from the District Court of Concordia, Curry, J. T. P. Farrar, A for the appellants. Frost, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon a note, drawn by the defendant to the order of the plaintiff. It has endorsed upon it a credit, as of January 5th, 1839, of \$1,308 72.

The defence rests upon the alleged usuriousness of the contract, and a claim also that there should be a credit for a much larger amount, to wit: the entire proceeds of certain cotton placed by the defendant under the control of plaintiffs, a portion of which the plaintiffs contend was properly appropriated to another note.

The jury found a verdict for the plaintiffs for \$1,460 04, with interest. from the date of the alleged credit. There is strong reason to suppose that they arrived at this result, by applying the proceeds of the cotton entirely to this note. The evidence on the point of imputation is not satisfactory to our minds; and we think justice requires that this cause should be remanded, that this matter of imputation may be unequivocally ascertained.

The loan being made in depreciated bank notes was usurious*. The amount of depreciation of the notes so given below the standard of lawful coin should

^{*}The notes were proved to have been, at the time of the loan, from ten to twelve per cent below their par value.

Commenced be deducted from the face of the note, also the interest embodied in the note. Under the statute of Mississippi, where this contract was made, no interest whatever is recoverable upon a contract tainted with usury; and, in allowing interest, the jury erred.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for a new trial, and for further proceedings according to law; the defendant paying the costs of this appeal.

MORRIS v. TERRENOIRE.

Fraud may in all cases be proved by parol. C. C. 1842.

PPEAL from the District Court of East Baton Rouge, Boyle, J. Elam, for the plaintiff. Brunot, for the appellant. The judgment of the court was pronounced by

Rost, J. The facts of this case are fully stated in the opinion of the late Supreme Court, rendered on a former appeal, and reported in 10 Robinson, 33. The Supreme Court reversed the judgment rendered on all the issues then presented, and gave the following reasons for remanding the case:

"A close examination of the evidence has left us under the impression, that nothing sustained the charge of fraud against the defendant. The person on whose description the notary and the plaintiff acted in the confection of the deed, does not appear to have been authorised to represent the defendant. Neither can we concur in the opinion of the judge, that there was error on the part of the plaintiff. This appears to us doubtful, and justice seems to demand that he should be afforded the opportunity of adducing further proof."

On the return of the mandate the plaintiff filed an amended petition alleging, that Jacques Beauregard, the person who gave to the notary the description of the property, was the son of the defendant and her accredited agent, and that he was authorised by her to designate the lots to be transferred; that, after the two lots in controversy had been examined by the plaintiff, the defendant was told, in presence of her son Jacques, that the two lots claimed had been pointed out to the plaintist as belonging to her; that they had been accepted by him as a part of the consideration for the property in New Orleans; and that she expressed herself as being entirely satisfied with the acts

This petition prays that Jacques Beauregard be made a party to the suit, and condemned in solido with the defendant, to pay one thousand dollars as damages; and further, that such judgment should be rendered on the original petition as the nature and justice of the case may require, and for a trial by jury. The court refused to permit Jacques Beauregard to be made a party defendant, and Constance filed a general denial, and averred that Jacques Beauregard never did act as her agent for the purposes stated by the plaintiff.

In the course of the trial, the plaintiff offered parol evidence to establish the agency of Jacques Beauregard, and to show the nature of the contract between the plaintiff and the defendant. The defendant's counsel objected to the reception of the testimony, on the two following grounds: 1st. That this

suit is in the nature of a petitory action, in which the plaintiff seeks to compel the defendant to convey to him certain lots, and that no parol evidence could TERRESOIRE. be received. 2d. That the evidence was not admissible even to prove damages, in the present action.

The plaintiff having desisted from his claim for the conveyance of the two lots, the court received the testimony for the purpose of sustaining the claim for damages. This evidence was properly admitted. The plaintiff charges fraud against the defendant, and fraud can always be proved by parol evidence. C. C. 1842. or with the sounder, interest that wenter to

The plaintiff introduced evidence in support of the allegations in the amended petition, and the jury found in his favor five hundred dollars damages.

The defendant moved for a new trial, and supported her motion by an affidavit of her counsel, that he was taken by surprise during the trial, by the abandonment of the claim for the lots by the plaintiff; that, if he had been apprised of that course, he would have advised the defendant to have been better prepared to establish the true value of the lots. The court overruled the motion, and the defendant has appealed from the judgment rendered against her.

The questions presented to the jury by this case were peculiarly within their province; and, after a careful perusal of the evidence, we are not prepared to say that they have not done justice between the parties. Whether they considered that there was fraud on the part of the defendant, or error on the part of the plaintiff, we have no means of ascertaining. Under the evidence adduced, either view justifies the verdict.

There is nothing in the objection that the defendant was taken by surprise. The prayer of the plaintiff was originally in the alternative, and the situation of the defendant was not made worse by the abandonment of one of the remedies prayed for. Judgment affirmed.

In one 10 of shoot sale and country have sell puly made of DWIGHT et al. v. CARSON, Administrator.

A purchaser, disturbed in his possession by the institution of a sait, cannot require security for any portion of the price which has been paid. C. C. 2538.

Where a party ordered to give security before taking out execution, executes a bond, with surety, for a certain sum, but, on an objection to the bond as not for a sufficient amount, executes a second bond, with the same obligors, for a further sum, the mere fact that two bonds were given instead of one will not authorize an injunction.

A debtor of an insolvent succession cannot plead in compensation, judgments against the succession acquired by him since he became its debtor. His claim under such judgments can only be paid contradictorily with the other creditors of the succession, and partially, or in full, according to its rank. C. C. 1056.

PPEAL from the District Court of St. Mary, Boyce, J. W. C. Dwight, A for the appellants. Simon and Morphy, for the defendant. The judgment of the court was pronounced by

Kine, J. The plaintiffs were sued by the administrator of Johnson for the residue of the price of the slave Isabella, and resisted the demand on the ground that the slave was entitled to her freedom. A judgment was rendered against them, in solido, for \$131 88, which on an appeal to the Supreme

Dividire

Court, was affirmed; but the administrator was required, before issuing execution, to give the plaintiff, W. C. Dwight, security against the consequences of a suit then pending in which the slave claimed her liberty. The case is reported in 5th Robinson's Reports, p. 484. In pursuance of this decree, Carson, the administrator, filed with the clerk of the court a bond for \$131-88, and issued an execution upon the judgment, which was enjoined on the ground, among others, that the bond was for an insufficient sum, and the injunction was summed. An additional bond, with surety, for \$50, was then filed by the administrator, and a second execution was issued, which has been enjoined in the present action, on the grounds: that the bonds furnished are imadequate to secure the plaintiff, W. C. Dwight, against the event of evetion; that the bonds were not tendered to him, but were filed with the clerk, of which he received no notice, previously to the issuing of the execution. He further pleads in compensation, two small judgments against the administrator. The injunction was dissolved in the court below, and the plaintiffs have appealed.

The slave was adjudiented to the plaintiff, W. C. Dwight, for \$700, and he insists that, under the decree of the Supreme Court, he has a right to demand security for the reimbursement of the entire price, in the event of eviction. To this he is clearly not entitled. He had paid the first instalment, and, on a seizure and sale of the slave, \$232 62 had been made, and applied towards the second instalment. These payments having been made previous to the disturbance, he was not authorised to demand security as regards them. Civil Code, art. 2538.

The bonds filed were for a sufficient sum to cover the amount for which the administrator was bound to give security, and we think there is no weight in the objection that two bonds were given instead of one. The obligors in both were the same, and the second was given as an additional security, upon the complaint of the plaintiff, W. C. Dwight, that the first was insufficient.

This plaintiff complains that the bonds were not formally presented to him, and that no opportunity was afforded of objecting to their sufficiency, or of paying the debt without the further accumulation of costs, if he had deemed them adequate. It is clear that he was aware that the bonds had been filed when he obtained his injunction, and yet he made no objection that the surety offered was not possessed of the qualifications required by law. If that objection had been taken and sustained by proofs, his injunction must have been sustained; or, if he had deemed the security sufficient, and paid the debt, he could not have been taxed with the costs of an execution which issued previous to notice, or a tender of security. The plaintiff was exposed to no loss which required that the execution of the judgment should be suspended, in order to protect his rights.

The two judgments held by W.C. Dwight cannot be allowed as offsets against the defendant's demand. Carson claims as the administrator of a succession which the plaintiffs themselves aver to be insolvent, and both of the judgments which Dwight offers in compensation were acquired long after he became the debtor of the succession. His claim can only be paid contradictorily with the other creditors. Crain v. Baillio, 2 La. 84. Civil Code, art. 1056.

to the property of the course of the course

Judgment affirmed,

THE BANK OF TENNESSEE v. McKEE.

An appeal from a judgment rendered in an action instituted by plaintiffs for the use of third persons, will not be dismissed because the appeal bond was made payable, and the citation of appeal directed, to the plaintiffs, simply, without mentioning those for whose use the suit was instituted.

An appeal will lie from an order of a judge rendering a judgment of another State executory, though not made in court.

A judgment of another State cannot be rendered executory here, where the transcript of the record shows that a f. fa., issued on the judgment in the State in which it was rendered, had been levied upon property, but does not show what disposition was made of it.

A PPEAL from the District Court of Madison, Curry, J. Amoneti, for the plaintiffs. Shannen, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The proceedings in this cause are in the name of the Bank of Tennessee, and although it is stated in the plaintiffs' petition, that the plaintiffs prosecute for the use of Folkes, and J. J., and William Amonett, yet we are of opinion that a bond given and a citation issued to the plaintiffs was sufficent to bring the case by appeal before this court. The decree which forms the subject of this controversy was a decree rendering executory a judgment obtained by the bank in Tennessee, against McKee and others. Folkes and the Amonetts are not named as petitioners in the petition. It is filed in the name, and as the petition, of the bank, but contains an averment that the bank sues for the use of those persons. The decree of the court below, after reciting that the plaintiffs sue for the use of Folkes and the Amonetts; orders that the judgment rendered in Tennessee be made and adjudged executory in this State, and that the property of McKee be seized and sold to pay the plaintiffs; There was no express appearance of the usees in the cause, in the court below; but they appear here to move the dismissal of the appeal, upon the ground that they have not been cited, and that no bond has been given. We think the ground for dismissal insufficient.

They also ask the dismissal upon the ground, "that there is no law authorising an appeal from the executory process, or from any other decree granted by the judge at chambers; that the only remedy is by injunction to bring the matters before the court, from the decision of which an appeal may be taken." This ground also is insufficient. A decree rendering a foreign judgment executory, is a final decree. The case, in this respect, is not distinguishable from an order of seizure and sale. See McDonogh v. Fort, 14 La. 350.

In the decree rendering the judgment executory there is error. The transcript of the record of the suit in Tennessee shows that a fieri facias had issued, and levies had been made upon various lands; but it is not shown what disposition had been made of the property levied upon. It is impossible to say, upon the evidence, what amount, if any, is due upon the judgment.

It is therefore decreed that the judgment of the court below rendering executory the judgment rendered in Tennessee in favor of the said bank of Tennessee against McKee, Young & Co. et al., be reversed and set aside, and the said sait dismissed, with costs in both courts.

BALPH, Administrator, v. Hoggatt.

An appeal will not be dismissed where the bond, though insufficient for a suspensive, is large enough for a devolutive, appeal.

Legal interest is due from maturity, and without putting the maker in default, on a note given for the price of property producing fruits. C. C. 2531.

A PPEAL from the District Court of Madison, Selby, J. A. Pierse, for the plaintiff. Shannon, for the appellant. The judgment of the court was pro-

SLIDKLI, J. There is a motion to dismiss the appeal in this case, on the ground that the appeal bond is not for the amount required by law. The order of appeal was, that a suspensive appeal be granted to the defendant, upon entering into bond with surety, conditioned according to law, in the sum of \$1,500. The appellant gave bond in the sum of \$1,500. This sum we find on calculation to be for about \$13 less than it should have been, to authorise a suspension appeal.

We do not think this mistake of the judge a ground for dismissal. The bond was ample to authorise a devolutive appeal. It would be an unjust imposition of trouble and expense upon the appellant, to dismiss the appeal, or even to hold up the case until he could correct the irregularity in the court below. The appellee is not injured, for it is a much larger bond than would be necessary for a devolutive appeal, in which light we regard it. See Parks v. Patton, 9 Rob. 167.

The alleged failure of consideration is not proved, and judgment was correctly rendered for the amount due on the note. We find, however, nothing to authorise the allowance of eight per cent interest. The plaintiff is entitled to five per cent, and this without a putting in default, because it was the price of property producing fruits. Civil Code, art. 2531.

It is therefore decreed that the judgment of the District Court be so amended, as to allow interest only at the rate of five per cent per annum from the 16th January, 1846, and that, in all other respects, the said judgment be affirmed; the plaintiff paying the costs of this appeal.

and public or section of a large in prompter as Spirit, the

As allegas among the same and t

Beyan v. Atchison.

meters in a final corner. The come in this copies, A to a like opposite the factor

cetters in course from the decision of surject an applical offs he before

Where all the heirs of a succession are minors, their tutor may, as such, administer the succession, and sue for the sale of the property. The decree for the sale will be binding upon the heirs and creditors. Per Curiam: By the dispositions of the Civil Code, when the heirs claimed time to deliberate, an administrator was to be appointed in all cases; and when the succession was afterwards accepted with benefit of inventory, the administrator was to continue in his functions, and to settle the succession. But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed in such cases, if any of the creditors of the succession require it; and this we take to be the rule now in force, as being the last expression of legislative will. C. P. 976.

Where a judgment has been rendered between proper parties and by a court of competent jurisdiction, the truth of the facts upon which it rests cannot be inquired into collaterally. Where the demand of an intervenor does not grow out of the principal action, and is not specially permitted by law, it must be dismissed. C. P. 338.

BRYAN P. ATCHISON.

A PPEAL from the District Court of Carroll, Mayo, J. The facts of this case are stated in the opinion of the court, infra.

Dunlap, Snyder and Bullard, for the plaintiff. The warranter sets up title by a forced alienation from Neibert's estate to Wilkins, made April 8th, 1842, resulting from a judgment of the Court of Probates, and sale in pursuance thereof.

This title, and the judgment or decree upon which it is founded, are opposed by us as absolutely null and void. 1st. Because the decree of sale was ex parte, and without notice to any one as representing the succession, and was not a judgment. 1 Mart. N. S. 9. 5 lb. 446. 19 La. 354. 14 La. 17. 2d. The judgment in favor of Wilkins is a nullity as affects the succession or creditors of Neibert, because there was no defendant authorised to represent the succession or creditors. 10 La. 222. 1 Kent. 261. 5 Rob. 420. 3d. An administrator must be appointed in every succession accepted with benefit of inventory. 9 Rob. 141. C. C. arts. 1034, 1037, 327, 1051. 6 La. 207. 17 La. 149. C. P. 976. 18 La. 396. 11 Rob. 69. 4th. Administrators must give bond, 11 La. 134. 11 Rob. 407. A tutrix, as such, could not stand in judgment. 17 La. 149. 11 Rob. 69. She may be appointed administratrix, but must give bond. 1051 C. C. 963. A administrator must be a resident of the State. C. P. 990, 995-6-7. 5 La. 386. 6 Mart. N. S. 521. 4 La. 202. C. C. 1036. 1 Rob. 235, 261, 268. Forced alienations are void without legal formalities. 2 La. 328. 11 M. 610. 3 La. 427. 4 La. 150. 9 La. 543.

A tutrix, as such, cannot stand in judgment in an action for the sale of the property of the minors. A sale made under a judgment obtained in such a case will not be binding on the heirs or creditors. C. C. 1037, 1041, 1042. Tildon v. Dees, 1 Rob. 407. Hall v. Parks, 9 Rob. 138. Parks v. Patton, 9 Rob. 167. Beale v. Walden, 11 Rob. 69.

Thomas, for the defendant.

R. N., and A. N. Ogden for the intervenors, contended that the sale at the suit of the tutrix was legal, citing Erwin v. Orillon, 6 La. 212. Poultney's Heirs v. Cecil, 8 La. 4. Jacobs v. Tricou, 17 La. 106. Civ. Code, arts. 934, 935, 936, 939.

Stacy and Sparrow, for Chambliss, cited in warranty.

The judgment of the court was pronounced by

Rost, J. James Campbell Wilkins and Joseph Neibert, were joint owners of a plantation and slaves, and Wilkins was a creditor of the partnership for a large sum. Niebert died, leaving a wife and three minor children. Sarah Bryan, the widow, was confirmed as natural tutrix, and an under-tutor was appointed. A family meeting, convened to deliberate on the interests of the minors, was of opinion that it was materially for their interest and advantage, that the succession of their father should be accepted in their behalf, under the benefit of an inventory; and, with the authorisation of the judge, it was so accepted by the tutrix. Wilkins instituted an action against the succession of Joseph Niebert, for a partition of the partnership property, and a settlement of accounts, and caused a curator ad hoc to be appointed to represent the tutrix, who resides, with her children, in the State of Mississippi. Wilkins having subsequently been apprised that the tutrix had appointed an agent to represent her in this State, presented a supplemental potition, asking that he might be cited. This was done, and the agent appeared and defended the suit.

The court, after hearing the parties, gave judgment against the succession of Joseph Niebert, represented by Sarah Niebert, tutrix, for the sum of \$77,000, and it having been made satisfactorily to appear that the tutrix had no funds in BRYAN C.

her hands belonging to the succession, and that a sale of Niebert's interest in the plantation and slaves was necessary to satisfy this judgment and such other debts as the succession might owe, the court, on the petition of Wilkins, ordered the property to be sold. The sale was made by the judge, and the undivided half of the plantation and slaves was adjudicated to Wilkins, at public auction, for a sum greater than its appraised value. The purchaser obtained a monition, and, after the usual advertisements, a decree ratifying the sale was obtained without opposition. Wilkins subsequently sold the whole plantation and slaves to the defendant. This sale took place on the 20th of April, 1842.

On the 21st of November, 1845, the plaintiff was appointed administrator of the succession of Niebert, and, on the next day, instituted the present action to avoid the probate sale, on the grounds that the tutrix had not given surety as administratrix; that, in her capacity of tutrix, she could not administer; and that the succession was not represented in the suit of Wilkins, under which the sale took place. He claims the undivided half of the plantation and slaves, and of the crops made upon the plantation since the opening of the succession. The defendant called in his warrantors, and left to them the defence of the suit, claiming against them his legal rights, in case of eviction. Several banks of the State of Mississippi, who were the holders of the notes given by Atchison to Wilkins for the price of the plantation, having been notified of the proceedings by Atchison, intervened, and joined in the defence, asking, at the same time, judgments in reconvention against him, upon such of the notes in their possession as were due at the time.

There was a final judgment against the plaintiff in the first instance, and a judgment of non-suit against all the intervenors, but Jacob Surget, who, we are informed in argument, obtained a judgment against the defendant for the amount of his claim, although this fact does not appear in the record. All the parties cast have appealed.

It seems to have been conceded on both sides in argument, that the legal question upon which this case turns is, whether, when all the heirs in a succession are minors, their tutor may, as such, administer the succession, and has capacity to stand in judgment in a suit for the sale of the property, so as to make the decree of sale binding upon the heirs and creditors. The warrantors, relying upon the case of *Erwin* v. *Orillon*, 6 La. 213, in which the Supreme Court held that, under art. 327 of the Louisiana Code, the administration of the succession which gave rise to the tutorship, devolved upon the tutor; the plaintiff resting his case on the decisions of the same court in *Self* v. *Morris* and other cases, where it has been held that a succession accepted in behalf of minors cannot be said to be their property; that it does not legally come to their possession, until it has been administered upon; and that only what remains after the payment of its debts, belongs to the minors, and falls under the administration of their tutor.

A succession is a fictitious being, representing the rights and charges which a person leaves at his death, and in neither case the person of the deceased. All persons having rights against it must have a remedy to enforce those rights. Whether the title to so much of the property of the succession as is necessary to pay the debts, vests in the creditors absolutely, or whether the whole property of the succession is acquired by the heir, and stands in his hands as it did in those of the deceased, the common pledge of the creditors, are questions of

little practical utility, so far as the creditors are concerned. Upon either aypothesis, the debts must be paid. BRYAN 9. Atchison

It is true that, under the dispositions of the Civil Code, when the heirs claimed the term to deliberate, an administrator was to be appointed in all cases; and when the succession was afterwards accepted under the benefit of an inventory, the administrator was to continue in his functions, and to settle and liquidate the succession. But the Code of Practice, subsequently adopted, provides that an administrator shall be appointed in such cases, if any of the creditors of the succession require it; and this we take to be the rule now in force, as being the last expression of legislative will, and having moreover the advantage to be founded in reason, and to harmonise with other dispositions of the Code of Practice relating to the administration of successions. C. P. art. 976.

It is not pretended that any creditor in this case ever required the appointment of an administrator, and the Judge was not bound to appoint one; so that, if the tutrix did not represent the succession, creditors could not enforce their claims. The law has not left without a remedy persons, who being thus situated, are either unwilling or incapable to be administrators, or unable to give the security required. Art. 120 of the Code of Practice provides in what manner, and against whom, suits are to be brought in such cases. Art. 25 of that Code goes so far as to give a direct action against the heirs, for the reparation of injuries caused by the crimes or misdemeanors of the deceased; and, in cases where the heir is not personally responsible, because he has accepted the succession under the benefit of an inventory, art. 992 gives the creditor the right to cause so much of the property of the succession as is necessary to satisfy his claim, to be sold. Art. 1370 of the Civil Code gives creditors the right in all cases, to cause the property of the succession to be kept distinct and separate from that of the heirs. All these articles would be inoperative, if successions were in all cases to be administered by administrators.

Wilkins, in his suit against the succession, has substantially complied with these dispositions of the Code of Practice. The proceedings appear to have been conducted in good faith, and there cannot be a doubt that the succession of Niebert was properly represented. The judgment having been rendered between proper parties and by a court of competent jurisdiction, the truth of the facts upon which it rests cannot be enquired into collaterally; and the informalities alleged to have taken place in the subsequent proceedings, were all cured by the monition.

There is no error in the judgment of non-suit against Mandeville, Montgomery, and Walworth, claiming to be assignees of the Planters Bank, and Robeson, claiming to be trustee of the Commercial Bank.

Supposing, for the sake of argument, the capacity of those persons to have been shown, their demand does not grow out of the action, and is not specially permitted by law. C. P. art. 328.

The defendant, by leave of the court, abandoned that portion of his answer which claimed a recision of the sale from Wilkins to him, on account of want of title to the three school lots. After this abandonment, his interest, and that of the banks, in the principal demand, were identical. There was no contestatio litis between them, and the banks cannot create one, under color of a reconventional demand, as they have attempted to do. The only issue in the case was the validity of the probate sale, which we have just recognised.

Judgment offirmed.

McCullough et al. v. Minor, Executor.

In an action for the partition of a succession, the absent heirs are properly represented by a curator. C. C. 1129, 1238.

A hond fide purchaser at a judicial sale is protected by the decree. He is not bound to look beyond it.

Uninterrupted possession, under a just title, for more than ten years, of property purchased at the sale of the effects of a succession, is sufficient to prescribe against the claims of the heirs. C. C. 1024.

For the purposes of prescription, successions now represent, as they did under the Code of 1808 and the Homan law, the person of the deceased, so long as the heirs fail to assert their

PPEAL from the District Court of Concordia, Farrar, J. The facts of this case are stated in the opinion of the court, infra.

Frost, for the plaintiffs. The land sued for did not belong exclusively to the succession of Joseph Harrison. One half belonged to his wives; and no partition could be made without making their heirs parties, by the appointment of curators for the express purpose. C. C. art. 1291. The heirs should be cited, not the administrator. C. P. 1024, 1025. Even the names of the absent heirs are not given; nor was the counsel of the absent heirs cited. Prescription cannot be urged against the successions of the wives. Calvit v. Mulhollan, 12 Rob. 261.

Thomas, on the same side. The decree under which defendants claim was a nullity. The number and names of the parties between whom the partition was to be made do not appear in the decree. C. C. 1252. In matters of parwis to be made do not appear in the decree. C. C. 1202. In matters of partition, the order for a sale is the complement of the decree for a partition, and without such a decree is a nullity. Prescription did not run against such of the plaintiffs as were minors, and the claims of such of them as were non-residents could only be prescribed by twenty years. C. C. 3440, 3442.

Prentiss, also appeared for the plaintiffs.

Shaw, Lawrence, R. N., and A. N. Ogden, for the defendant. The judgment ordering the sale was rendered in strict pursuance of all the forms of law. C. C. 1129, 1238. The curator of absent heirs was the proper person, and the only proper person, to sue or be sued for a partition. The judgment recites that the curator was present, and that it was rendered contradictorily with him. This is evidence of the fact; and it is every day's practice in our courts, when the defendant appears in open court and consents to judgment being rendered against him, to enter it up without any thing appearing on the record, but the mention of the fact in the judgment, which ought to be the highest evidence of it. On this point we cite the cases of Brainard v. Francis, 2 Mart. N. S. 150. Dangerfield's Executors v. Thurston's Heirs, 8 Ib. N. S. 236. Hubbel v. Clannon, 13 La. 496. On the subject of the partition, we refer also to articles 1246, 1251, 1252, 1261, 1262, 1230, 1234, 1238, 1136, 1146, 1147, 1148. The jurisdiction of the Probate Court which ordered this sale, is established by art. 923 of the Code of Practice.

It is contended that the counsel for absent heirs was not cited, and that to make it a legal sale, he should have been a party. Art. 1238 of the Code declares that the curator for absent heirs is the proper person to be sued for a partition, and there is no law requiring that the counsel for absent heirs should be cited. Art. 1157, which requires the counsel of absent heirs to be notified, refers expressly to the case where the curator himself provokes the sale for the payment of debts. Although, therefore, it was not necessary that he should be notified, yet, in this case, it was done. The judgment recites that it was rendered contradictorily with him; his name is signed to the inventory and appraisement, and the accounts of the parish judge and the curator, in the proceedings, show that a charge was made and paid, for his services, at that very sudiance. Art. 1213 of the Civil Code provides the mode in which proof shall audience. Art. 1213 of the Civil Code provides the mode in which proof shall be received of the services rendered by the counsel of absent heirs, and authorises the judge to grant compensation, on the proof being made. It must there- McCultoven fore be presumed, that this proof was then made. The sale was a judicial one, and as the parish judge was, ex officio, judge of probates and auctioneer, the objection taken, that it was made by the parish judge, is entitled to no weight whatever. In the case of Lallane's Heirs v. Moreau, 13 La. 433, it was decided that "sales directed by the Court of Probates are judicial sales, and the purchaser is protected by the decree ordering them." The same principle has been frequently decided. See Poultney's Heirs v. Cecil, 8 La. 321. Beale v. Walden, 11 La. 68. According to these well settled principles are sales in the purchaser would not have been irregularities preceding this judicial sale, the purchaser would not have

been affected by them. In the present case, however, both the curator of absent heirs, and the counsel for absent heirs, were parties to the judgment ordering the sale. An inventory and appraisement of the estate had been previously made; the property was sold for a larger amount than the appraisement, and the price paid over to the curator, who had qualified in every respect according to law; and the title of the defendant ought to be considered free of all doubt or difficulty whatever. The defendant's title is also supported by the prescription of ten years; more than ten years having clapsed after the sale and delivery of possession, before the institution of this suit; and the heirs may well be considered to have acquiesced in the sale, when they permitted the price to be paid over to the curator, and took no steps for more than ten years to impeach the sale. The defendant has made out a perfect title to the land in controversy; but this is a petitory action, in which the plaintiffs must make out title in themselves.

The judgment of the court was pronounced by

EUSTIS, C. J. This is a suit to recover a tract of land in the parish of Concordia, formerly belonging to Joseph Harrison, deceased. The suit is brought by his heirs, and those of his first and second wives. By the first he had children; by his second wife he had no issue. The answer sets up title in the defendant's testator, under a sale made by the Court of Probates, on the 3d of February, 1834.

It appears that a curator of the absent heirs of the succession of Joseph Havrison was appointed by the Court of Probates of Concordia, and that, in a suit for a partition brought by an heir present against the curator, a decree was rendered ordering the land in question to be sold, which was accordingly done, and the defendant's testator became the purchaser for \$12,000, which was paid to the curator.

I. The plaintiffs claim the land as their property, without reference to any judicial proceedings; and it has been argued at bar, that the decree under which the defendant claims is a nullity, and must be treated as such. It is urged as grounds of nullity that there were not proper parties to the decree; that the heirs were not parties to it; and that neither their names nor number appear in the record, which is necessary in an action for a partition, inasmuch as no share can be ascertained without the number of the participants be estab-

It certainly was the duty of the curator in this case to effect a partition. The Code makes it imperative on curators of absent heirs, when one of the heirs is present, to sue for it (article 1129); and makes the curators competent parties, in a suit for a partition, to represent in every respect the absent heirs (art. 1238). It cannot therefore be said that proper and competent parties were not made in this suit.

The purchaser in this case was not bound to look beyond the decree. jurisdiction of the court was undoubted, and the jurisprudence of this State has long since been settled, that a bond fide purchase at a judicial sale is protected by the decree. Lallane's Heirs v. Moreau, 13 La. 432. Brosnabeau v. Tur-

MIROR

McCullovou ner, 16 La. 440. Beard et al. v. Morancy, 3 Rob. 122. Beale v. Walden, 11

La. 68. Vide also Thompson v. Tolmie, 2 Peters, 168.

II. It is urged in argument that the curator only represented the absent heirs of Joseph Harrison, and not the heirs of his pre-deceased wives, and that the decree only related to the sale of the land of his absent heirs, and not theirs. The first wife died in 1807: the second in 1816 or 1817; and Harrison himself died in 1823. Both the successions were vacant. The defendant's possession is under a just title, and has continued without interruption for more than ten years. Prescription runs against a vacant estate, though no curator has been appointed to it. C. C. art. 3491. We have examined, with much attention, the learned opinion delivered by the late Supreme Court, in the case of Calvit et al. v. Mulhollan et al., 12 Rob. 261, without having been able to concur in all its conclusions.

We find that the vacant succession, the hereditas jacens of the roman law, forms an important constituent portion of the legislation concerning the administration of successions in the Code of 1825.

The fact that all prescriptions, which are incomplete on the death of the deceased, continue to run against his vacant succession, necessarily pre-supposes that, until it is accepted by the heir, it represents the person of the deceased. Article 940 of the Code, by providing that the right of the heir is in suspense until he decides whether he accepts or rejects it, modifies and limits, in accordance with that principle, the rule that the succession is acquired by the heir from the moment of the death of the deceased, by the operation of law.

It is the interest of the State that real property should have a visible and responsible owner. When heirs choose to relieve themselves from the charges of ownership and the payment of the debts of the succession, and await in security the improvement of property falling to them through the enterprise and labor of others, the law has wisely held that they should not be permitted to use their rights to the manifest injury of others. It has provided consequently for the appointment of curators to vacant successions, that prescription shall not be interrupted against them, and that when the heirs accept the succession, it shall be taken only on the condition of not prejudicing the rights which may have been acquired by third persons upon the property of the succession, either by prescription or by lawful acts done with the curator. Civil Code, art. 1024. Davis's Heirs v. Elkins, 9 La. 147. Poultney's Heirs v. Cecil, 8 La. 342.

We consider that, for the purposes of prescription, successions now represent, as they did under the Code of 1808 and under the roman law, the person of the deceased, as long as the heirs leave their rights in abeyance, and avoid the responsibility and charges of asserting them.

Such being our conclusions, it is unnecessary to examine the other questions which have been raised in argument. We are of opinion that the claims of the plaintiffs, as heirs of the deceased wives of the late Joseph Harrison, are prescribed by lapse of time.

Judgment affirmed,

SUCCESSION OF MONTGOMERY.

An appeal from the Probate Court of the parish of Madison, allowed in November, 1945, was properly made returnable to the Supreme Court at Alexandria. The 149th art. of the constitution, which provides that appeals from that parish shall be returned to New Orleans, was inoperative until the constitution was proclaimed, on the 2d of December of that year. Const. art. 150.

On an appeal from a judgment on an opposition to a tableau of distribution presented by the curator of a succession, absent creditors who never appeared in the court below, nor ever claimed to be acknowledged as creditors, and who were placed on the tableau by the carator for the protection of his own interest, as a surety of the deceased, need not be made appelleos, though their claims were opposed by the appellants. It is enough that the cu-

rator, who is the real appellee, be cited.

Where a deed of trust has been executed in another State for the purpose of protecting a surety against any loss in consequence of his suretyship, the latter, if legally liable, is not bound to wait until he has actually paid as surety, before he can require the trust fund to be applied to the payment of the principal obligation, so as to effect his release. And where the principal has died, and the liability of the surety is contested, the trust fund may be withhold from distribution, for a reasonable time, until it can be ascertained whether the surety will be liable or not. C. C. 3026.

The omission to state in a mortgage of slaves their "ages and nations," will not render the

mortgage null. C. C. 3273, 3274.

Slaves in possession of a mortgagor at the time of his death, of the same names with those enumerated in a mortgage executed by him, will be presumed to be the same. It is for the party who denies that they are the same, to establish that they are not.

It is not necessary that the register of mortgages, on registering an original act, not authentic, upon his own knowledge of the signatures of the parties, should certify upon his records that he knew their signatures.

PPEAL from the Court of Probates of Madison, Downes, J. Stockton and Steele, for the appellants. Downes, contra. The judgment of the court was pronounced by

SLIDELL, J. There is a motion by the curator of the succession to dismiss the appeal in this case, on two grounds:

I. That the appeal was not made returnable to the place required by law.

The judgment was rendered by the Probate Court of the parish of Madison, and the appeal was granted on the 22d November, 1845, returnable to Alexandria. Alexandria was, at the time, the proper place to which to make the appeal returnable. By the 149th article of the constitution, appeals from the parish of Madison were directed to be returnable to New Orleans. This constitution was adopted in convention, on the 14th May, 1845. But article 150 required that its adoption or rejection should be submitted to the vote of the people, on the first monday of the ensuing November; that the returns of votes should be examined by the governor and certain other officers, on the first monday of December ensuing; that, if there should be found a majority for its adoption, it should be the duty of the governor to make proclamation of that fact, "and thenceforth this constitution shall be ordained and established as the constitution of the State of Louisiana." This proclamation was made on tuesday, the second day of December, 1845. The constitution not having gone into effect at the date of the order of appeal, the objection is not well taken.

II. That the creditors whose claims have been opposed by the appellants, are not made parties to this appeal. 'I hese cre liters never appeared in the court SUCCESSION OF MONTGOMERY.

below, never made any application to the curator to be acknowledged as creditors, and were absentees. The curator voluntarily placed the n on the tableau for the protection of his own interests, as *Montgomery's* surety, as will be more fully noticed hereafter. The curator is the real appellee, and he is before us. The motion to dismiss is therefore rejected.

The opponets claimed to be creditors of the succession, and that they are so is not disputed in argument by the appellee. The whole of the proceeds of the property of the succession, after deduction of certain expenses of administration, were awarded by the tableau to Wm. M. Taylor and James W. Gillespie, as mortgage creditors; the former for a claim of \$5,000 and interest, and the latter for a claim of \$8021 and interest.

The position taken by the curator, William Jenkins, is, that these debts are entitled to a mortgage preference, because they are covered by a deed of trust executed by Montgomery, in Mississippi, on certain slaves, of which those sold at the succession sale formed part, to a trustee in trust to secure Jenkins and another, and hold them harmless from all damages, costs and charges, and loss, for and on account of their liability as sureties of Montgomery, on a certain bill single, executed by William Montgomery, the deceased, together with William Jenkins and James Jenkins, in favor of Taylor, for \$5,000, and on a certain promissory note made by Montgomery and William Jenkins, in favor of James Gillespic, for \$8,021 24; that judgment has been obtained against William Jenkins on both claims; that upon one judgment a levy has been made on his property in Mississippi, and on the other a writ of error is pending. That this deed of trust was duly recorded in the parish of Madison.

We will now proceed to consider, in the order in which they have been presented by counsel, the objections made to the judgments rendered by the court below in favor of *Taylor* and *Gillespie*.

· There is no proof in the record that Taylor is a creditor of Montgomery. It is shown by a transcript of a suit in Mississippi, that one Dillingham had brought suit on the bill single above mentioned, against Montgomery and William Jenkins, and obtained judgment against them for the balance due upon it. Upon this judgment a writ of error was taken, the result of which does not appear.

It is said that there is a variance between the debt to Gillespie, as stated on the tableau, and that shown by the transcript of the suits of Gillespie v. Montgomery and William Jenkins. In one it is stated as \$8,021; in the other, the note sued upon is for \$8,021 24. This would perhaps be too trifling a variance to be regarded, if it stood alone. But there is a discrepancy in other respects between the note itself and that described in the deed of trust. The note is dated 26th January, 1841, and payable on or before the 26th January, 1842. The note mentioned in the deed of trust is described as dated the 6th February, 1841, and payable at twelve months after date. It would seem from the Mississippi record that the note sued upon had been given for the price of land, while that described in the deed of trust is said to have been given for money loaned.

It is said that, even if the bill single and the note are those contemplated in the deed of trust, yet the holders of those obligations are not the beneficiaries in the deed, nor have they claimed its benefit, but the curator himself has volunteered to place them on the tableau.

It is true the holders of those obligations have not appeared in the cause, but as we have come to the conclusion that this case must be remanded with in-

structions to file a new account and tableau, and they may perhaps avail themselves of the opportunity which will thus be afforded for all creditors to come MONTGONERY. in, we do not think it proper to express now a definitive opinion with regard to their rights. The opponents have made no objection to the form in which this foreign instrument was executed, and we have no evidence before us to show what right under it would accrue by the laws of Mississippi, to the creditors by reason of the security given by the principal debtor to his sureties.

Whether the holders of obligatious mentioned in the deed of trust be entitled to its benefit or not, there can be no doubt that William Jenkins was a beneficiary under it. Its object was to hold him harmless against loss or damage by reason of his suretyship. Under such a contract, we are of opinion that he is not bound to wait till he has actually paid as surety. If he be legally liable as the surety, he is entitled to have the fund conveyed for his indemnity applied to the payment of the principal obligation, so as to effect his release. As the liability however is contested, we think the fund, now in the custody of the probate court, should be, pro tanto, withheld from distribution for a reasonable time, that the writ of error may be disposed of in Mississippi, where the suit against him is now pending, and it may be ascertained whether he is legally liable, or not, on the bill single for \$5,000, mentioned in the deed of trust. See Civil Code, art. 3026.

It is said that the deed of trust cannot have validity as a mortgage in this State, because the ages and nation of the negroes are not mentioned. The deed of trust states only the names and sex of the negroes. The counsel relies on article 3274 of the Civil Code, which declares that if the mortgage be of slaves, "their names, sex, and, as nearly as may be, their age and nation, must be mentioned in the act of mortgage, that their persons may be more easily identified." The point now raised, so far as our researches have gone, has never been decided. After a careful consideration, we are of opinion that the omission to state the ages and country of slaves mortgaged does not affect the mortgage with nullity. A difference of phraseology will be remarked between this article and that which precedes it, prescribing what is necessary in the description of "immovables," by which is there meant landed property. We know that in the practice of notaries and parish judges, it has been very common to omit the full and complete description in sales and mortgages of slaves, which the appellants say is required on pain of nullity. This long practice and contemporaneous professional interpretation being not manifestly erroneous, is entitled to great weight. Immense amounts of slave property have been sold and mortgaged under descriptions of the same character as that now in question, and we should do great injustice, were we, in the interpretation of an ambiguous clause, to reject the popular acceptation.

The identity, however, is a lawful subject of enquiry. The appellants have a right to show that the negroes of like names, pessessed, inventoried, and sold as the property of the succession, are not the same as those conveyed by the deed of trust. The identity of name and the possession establish a case infavor of the mortgagee, which it is incumbent on the opposing creditor to dis-

It is contended that the register of mortgages had no right to register the deed of trust which was not an authentic act, unless he was acquainted with the signature of the parties, and agreed on his own responsibility to make the inscription on presentation of the original act, in which case it is said that the reOF MONTGOMERY.

gister should certify such knowledge upon his record. The original deed was presented to the recording officer, and, as we said in the case of Ells v. Sims, ante p. 251, we do not consider it necessary that the register should certify on his record that he knew the signatures.

This transcript comes before us in a very imperfect form. None of the proceedings anterior to the filing of the tableau are transcribed, nor are they noticed in the statement of facts. We have not the inventory nor the proces-verbal of the probate sale, nor are we informed when the succession was opened. The opponents charged expressly that the tableau was filed prematurely; there is no evidence to contradict the charge, but, on the contrary, indications of an attempt to close the estate precipitately. We are unwilling to conclude creditors upon a showing so loose. We think a new account and tableau should be filed, so that all the creditors may have a fair opportunity to come in and be heard.

It is therefore ordered that the judgment of the court below be reversed; that this cause be remanded with instructions to the court below to require a new account and tableau, to be filed by the curator, and for further proceedings according to law; the appellee paying the costs of this appeal.

BEHRNES v. Coxe.

In an action for damages for a malicious prosecution, instituted against plaintiff on a charge of stealing a slave, the testament of a person by whom the slave was devised to plaintiff's wife, and proceedings had in the court of probates by the defendant as co-tutor of other minor heirs of the testatrix, and other proceedings connected with the administration of the succession of the testatrix, are admissible in evidence to show want of probable cause for the prosecution. Per Curiam: It devolved on the plaintiff to show malice; a fact which is usually inferred from the want of probable cause for the prosecution.

An objection that the sum for which a verdict is found in an action for damages is expressed in figures, is too late after appeal. If it be a defect, it is one which might have been cor-

rected on the trial below, at the request of either party. C. P. 528.

A PPEAL from the District Court of East Baton Rouge, Burk, J. A. M. Dunn, for the plaintiff. Z. S. Lyons, and Loucks, for the appellant. The judgment of the court was pronounced by

Kine, J. This is an action for a malicious presecution. The plaintiff avers that the defendant maliciously intending to injure him, and without reasonable or probable cause, charged him, on oath before a justice of the peace, with having stolen a negro girl slave, named Maria, and caused him to be arrested and taken before a justice of the peace, by whom he was discharged. He prays for five thousand dollars damages, for the malicious prosecution and wrongful arrest. The jary gave a verdict in favor of the plaintiff for five hundred dollars, and the defendant has appealed. The defendant denies generally the allegations of the plaintiff's position, but admits that he made an affidavit for the purpose of obtaining the negro girl in question, in which he charges the plaintiff with improperly taking her from his possession, but upon the slave being returned he desisted from the prosecution.

The answer is substantially an admission that the plaintiff instituted the prosecution, an averment that it was founded upon sufficient probable cause, and a denial of malice. It appears from the evidence that, a short time before the

BEHREE S. COXE.

occurrences which led to this suit, the plaintiff intermarried with Elizabeth Williams, a minor daughter of the defendant's wife, by a previous marriage. The mother, as the tutrix, administered the property of her children, including the slave in question, which had been devised to the plaintiff's wife by her grandmother, Mary Y. Williams. Shortly after the marriage of the plaintiff, the defendant and his wife caused proceedings to be instituted by which the former was restored to the tutorship of her minor children, which she had forfeited by her second marriage, and her husband was appointed co-tutor. They applied jointly for several orders, and among others for a sale of property belonging to the succession of Mary Y. Williams, for the purpose of paying debts which were alleged to be still due, although a previous sale had been made, for the same purpose, which produced a sum far exceeding the amount of debts then represented to be due by the succession. While these proceedings were in progress the slave in question left, or was removed from, the possession of the defendant, and went to the plantation of the plaintiff's father, where the plaintiff resided, but through whose agency is not distinctly shown. The defendant thereupon made oath before a justice of the peace, "that a slave named Maria belonging to the succession of Mary Y. Williams, under his control and management, was stolen and taken away from his premises, &c., and that he verily and truly believed that George F. Behrnes was the person who committed the act." Upon this affidavit the plaintiff was arrested, on sunday, at the defendant's request; but objecting to appear on that day, the officer assumed the responsibility of permitting him to go at large until the following day. No witness appeared to support the accusation, and the prisoner was discharged.

On the trial in the court below, the will of Mary Y. Williams, which contained the bequest to the plaintiff's wife, as well as the probate proceedings already referred to, were offered and admitted in evidence, to show the want of probable cause for the prosecution, and that the object of the defendant was to recover possession of the slave in question, with the view of defeating the title of the plaintiff's wife. They were objected to, on the ground of irrelevancy. We think the judge did not err in permitting them to go to the jury. They were admissible for the purposes for which they were offered, and, in our opinion, tend strongly to show that the defendant was influenced by other motives than a belief that the plaintiff had been guilty of an infraction of the criminal laws. It devolved on the plaintiff to show malice; a fact which is usually inferred from the want of probable excuse for the prosecution. The testimony offered tended to show that the prosecution was groundless, and that the defendant must have known that the plaintiff was inaccent of any criminal offence, which is the most conclusive evidence of malice. Starkie on Evidence, pp. 911, 913, 915.

For obvious reasons of public policy actions like the present are cautiously entertained, and meet with no favor when the proof is not clear of the absence of probable cause for the prosecution. After an attentive examination of the evidence, we find no circumstances of excuse for the defendant's conduct which entitle him to relief at our hands. We think that the verdict of the jury ought not to be disturbed.

It is objected that the sum for which the verdict is given is expressed in figures. If this be a defect, it is one which could have been corrected at the trial below, at the request of either party. The objection comes too late when presented in this court. C. P. 528. 9 Rob. 60.

Judgment affirmed.

STANBBOUGH, Curator, c. Evans.

Where one to whom slaves sold at the sult of a second mortgagee are adjudicated, enters into a bond to produce them whenever required for the purpose of being sold under the first mortgage, and subsequently dies, a purchasesr of the slaves at a probate sale of his succession, will acquire only the rights of the deceased, and will be bound by his obligation to deliver the slaves. Such a purchaser cannot be considered a third possessor; nor can he require the original vendor to resort to an hypothecary action to enforce his mortgage.

A PPEAL from the District Court of Madison, Selby, J. Bemiss, Stacy and Sparrow, for the plaintiff. Pierse, appellant, pro se. No counsel appeared for the defendant. The judgment of the court was pronounced by

King, J. At a probate sale of the succession of Jesse Harper, deceased, the defendant, Evans, became the purchaser of four slaves; and, to secure the payment of the notes given for their price, the slaves, together with a tract of land, were specially mortgaged. The plaintiff obtained an order for the seizure and sale of the mortgaged property, which was executed by making a levy on the 3d of December, 1842; and on that day the slaves were sold, notwithstanding this seizure, in virtue of writs previously issued under other judgments against Evans, and adjudicated to Walker. On the 5th of December, two days after the sale, Walker entered into a bond, in which he obligated himself to produce the slaves whenever thereto required, to be sold under the order of seizure of Stanbrough, or the judgment of Kinnard, also a creditor of Evans. Shortly after Kinnard enjoined Stanbrough's proceedings, and the writ remained suspended until 1845, when, by order of the plaintiff's counsel, it was returned, and a second was issued, Pending the injunction Walker died. At the probate sale of his property the intervener appeared in the name of Stanbrough, and forbid the sale of the slaves, notwithstanding which they were adjudicated to himself and Wallace for \$190 50. Pierse subsequently purchased the interest of Wallace, and has intervened in this suit and enjoined the plaintiff's execution, alleging that Harper was without title to the slaves; that they belonged to Evans, when they were inventoried and sold as Harper's property; that the title to them, free from any incumbrance in favor of Harper's succession, was vested in Walker by the sheriff's sale; that the plaintiff's writ, issued after the intervenor became possessed of the slaves; and that he could only be proceeded against as a third possessor. The right to enforce the mortgage on the slaves only is in controversy. The cause was tried by a jury, who dissolved the injunction with damages, and the intervenor has appealed.

There is no error in the judgment appealed from. The evidence establishes clearly the title to the slaves in the succession of Harper, at the date of the sale to the defendant. Walker voluntarily obligated himself to produce the slaves whenever required, to be sold under the judgments either of Stanbrough or Kinnard, who it seems were engaged in a controversy in relation to their respective rights upon the slaves. This contest was in the nature of a pact of non-alienation. Pierse acquired the rights of Walker to the slaves, and incurred all the obligations of the latter in relation to their delivery, when he became the purchaser. Of these he cannot plead ignorance, having appeared at the sale of Walker's succession, and forbidden the adjudication as being in violation

of the rights of Harper's succession. The bond of Walker is obligatory on the STANBROUGH intervenor, who cannot claim to be treated as a third possessor, and require the plaintiff to resort to an hypothecary action, in order to enforce his mortgage.

Judgment affirmed.

FARRAR v. Rowly et al.

Where one of the parties to a contract is bound to protect the other from eviction from property delivered to him in pursuance of the contract, and which he was to receive free of encumbrance, the seizure of the property by a mortgage creditor will put the former in default from the time of the seizure.

Where a mortgage creditor by whom an order of seizure and sale had been taken out against the mortgaged property, enters into an agreement with the debtor, by which it is stipulated that the latter shall convey to him certain property free of encumbrance, and that, in consideration thereof, the creditor shall assign to the debtor "all his right to the judgment, or acknowledge satisfaction thereof, with subrogation, as may be required by the debtor," the creditor may, on the seisure by another mortgage creditor of the property which was to have been conveyed to him free of encumbrance, proceed by an hypothecary action against the property originally seized, though in the possession of a third person, and cause it to be sold to satisfy his claim, without having taken any steps to rescind the contract.

In case of doubt as to the meaning of a contract, the mode in which the parties undertook to execute it themselves, is the best exposition of its intendment.

A married woman, who has obtained a judgment against her husband, is competent to receive payment, and give a discharge. Her receipt is evidence of payment, as between the

PPEAL from the District Court of Concordia, Mayo, J. In this case the A defendant Rowly alone appealed. The facts of the case are stated in the opinion of the court, infra. Thomas and Snyder, for the plaintiff. Frost and H. A. Bullard, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an hypothecary action, brought by the plaintiff as assignee of a certain judgment rendered by the Supreme Court, in October. 1841, at the suit of Jane Rowly, against one of the defendants, her husband. It is stated at length in 19th Louisiana Reports, 583. It decreed to the plaintiff, Jane Rowly, the sum of \$43,549 14, with five per cent interest from July 3d. 1841, until paid, for which sum she was declared to have the following securities, to wit: for \$2,983 14, a special mortgage on the Marengo plantation, its stock, slaves, &c., to date from June 15th, 1835; for \$37,390, a legal mortgage on all the property of her husband, to take effect from said date ; and also a legal mortgage as aforesaid for \$3,761, to take effect from the 15th of October, 1839.

The object of this suit is to subject a plantation, called the Bristol plantation, and slaves, to the satisfaction of the two last mortgages. Rowly, the principal debtor, and Frost, who appears as a third possessor, are made defendants. The prayer of the petition is, that the hypothecated property may be seized and sold, and that the defendants pay the costs.

It has been presented to us as a ground of defence by counsel, that there existed a subsisting contract, made between the plaintiff in this suit and Charles FARRAR ROWLY. N. Rowly, for himself, and as agent for Jacob D. Lansing, dated the 30th of December, 1843, which it was alleged precluded the possibility of enforcing the judgment on the part of the plaintiff, until that contract was rescinded, or otherwise disposed of in a lawful manner.

The question of law which this proposition presents under article 2042 of the Code, has been the subject of argument here, but it does not appear that the opinion of the court below was taken on it. It is set forth in the answer of the principal defendant, which also contains allegations of performance of the agreement on his part and that of Lansing, and other matters relating to the merits of the cause, and concludes thus: "Wherefore he prays that this suit be dismissed; that he have judgment in his favos; that the mortgage of Mrs. Jane Rowly be decreed extinguished by transaction, novation, and payment. If such judgment cannot be granted, he prays that their suits be reinstated in the condition in which they were previous to the compromise and settlement hereinbefore named, and for all such relief as the nature of the case may require; and prays a trial by jury."

The whole case was submitted to a jury, who found a verdict in these words: "We, the jury, find for the plaintiff, and that the contract between Thomas P. Farrar and Jacob D. Lansing, is a nullity; and that the judgment and mortgage in the case of Jane Rowly v. Charles N. Rowly, binds the Bristel plantation and property, and we assess no damages to either party."

In this case, as in the case of Kemp v. Rowly, which we have recently decided, ante p. 316, Lansing, Rowly, senior, the Mechanics and Traders Bank, with some additional parties, are all concerned in the promotion of one single-purpose. The jury appear to have come to the same conclusion as to their respective interests, which was forced upon us in that case. After the finding of the jury, we shall consider this case as exclusively between the plaintiff and Charles N. Rowly, the defendant.

It would extend this opinion to an inconvenient length to repeat the particular facts and incidents to which this litigation extends. The present suit is a portion of the whole, to understand which references may be had to the cases recently decided by this court, in which Rowly was a party. See pp. 208, 316, ante. The plaintiff, the assignee of the judgment of Mrs. Rowly against her husband, had obtained an order of seizure and sale against Lansing and Rowly, under which the Marengo plantation and slaves were under seizure, and the agreement of the 30th December, 1843, was made for the purpose of compromising and adjusting not only that suit, but all suits pending between Mrs. Rowly, Lansing and Rowly, or either of them. It is in substance as follows:

1st. That all suits then pending between Mrs. Rowly, and Lansing and Rowly, or either of them, should be dismissed, at their costs.

2d. That Mrs. Rowly should renounce the community of acquets and gains between her and her husband, and acquiesce in a decree of separation from bed and board, dismissing her appeal therefrom.

3d. That her claim for alimony should be assumed, and paid, by Farrar.

4th. The the amount then due on the judgment was about \$45,000; and shall be paid and satisfied as follows: 1st. The said Lansing and Rowly shall make to the said Farrar, either by judicial sale or otherwise, a good and unincumbered title to the one-third, divided, of the Marengo plantation, slaves, &c. The said third, when partitioned, to be composed as hereinafter specified. 2d. The said Lansing and Rowly to pay Farrar \$5,000; \$2,500 on the tenth of

March next, 1844, and \$2,500, on the first of January, 1845, to be secured by notes, in solido, "and, in consideration of such title and payment, said Farrar is to assign all his right in suid judgment, or acknowledge satisfaction of the same, with subrogation, as may be required by said Rowly and Lansing."

5th. The third of Marengo to be conveyed to said Farrar, is to be taken from the upper portion of the Marengo tract, to contain the fair third of the cleared and uncleared land, to be ascertained by survey. The third of the slaves, &c., and the third of the land falling to the share of Farrar, to be furnished with negro cabine, mills, &c.

6th. The division of the slaves to be made; &c.

7th. The balance of the slaves to be divided, &c.

8th. All the costs to be paid by Rowly and Lansing.

9th. The title of the one-third of the Marengo plantation, &c., as above set forth, to be made as follows: "After ascertaining the equitable division thereof as herein before required, the sheriff shall advertise and sell the third of said property, which is to be transferred to said Farrar, under the order of seizure and sale by virtue of which he now holds said property, and at said sale said Farrar shall bid the sum of \$40,000, and receive the sheriff's deeds thereto, in payment of so much of the judgment owned by him."

10th. The payment of the \$5,000 may be made as follows, by the delivery of cotton, &c.

In fulfillment of this agreement a separation was made of the ene-third of the plantation by a surveyor, and the third assigned to the plaintiff was delivered to him as well as his proportion of the slaves, stock, &c. No complaint appears to have been made as to the manner in which the agreement was performed on the part of Rowly. Both parties appear to have been satisfied with their bargain, until the plaintiff's possession was alleged to be disturbed by a seizure under an execution, issued on the 4th June, 1845, at the instance of the Mechanics and Traders Bank against the Marengo plantation and slaves.

Evidence was offered on both sides concerning the doings of each in relation to the different requisitions of the agreement; and, under this state of the cause, we are authorised to consider and determine on the rights of the parties, as in a direct act to rescind the agreement, or for damages for its non-execution, We have an aversion to send causes back for revision when we have all the evidence before us, especially when the parties have had a fair and full opportunity of supporting their respective rights, and of scrutinising those set up adversely to them. Such has been the case in the cause now before us. There does not appear to have been any question of law which requires our notice, reserved by bill of exceptions; and the argument at bar has been based on those questions of law which the facts present.

It is urged for the defence that Rowly, or Lansing, were never put in default; that all the conditions of the agreement were strictly complied with by them; that Farrar, the plaintiff, was in default, and that he never made, nor offered to make restitution of what he received under the agreement; that the agreement itself was a sale, and extinguished the judgment held by the plaintiff; and that no time was stipulated within which the conditions of the agreement were to be performed.

I. The breach of the agreement of which the plaintiff complains was, his eviction from the portion of the plantation and slaves possessed by him under the agreement, by seizure under judicial process, at the suit of the Mechanics

FARRAR P. BOWLY.

PARRAR V. ROWLY. and Traders Bank, under which the whole plantation and slaves were sold to Samuel Rowly, with the crop gathered after the seizure, on the 5th of January, 1846. This is charged to have been an active violation of the agreement, which dispensed the plaintiff from the necessity of putting the other party in default. That Rowly was bound to protect the plaintiff from this eviction cannot be questioned; and no satisfactory reason has been given why he failed to do it, and he was in default from the day of the seizure.

II. So far from the judgment held by the plaintiff having been extinguished by the agreement, or what was done under it, it was to remain in force; and when the good or unincumbered title, by judicial sale or otherwise, and the payment, should be made, it was to be assigned, or satisfaction, with subrogation, was to be acknowledged, at the option of said Rowly and Lansing. In the mean time, Farrar was put in possession of the land and slaves, the parties were to proceed in the performance of the agreement, the execution of the judgment being of course suspended. This agreement we consider to have been what the parties called it, and understood it to be, a compromise or transaction, for the termination of the litigation in which the true interest of no one was likely to be advanced. Up to the time of the disturbance of the possession of Farrar, by the seizure at the instance of the Mechanics and Traders Bank, it appears to have been carried into effect, in good faith. The respective rights of the parties, that is Rowly's right to demand the extinguishment of the judgment, and Farrar's to exact the title to the land and slaves, depend on the completion of the conditions of the transaction, and on their due performance by the party obligated. The contract is entire, and by its very terms must stand or fall as a whole. Neither party has any advantage as to any rights acquired under it. We cannot recognise the principle on which it is maintained in argument, that Rowly is permitted to consider it in the light of a sale of the plantation and slaves to Farrar, while he fails to remove the encumbrance which rendered them valueless.

III. It is said there was no time stipulated within which the agreement was to be carried into effect. The mode in which the parties undertook to execute it themselves, is the best exposition of its intendment. The portion of the plantation and slaves were delivered immediately, and the defendant, Rowly, expressly relies upon his performance of his part of the agreement. Though it may be true that he was not in default, in point of time, so far as relates to furnishing the plaintiff with an unincumbered title, yet he was delinquent in suffering Farrar to be evicted, by reason of a judgment from which he was bound, and had the power, to protect him.

On the trial of the cause evidence was offered in support of the claim of each party on the other, arising out of the breach of the agreement and the injury sustained thereby, which were mutually attributed to each other. The jury, by their verdict, left the parties where their attempted compromise found them. We shall not disturb their verdict, as it turns exclusively on questions of fact, and upon matters with which planters must necessarily be particularly competent to come to a just conclusion. The terms of the verdict are peculiar, but its intendment is unqualifiedly in favor of the plaintiff as to the agreement, as to his judgment, and as to the claims of each party for restitution and indemnity.

There are several matters to which a great deal of importance seems to have been attached, which we do not make any mention of, on account of the view we have taken of the real merits of this case. It was impossible for a title to be given to Farrar, under the agreement, by a judicial sale, except after the encumbrances, on the portion of the plantation and slaves which he was to take, should be removed. They could have been removed by the agreement of the mortgagees, or by payment. Their removal was within the power of Rowly to accomplish, and we have seen no attempt to effect that object on his part, which we are permitted to consider as serious.

It is alleged that the sum of \$4,000 was paid on the judgment in favor of Mrs. Rowly, in January, 1842. This matter was before the jury. The evidence in support of this sum consists of the simple receipt of that sum, under an agreement to which it was appended, signed by Mrs. Rowly during her coverture. The verdict of the jury gives effect to the judgment for its whole amount, and the jury must have considered the evidence as insufficient to establish the payment of this sum of \$4,000, which was was formally pleaded in the answer. In this, we think, the jury erred. Mrs. Rowly, having a judgment against her husband, was competent to receive payment, and give a discharge. The receipt, having been offered in evidence without objection, is good proof of the payment between the parties. The judgment was reduced before the plaintiff acquired it; and the imputation must be made according to the agreement of the parties at the time the payment was made. In this respect the judgment appealed from must be amended.

It is therefore ordered that the judgment appealed from be amended, by allowing interest thereon from the 18th of July, 1842, and that, in other respects, it be affirmed; the plaintiff paying the costs of this appeal, and the defendants those in the court below.

GAINES v. THE MERCHANTS BANK OF BALTIMORE.

A purchaser at a sheriff's sale, who has been evicted, cannot maintain an action against the seizing creditor alone; he must proceed against the creditor, and the debtor in execution, jointly. C.P.711. The fact that the domicil of one of the parties is out of the State, is no obstacle to the exercise of the remedy provided by art. 711 of the Code of Practice.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Britton, for the appellant. Wharton, for the defendants. The judgment of the court was pronounced by

King, J. Most of the facts upon which this case depends have been admitted by the parties. They are as follows: The United States Bank, incorporated by the State of Pennsylvania, being in insolvent circumstances, made a general assignment, in September, 1841, of all its property, rights and credits, not previously assigned, to certain trustees, with power to sell the same and distribute the proceeds rateably among the creditors of the institution. Among the assets thus assigned was, the "right of the bank to any further dividend that may be declared in the estate of Wm. Kenner & Co." In January, 1842, the United States instituted a suit in the Commercial Court against the bank, in which, among other effects of the latter, the claim to any dividend to be declared in the estate of Wm. Kenner & Co. was attached. The trustees intervened in that proceeding, and claimed the property attached, in virtue of the assignment, and apon a final decision of the cause it was determined that the assignment was

FARRAR V.

GAINES

O.

MERCHANTS

BANK.

valid, except so far as the United States were concerned. In May, 1842, the Merchants Bank of Baltimore caused a judgment, obtained in Philadelphia against the United States Bank, to be made executory in this State, and in virtue of a fieri facias issued under it seized, among other things, the right of the United States Bank to receive any further dividend from the estate of Wm. Kenner & Co., notwithstanding the previous assignment to the trustees and the attachment of the United States. At the sheriff's sale, this right was adjudicated to the plaintiff for \$1,000 cash. The plaintiff has instituted this action to recover back the price thus paid, alleging, first, that the United States Bank was divested of title previous to the seizure and sale by the sheriff, and that nothing passed by the adjudication; secondly, that the sale was made without a previous appraisement, and is consequently void. There was a judgment of non-suit in the court below, and the plaintiff has appealed.

We think that there is no error in the judgment appealed from. The purchaser at a sheriff's sale, who is evicted, has his recourse against the seized debtor and seizing creditor, but must exercise his remedy against those parties jointly. This suit is instituted against the plaintiff in execution alone, against whom the action cannot be maintained without uniting with him the defendant in execution. C. Prac. art. 711. The questions, therefore, presented by the pleadings cannot be disposed of in the present suit. It may not, however, be improper to observe, that it has been left doubtful by the evidence at present in the record, whether the mere contingent residuary interest of the United States Bank, after the completion of the trust, was adjudicated, and whether the plaintiff understood that he was acquiring only a future hope. We wish not to be understood as deciding whether anything passed by the sheriff's sale, or not.

We conceive it to be no objection to the exercise of the remedy provided by the 711th article of the Code of Practice, that the domicil of one of the parties is out of the State. Our laws have provided the means for causing absent parties to be represented, who have an interest in a pending litigation between other parties.

Judgment affirmed.

GROVES v. STEEL et al.

An account rendered, or a letter written, to a party to a suit by his agent, is inadmissible in an action against a third person, to prove payments made by the principal, where the agent is alive and within the State. His testimony must be procured personally or under a commission.

Parol evidence is admissible in favor of one not a party, nor representing a party, to a sale of land, to prove that the consideration of the sale was different from that stated in the written act.

The declarations of a vendor, made shortly before and after a sale, though out of the presence of the vendee, acknowledging its simulation, are admissible against the latter, to prove fraud in the vendor; but such evidence is insufficient in itself, to establish fraud in the vendee.

Where an endorser on notes given for the price of property purchased by the maker, is compelled to pay them, he will be subrogated to the right of the creditor to maintain an action against a subsequent purchaser of the property to rescind the sale as simulated and fraudulent, though it was made before the payment of the notes by him. PerCuriam: The first vandor

could have attacked the sale, for it was made while he was a creditor; and as the conditional liability of the endorser existed at the date of the sale, it is just that, when subsequently compelled to pay, he should be considered as standing in the place of the vendor, and subrogated to his right to sue for a recision of the sale. C. C. 2157.

Where the testimony of a witness was taken under a commission, on account of her infirmity and inability to attend the trial, and a rule, taken on the opposite party, under the stat. of 20 March, 1839, s. 17, to show cause why the testimony should not be read, returnable on the day of trial, was made absolute without opposition on that day, but before the trial commenced, the testimony cannot be objected to on the trial, on the ground that the witness was really able to attend.

A mother is incompetent as a witness for or against her daughter (C. C. 2260); but her evidence is admissible in favor of her son-in-law; her credibility, as affected by her connection with him, being a proper subject for the consideration of the jury.

A PPEAL from the District Court of Madison, Curry, J. Snyder, Stacy, and Sparrow, for the plaintiff. J. Dunlap, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff seeks the recovery of the amount of two promissory notes, drawn by John W. Brown, and endorsed by the plaintiff, both dated at Natchez, December 20, 1836, one for \$7,000, payable twelve months after date, and the other for \$7,875, payable twenty-four months after date. He alleges that, these notes were given for the price of certain slaves sold by one Slaughter to Brown: That the notes not being paid at maturity, the plaintiff was sued as endorser by Slaughter, and compelled to pay their amount : That Brown died and left a child and a surviving wife, the defendant, now the wife of Steele: That she was in community with Brown, and by intermeddling with the community after his death, has made herself personally liable for his debts: That the child also died, and the mother has accepted its succession purely and simply: That Brown, in the year 1838, to screen his property and defraud his creditors, made simulated sales to Steele of certain slaves, being those sold by Slaughter, the said slaves, however, really remaining the secret property of Brown. Judgment was asked against the widow Brown, for the amount of the sums thus paid by plaintiff as endorser, with interest and costs. It was also prayed that the sales of the slaves to Steele be annulled, and that they be decreed to be sold to satisfy the plaintiff's claim. There was judgment for the plaintiff, and the defendants appealed.

Portions of these averments were made by a supplemental petition; but we deem it unnecessary to consider any objections of form in that respect, as the defendants have not pressed a dismissal, but have asked that the cause be remanded for a new trial. There are bills of exceptions in the record which entitle them to this relief.

The court erred in admitting an account rendered, and a letter written to Groves by Bogart, his commission merchant, to prove certain payments to Slaughter, for account of Groves. Bogart was alive, and residing in the State. His testimony could have been procured.

In the answer it was pleaded, among other matters, that Groves had received from Brown a conveyance of a tract of land, which was made for the purpose of securing Groves on account of his liabilities as endorser for Brown, and that Groves was barred by the arrangement from recovering in the present sait. The deed from Brown to Groves was offered in evidence. It purported to be for a consideration of \$13,200, paid by Groves to Brown in cash. In the inventory of Groves's estate, these lands were inventoried as belonging to his suc-

GROVES V. STREL. cession. The two subscribing witnesses to this deed were then offered, to prove the acknowledgments of *Groves*, before and after the execution of this deed, that he had received the land in satisfaction of all claims against *Brown*, and that he particularly specified the debt now in controversy. This testimony, upon objection by the plaintiff that it went to explain and contradict the deed, the court refused to receive; and *Steele* now contends that it should have been received in his favor.

We think he was clearly entitled to the benefit of such testimony. He was a third person, not a party to, nor representing a party to, the act. The declarations of Brown and wife, made shortly before and after the sale to Steele, but out of Steele's presence, acknowledging the simulation, were admissible against Steele to prove fraud in the vendor. The defendant, Steele, might have asked the court to charge the jury as to the limited effect of this evidence, and its insufficiency in itself to establish fraud in the vendoe. The doctrine on this subject is more fully stated in Martin v. Reeves, 3 Mart. N. S. 24. See also Guidry v. Grivot, 2 Mart. N. S. 13.

The charge "that the surety is not the creditor of the principal until he has paid the dobt," was calculated, in the form asked for, to mislead the jury, and was properly refused. If there was simulation as alleged, it was a fraud upon Slaughter, then the creditor. That very fraud may have induced Slaughter to believe that it was useless to attack Brown, and have led him to pursue the endorser, Groves. Slaughter could have attacked the sale, for it was made while he was a creditor; and as the conditional liability of Groves existed at the date of the sale, it is just that when he subsequently was compelled to pay, he should be considered as standing in the place of Slaughter, and subrogated to his right to maintain this action. Civil Code, art. 2157.

A witness, the mother of Mrs. Brown, now the wife of Steele, living in the parish where the cause was tried, had been examined under commission, obtained upon the affidavit of the defendant Steele, that she was infirm and unable to attend the court. After her testimony had been taken under commission, a rule was taken, under the statute of 1839, upon the plaintiff, to show cause why the testimony should not be read. This rule was returnable on the same day that the cause was put on trial, and was made absolute, without opposition, before the trial commenced. It would have been a surprise upon the defendants to permit the plaintiff still to object to this testimony, upon the ground that the witness was really able to attend personally. We think, however, that at a future trial, the enquiry may be raised upon affidavit by the plaintiff, whether the infirmity and disability to attend still continues; and, if it should satisfactorily appear that the witness is still living in the parish and able to attend the trial, the testimony under commission should not be received. The privilege accorded by article 430 of the Code of Practice should not be extended beyond the fair intendment of the law. It is always desirable that witnesses should be seen and heard by the judge and jury, if possible, and especially in a controversy involving questions of fraud.

Objection was made to the competency of this witness, on the ground that she was the mother of Mrs. Steele. If such was the fact, she was incompetent to testify either for or against her daughter (Civil Code, art. 2260); but her testimony was admissible in favor of Steele. Her credibility, as affected by her connection with him, was a proper subject for the consideration of the jury-See 6 La. 74. 10 Mart. 554.

It is therefore decreed that the judgment of the District Court be reversed, and that this cause be remanded for a new trial, and for further proceedings according to law; the plaintiff paying the costs of this appeal.

GROVES U. STEEL.

DENNIETOUN et al. c. NUTT et ux.

In principle, no distinction can be made between a conventional transfer of property by a husband to his wife for the payment of her detail or paraphernal rights, and one made under the form of judicial proceedings.

A judicial sale rande in execution of a judgment obtained by a wife against her husband, where no debt was due by the latter to her, is a mere nullity, and transfers no title to her. The prescription of one year, established by art. 1989 of the Civil Code, applies to actual contracts, made in fraud of creditors, by persons capable of contracting. It is inapplicable to such a simulated sale.

The general rule is that, husband and wife are incapable of contracting with each other. The only exceptions to this rule are those enumerated in art. 2431 of the Civil Code.

A PPEAL from the District Court of Madison, Willson, J. The facts of this case are stated in the opinion of the court, infra.

Stockton and Steele, for the appellants, contended that the judgment and sale under it, were mere simulations, and are not protected by prescription. Cammack v. Watson, 1 Ann. R. 132.

Short, Prentiss and Fianey, for the defendants. The action is prescribed by art. 1989 of the Civil Code. See also arts. 3484, 3487, and 1965 to 1989. 6 Mart. N. S. 130. 8 Ib. N. S. 532, 675. 3 La. 29. 4 La. 260. 8 La. 308. 9 La. 106. 11 La. 552. 12 La. 533. 14 La. 308, 322. 16 La. 103. 17 La. 213. 19 La. 594. 2 Rob. 279. 4 Rob. 396, 438. 9 Rob. 105.

The judgment of the court was pronounced by

SLIDELL. J. The appellants are judgment creditors of Nutt, and instituted this action against Nutt and wife, for the purpose, among other things, of setting aside a judgment rendered in favor of Mrs. Nutt against her husband, and a judicial sale of his lands made to her in execution of said judgment. The defendants pleaded, by way of exception, the prescription of one year; the exception was sustained, and the plaintiffs, A. & J. Dennistoun & Co., have appealed. The judgment in favor of Mrs. Nutt, against her husband, was obtained in May, 1844; the adjudication to her upon execution took place the 5th of August, 1844. The judgment held by the appellants was obtained against Nutt by one Dawson, in May, 1843, with a stay of execution for twelve months. Dawson transferred this judgment, in May, 1844, to Pinckard & Huntington, who transferred it to the appellants. The citation in the present action was served on the 16th of August, 1845.

If the judgment and judicial conveyance sought to be annulled had occurred between ordinary parties, having full capacity to contract, and their dealings under the form of judicial proceedings were not merely simulated, the prescription of one year would have been properly invoked, pursuant to article 1989 of the Civil Code. For the purpose of considering the applicability of that prescription to the present case, it is necessary to recur to the allegations of the plaintiffs' petition, which, for the purposes of the exception, must be taken as true.

The petition is diffuse and inartificially drawn, but the averment is repeatedly made, not only that the judicial proceedings between the husband and wife

DESSISTOUN v.

were fraudulent and collusive, but that in fact the indebtedness of the husband to her, upon which she based her action and obtained judgment, and in satisfaction of which she became a judicial purchaser of his property, never had any existence.

In principle no distinction can be made between a conventional transfer of property, made by the husband to the wife for the payment of her dotal or paraphernal rights, and one made under the form, and by the instrumentality, of judicial proceedings. The right of the parties thus to contract, either directly or indirectly, is exceptional to the general rule. The general rule is, that the husband and wife are incapable of contracting with each other; the exception is in the three cases only which are enumerated in art. 2421 of the Civil Code. Out of those enumerated exceptions attempted contracts between husband and wife are nullities. See the case of Spurlock v. Mainer, 1 Ann. R. 301. If therefore the allegation of the plaintiffs' petition be true, that there was no indebtedness of the husband to the wife, there was an utter incapacity of the parties to do what they have done, and the case presented does not full under the prescription applicable to actual contracts made in fraud of creditors by persons capable of contracting. If there was an absolute incapacity to contract, there was no contract, and the title has not passed out of the husband.

Entertaining this view of the plea of prescription, it is unnecessary to enlarge upon the other allegations of the petition. It is proper however to say that, even if there should prove to have been a real indebtedness of the wife to the husband, so as to have capacitated them to stand in judgment against each other, still the action should have been entertained upon other allegations. The plaintiffs claim to be the antecedent mortgagees of the land adjudged to the wife at judicial sale, the existence of which mortgage they charge was known to her, and that, if she be a purchaser, she is a purchaser with notice. If their allegations be true, they have a right to have the mortgaged property applied to the payment of their judgment.

The court below should have overruled the exception, and required the defendants to answer.

It is therefore decreed, that the judgment of the court below be reversed, and that this cause be remanded for further proceedings according to law; the appellees paying the costs of this appeal.

BATES et ux v. WEATHERSBY et al.

A party who had obtained an order allowing him an appeal, on discovering that several defendants had not been made parties, presented a second petition, and obtained a second order of appeal, embracing all the parties. A transcript having been sent up under each order, by an agreement of counsel the first appeal was dismissed. Held, that the court below was not divested of jurisdiction by the first order of appeal, it having been irregularly obtained; and that the second appeal cannot be dismissed on the ground that a previous appeal had been abandoned.

Where one of the defendants in an action for the partition of a succession dies while the case is pending in the court of the first instance, and it is afterwards decided without his heirs having been made parties, the appeal will not be dismissed, but the case will be remanded, that the heirs may be made parties to the action. C. P. 120.

A PPEAL from the Court of Probates of Livingston, Watts, J. Watterston BATES and Winter, for the plaintiffs. Baylies, for the appellants. The judg-Weathersex. ment of the court was pronounced by

King, J. The appellees have moved to dismiss this appeal, on the ground that it was granted while another was pending in the same cause, which has since been abandoned, and because all the parties to the suit in the court below have not been made parties to the appeal.

In the first petition presented for an appeal, the appellants omitted to make several of the defendants parties. Upon discovering this error a second petition was presented, which embraced all the parties, and on this a second order of appeal was granted. The clerk prepared and sent up a transcript under each order. By an agreement of counsel on file the first appeal was dismissed. It was irregularly taken, and the inferior court had not, by the first order given, divested itself of jurisdiction of the cause, but still retained full authority to grant a second order, which would be available to the parties, and enable them to be heard in this court.

The fact relied on in support of the second ground, does not, in our opinion, authorise the dismissal of the appeal, but requires that the cause be remanded, During the pendency of the action in the court below, one of the parties, Lodwick L. Weathersby died. No notice appears to have been taken of the fact, and the cause was tried and decided without citing his heirs, who have neither been made parties to the proceedings below, nor to this appeal. This is clearly irregular. The suit is for a partition, and the validity of certain testamentary dispositions are brought in question. The interests of the heirs of the deceased must necessarily be affected by the result, and no final judgment can be rendered until they are made parties. 3 La. 524, 442. C. P. art. 120.

It is therefore ordered that the judgment of the court below be reversed, and that the cause be remanded, with instructions to the judge not to proceed to trial until the heirs of Lodwick L. Weathersby be made parties to the suit; the appellees paying the costs of this appeal.

MONGET, Tutor, v. PATE.

In an action against a defendant to render her liable personally, and as tutrix of her minor children, for a debt due by the community which existed between her and her late husband on the ground that she had accepted the community, and had rendered herself liable, personally and as tutrix, by disposing of effects of the succession and paying its debts without observing the forms of law, where it is shown that the defendant had ceased to act as tutrix, the action against her as tutrix must be dismissed; but the plaintiff should be permitted to show that the defendant had accepted the community, either expressly or by acts of ownership, and thereby rendered herself liable for one half of its debts. C. C. 2387.

A PPEAL from the District Court of East Baton Rouge, Burk, J. G. S. Lacey, for the appellant, cited C. C. arts. 2379, 2387. Brunot, for the defendant. The judgment of the court was pronounced by

Kine, J. The defendant is sought to be rendered liable personally, and as the tutrix of her minor children, for a debt due by the community between her and her late husband, on the ground that she had accepted the community, and has further rendered herself answerable, both personally and as tutrix, by dispos-

MONGET 9. PATE. ing of effects belonging to the succession, and paying its debts without observing the formalities required by law. The plaintiff's right to maintain the action against the defendant was excepted to, on the ground that she had ceased to be the tutrix of her children. The exception was sustained, and a judgment of non-suit rendered, from which the plaintiff has appealed.

We think that the judge erred in dismissing the plaintiff's demand against the defendant personally. The latter had ceased to be the tutrix of her children, and the action against her in her representative capacity was properly dismissed. The defendant is not distinctly charged in the petition with the fraudulent acts contemplated by the 2387th article of the Code, which render the surviving widow liable individually; but the plaintiff should have been permitted, under his averments, to show that the defendant had accepted the community, either expressly or by acts of ownership which indicated her acceptance, and had thereby become responsible for one half of its debts.

The judgment of the District Court is therefore reversed, and the cause remanded with instructions to the judge to permit the plaintiff to proceed against the defendant personally; the appellees paying the costs of this appeal.

RANKIN, Tutor, v. BELL et al.

The fact of having possessed separately a portion of the hereditary effects during thirty years, gives, in all cases, to the heir who has thus possessed, the right to oppose the suit of his coheirs for a partition of those effects. C. C. 1228. The acquisition of this right is not suspended by the minority of any of the heirs.

A PPEAL from the District Court of West Feliciana, Burk, J.

Ratliff, Cowgill, Muse, and Merrick, for the plaintiff, contended that the prescription of thirty years under art. 1228 of the Civil Code, does not bar this action, there having been only nine years of adverse possession by defendants during which prescription was not suspended by minority. C. C. 3488.

Paterson, for the defendants.

Marks, Mayo, and Bowman, for the parties cited in warranty.

The judgment of the court was pronounced by

Rost, J. This is a petitory action. The facts are briefly as follows: Lucy Hall was the owner of the slaves Philip and Tempe. She died in 1813, leaving as her legitimate issue Burr S., and Thomas H. Hall and Harriett B. Hall, then married to John Stafford. No proceedings were had in her succession, and no inventory ever made; but the evidence admitted by the judge satisfactorily shows that at her death the two brothers retained the possession of the slave Philip, and that her sister had possession in the same manner of the slave Tempe. This separate possession continued till 1833, when Harriet B. Hall died, and Burr S. Hall, the father of the plaintiff's ward, was appointed tutor of her minor children. He gave bond as tutor for the appraised value of the property of the minors, in which the slave Temps and her children appear to have been included. He set up no claim to those slaves; and considering the slave Philip as the exclusive property of his brother and himself, he purchased of his brother the undivided half, and that slave was subsequently seized and sold at the suit of his wife against him.

Burr S. Hall died in 1836. An inventory of his succession was made in June of that year, in presence of his widow, who was at that time tutrix of the plain-

RANKIN O. BELL.

tiff's ward. It purports to include the property left by the deceased, and makes no mention of the slave Tempe and her children. Before the date of this inventory and the death of Burr S. Hall, a judicial partition was made of the slave Tempe and her children between the heirs of Harriet Stafford, under whom the present defendants claim and possess. This action was instituted in 1844, in behalf of the son and only heir of Burr S. Hall, to recover one undivided half of the slaves mentioned, on the ground that his father and himself have never been legally divested of their title. The court below gave judgment in his favor, and the defendants appealed.

The record contains several bills of exception, which it is not necessary to notice. The defendants and their warrantors have pleaded in bar of the plaintiff's action, the continued and uninterrupted possession of the slaves, by themselves and those under whom they claim, during thirty years; and the evidence adduced by them fully supports that allegation. It is contended that Lucy Havard herself did not transfer the possession of her portion of the slaves to Bell and Hall. Supposing the possession to have remained in her up to this time, the plaintiff's case would not be benefitted by it.

It is alleged that during all the time that possession has been adverse to the plaintiff's ward and his father, prescription had been suspended by reason of their minority, except during nine years. The article of the Code upon which defendants rely, is not found in the chapter treating of prescription, and from its plain import the limitation it creates is not suspended by minority. The fact of having possessed separately a portion of the hereditary effects during thirty years, gives in all cases to the heir who has thus possessed the right to oppose the suit of his co-heirs for a partition of those effects. Civ. Code, art. 1228. The father of plaintiff's ward has acquired a title to the slave Philip in the same manner; and a judgment adverse to his claim will but give effect to an amicable division of the property of Lucy Hall, made between Burr S. Hall and his sister, and executed in good faith by both.

For the reasons assigned it is ordered that the judgment be reversed, and that the defendants be for ever quieted in their possession and title to the slave *Tempe* and her children, against the claims and pretensions of the plaintiff. It is further ordered that the plaintiff pay the costs in both courts.

COPLEY v. MOODY.

The purchase of a litigious right by an attorney practising in the court in which the litigation was pending at the time of the sale, is null. C. C. 2423, 2623, 3529, § 22.

A PPEAL from the District Court of Madison, Curry, J. H. W. Dunlap, for the appellant. Bemiss, for the defendant. The judgment of the court was pronounced by

King, J. This is a petitory action, in which the plaintiff seeks to recover twenty-five slaves, which he alleges were adjudicated to him at the probate sale of the property of J. H. Sims, deceased. The defendant avers title in himself under a marshal's sale, made in virtue of an order of seizure and sale issued from the District Court of the United States. The plaintiff's demand was rejected in the court below, and he has appealed.

COPLET 0. MOODY.

From the evidence it appears, that the slaves in controversy, together with a tract of land, were mortgaged by Sims to the defendant, in 1841, to secure the payment of a sum exceeding \$28,000. Sime died in 1842, and during the same year an inventory of his succession was made. On the 10th of March, 1843, under an executory proceeding, all the mortgaged property was adjudicated by the United States marshal for the western district of Louisiana to the defendant. On the 25th of the same month, on the application of the creditors of Sims, the probate judge of the parish of Madison ordered all of the property thus adjudicated to the defendant to be sold, as composing a part of the succession of the deceased. A further order was granted for the provisional seizure and sequestration of the slaves and moveables, on the ground that they were in the possession of the defendant, who it was apprehended would remove them from the State, before they could be legally sold. The slaves were taken into possession by the sheriff, notwithstanding which the defendant succeeded in escaping with them from the State. After the removal of the slaves, a second inventory was made, in which was appraised "all the right, title, interest and claim of the succession to the slaves formerly employed on the plantation of Sims, and now in adverse possession, supposed to be in Morgan county, Georgin." The property advertised for sale was "all the right, title and interest of the succession of Sims, to the slaves," in question, "supposed to be in Morgan county, Georgia," and with this description they were adjudicated to the plaintiff. for \$14 50.

From this statement it is manifest that the adjudication to the plaintiff was of a litigious right. A litigation, extremely irregular it is true, in many respects, was, at the date of the adjudication, pending between the creditors of Sims and the defendant Moody, who possessed and claimed title in virtue of a judicial sale. The plaintiff was at the time of his purchase a practising attorney, and could only acquire such a right under the pain of nullity. C. Code, arts. 2422, 2623, 3522, no. 22. Copley v. Lambeth, 1 Ann. R. 316.

Judgment affirmed.

CHAMBLISS, Executor, v. ATCHISON.

Proceedings via executive cannot be changed into an action via ordinaria, without the assent, express or implied, of the seising creditor. Where such a change is made with the assent of the creditor, neither the interest nor damages allowed on the dissolution of an injunction can be recovered.

Interventions are not allowed in proceedings vid executivs. Third persons must assert their rights in direct actions.

Grounds for enjoining an order of seizure and sale may be noticed on appeal, though not set out in the petition for the injunction, when apparent on the face of the record. Not to notice such grounds, would be inconsistent with the rule that injunctions, though improvidently sued out, are never dissolved, when the facts show that, on the dissolution, the party will be immediately entitled to that remedy on other grounds. Per Curiam: The case of Landry v. Leglise, 3 La. 220, must be considered as referring exclusively to points not made in the petition for the injunction, nor appearing on the face of the record.

Decision in Spencer v. Knowland, ante p. 222, affirmed.

Acta sous seing privé can only be made authentic by a recognitive act setting forth their tenor, executed before a notary and two witnesses.

To entitle the holder of notes secured by mortgage to proceed by executory process, the identity of the notes with those secured by the mortgage must appear upon the face of the record; though, it may be true, that the certificate and paraph of the netary are not indispensable for that purpose.

CHAMBLISS W. ATCHISON.

A PPEAL from the District Court of Carroll, Mayo, J. Stacy and Sparrow, for the plaintiff. Thomas, for the defendant. Dunlap and Perkins, for the opponents. R. N., and A. N. Ogden, for the intervenors. The judgment of the court was pronounced by

Rost, J. The plaintiff, as dative testamentary executor of Job Bass, obtained an order of seizure and sale against a plantation and slaves in the possession of the defendant, upon a mortgage debt alleged to have been due originally to the testator by Joseph Niebert, and to have been assumed with a new mortgage by the said defendant. The defendant enjoined the seizure, alleging the executory process to be illegal, unjust and oppressive, both in its origin and in every stage of its progress, on various grounds stated in the petition. He also pleaded on the merits a partial failure of the consideration by him given for the property mortgaged, and prayed for the recision of the sale, with damages.

The plaintiff moved to dissolve the injunction, as having been improvidently sued out, on the allegations of the petition. Before this motion was disposed of, the defendant presented an amended petition, setting forth the institution against him of the suit of Bryan, Administrator, v. Atchison, lately determined, ante p. 462, for the recovery of one-half of the mortgaged premises; alleging other grounds of defence, and praying that the suit of Bryan against him might be consolidated with these proceedings.

The plaintiff opposed the filing of the amended petition, on the following grounds: 1st. That all amendments to pleadings upon which an injunction has been obtained, are inadmissible. 2d. That the amendment offered contradicted the original pleadings. 3d. That it cumulated the suit with matters that could not be pleaded in it. 4th. That it prayed to consolidate this suit with a petitory action, which could not be done.

The court refused to permit the suits to be consolidated, but allowed the amended petition to be filed, and the plaintiff took a bill of exceptions. He subsequently filed, as an answer to both petitions, and under the reservation of his rights on the motion to dissolve, a general denial, and prayed that the injunction might be dissolved with ten per cent interest, and twenty per cent damages, upon the amount enjoined, and \$1,000 as special damages. The persons named in the suit of Bryan v. Atchison, as representing the Planters Bank and the Commercial Bank, intervened, and prayed for judgment against the defendant as in that suit. The commercial firm of W. Jackson & Co. came into court by way of third opposition, and opposed the seizure and sale, claiming a privilege upon the crop then growing, for supplies furnished to the defendant for the use of the plantation and slaves. The court below, after hearing the parties, perpetuated the injunction, gave judgment against the intervenors as in case of nonsuit, and in favor of W. Jackson & Co. for the amount of their claim, with privilege upon the proceeds of the crop in the custody of the sheriff. The plaintiff has appealed from the judgment perpetuating the injunction, and from the judgment in favor of W. Jackson & Co. The intervenors have also appealed from the judgment rendered against them.

There has been no change in this case from the vid executiva to the vid ordinaria. That change cannot take place without the assent, express or implied,

CHAMBLISS O. ATCHISON.

of the seizing creditor, and the record shows most conclusively that no assent of any kind had been given by the plaintiff. The motion to dissolve insisted upon to the last, the grounds upon which the filing of the amended petition was opposed, and the prayer of the answer for the dissolution of the injunction with the highest rate of interest and damages, and special damages besides, all lead the mind to the inevitable conclusion that the plaintiff has not relented in the pursuit of the remedy at first resorted to. Had he intended to do so, neither interest nor damages would have been claimed by him, as none could be recovered in the vid ordinariá. McMillin v. Carlin, 16 La. 102.

This, we conceive, puts an end to the pretentions of the intervenors. Interventions takes place in suits, but an order of seizure is not a suit. All the proceedings allowed under it are summary, and parties are not permitted to embarrass the administration of summary justice with matters en pais, having no connection with the main issue; nor can they in that manner deprive the parties to the order of seizure of the right to contest their claims in the ordinary forum, and to have them tried before a jury. Courts of justice are open to the intervenors in this case, for the enforcement of their rights in a direct action. But this unusual complication of suits should be discouraged, as tending to create endless confusion, and to obstruct unnecessarily the avenues of justice. We have no hesitation in saying that the intervention of the banks in this case, is in derogation of common right, and unauthorised by law.

Among the specific grounds relied on in argument by the counsel for Atchi-* n, in support of the judgment appealed from, so far as it perpetuates the injunction, the following are deemed material:

1. Chambliss could not legally obtain an order of seizure on the outstanding notes of Niebert, the stipulation of the defendant to pay those notes only confering upon him an equitable action to enforce payment.

2. The power of attorney to Lacoste, which is one of the documents on which the order of seizure issued, is a private act.

The certificate and affidavit of the justice to prove demand from the original debtor, are private acts, not under seal as required by the statute of Mississippi.

4. The copies of the statutes of Mississippi adduced to show the capacity of justices of the peace to act as notaries and to prove the rate of interest on the notes, are not authentic in the meaning of articles 732, 733, of the Code of Practice.

5. The identy of the notes is not shown. They were not paraphed by the notary. The mortgage of Niebert describes those that were given as being drawn in favor of Bass, and his name is not on those which the plaintiff has produced.

The facts assumed in these grounds are apparent on the face of the record, and force upon us the conclusion that the order of seizure was granted upon evidence not authentic.

It is contended that none of those grounds but the first were set forth in the petition praying for the injunction, and that the others cannot be noticed here. The authorities relied on in support of that position do not, in our opinion, establish it.

"When executory process is prayed for on an act said to import a confession of judgment, the judge must examine and decide whether the instrument unites all the requisites of the law necessary to authorise this summary proceeding; so

far it is a judgment, and an appeal lies from it, as from all other orders of CHAMBLISS court that might work an irreparable injury." Harrod v. Voorhies' Administratrix, 16 La. 254.

ATCHISON.

The case of Landry v. Léglise, 3 La. 220, must be considered as controlled by that of Harrod, and as having exclusive reference to points not made in the petition of injunction, and not appearing on the face of the record. The defendant, Atchison, may avail himself in the Supreme Court of the defence which an appeal from the order of seizure would have enabled him to make.

The rule laid down in Léglise's case, if understood in the broad sense, that that the court can, in no case whatever, travel out of the matters set forth in the petition, would come in direct conflict with another rule of practice, which has received the uniform assent of the bench and the bar. That rule is, that injunctions, although improvidently sued out, are never dissolved, when the facts of the case show that on the dissolution the party will immediately be entitled to that form of remedy on other grounds. Bushnell v. Broom's Heirs, 4 Mart. N. S. 499. Exinicios v. Weiss, 3 Ib. N. S. 480. Crane v. Baillio, 7 Mart. N. S. 273. 4 La. 400. 5 La. 62.

Proceeding to examine the points made, in the case of Spencer v. Knowland, ante p. 222, we held that a copy of the statute of Mississippi regulating the rate of interest was not authentic evidence of that rate at the time the judgment was rendered executory, and the reasons there given apply to the two statutes found in this record.

The certificates of the justices of the peace of the State of Mississippi, are not under seal, and this omission has been held by the late Supreme Court to be futnl. 14 La. 157.

The power of attorney from Wilkins to Lacoste is a private act. The acknowledgment of one of the witnesses who signed it, although it may be sufficient to affect third persons with notice, when the act is recorded, does not make it authentic. The copy of it found in the record would not be legal evidence in an ordinary suit, and is totally insufficient to support an order of seizure. 5 Mart. N. S. 175, 691.

Acts under private signature can only be made authentic by a recognitive act setting forth their tenor, and executed before a notary and two witnesses. Maillan v. Perron and wife. 8 Ln. 138.

It may be true that, the certificate and paraph of the notary upon mortgage notes are not indispensable to enable the holder to resort to executory process, but their identity must be manifest upon the face of the record. It appears to us in this case to be a matter en pais. Had the plaintiff appealed from the order of seizure, he would be clearly entitled to relief. We consider that he is equally so under the present form of action.

The order of seizure having been improperly sued out, the plaintiff is without capacity to contest the claim and privilege of W. Jackson & Co. That branch of his appeal must therefore be dismissed.

For the reasons assigned, it is ordered that the judgment perpetuating the injunction, and dismissing the petition of the intervenors in this case, be affirmed with costs; and that the appeal taken by the plaintiff from the judgment rendered against the defendant in favor of W. Jackson & Co., be dismissed, with

CHINN et al. v. RoE et al.

A PPEAL from the District Court of Madison, Curry, J. This case was remanded for the purpose of making new parties, no decision being pronounced on the matters at issue. A. Pierse, for the plaintiffs. Shannon and Snyder, for the appellants.

GALBRAITH et al. v. SNYDER et al.

A District Court having jurisdiction over the place where an execution is levied may enjoin the execution, though the domicil of the party at whose instance it was issued be in another parish.

A judgment allowing a fee to counsel appointed by the court to represent an absentee, is a nullity. No action is necessary to have it declared so. Const. art. 71. C. C. 12.

Informalities in a seizure may be considered on the trial of an injunction to arrest it, though not set forth in the petition for the injunction.

Where notes offered in evidence before their maturity, have been withdrawn, by permission of the court on leaving certified copies of them in the record, the levying of a f. fa. upon the copies of the notes and notice to the maker, will not constitute a legal scizure.

Where judgment has been pronounced by a District Court, no other District Court has jurisdiction of an action to annul it. C. P 608.

A PPEAL from the District Court of Corroll, Selby, J. R.N., and A. N. Ogden, for the appellants. Thomas, for the defendants. The judgment of the court was pronounced by

SLIDKLL, J. Snyder obtained a judgment in the District Court of Madison, against the Planters' Bank, on attachment, on the 30th April, 1846. In this suit the bank was represented by Shannon as attorney ad hoc, under the appointment of the court, and he was allowed in the judgment a fee of \$125. Snyder's judgment was for \$2,150 and interest, upon which a collection has been made of \$1.073 50.

Upon this judgment in favor of Snyder and Shannon they issued an execution to the parish of Carroll, and attempted to levy upon certain debts, amounting to \$90,730 74, due by E. F. Atchison, represented by his six notes secured by mortgage upon lands in the parish of Carroll, which notes, once held by the bank, are now claimed by the plaintiffs to be their property. A few days previously to the seizure these notes had been offered in evidence by the trustees, Mandeville and others, in the two cases now pending in this court, of Bryan and of Chambliss against Atchison, and were then withdrawn by leave of court, on leaving in the record certified copies of them. This so called seizure was made by levying upon the copies of the notes and act of mortgage, and giving notice to the attorney who represented the trustees in those suits and to Atchison. Those trustees were not the present plaintiffs, but trustees appointed by an assignment made by the Planters' Bank.

The sheriff, after these proceedings, advertised the Atchison debt for sale, and the trustees then brought the present suit, and enjoined the sale. They allege the forfeiture of the bank's charter, their appointment, their ownership

of the Atchison debt, and the nullity of the judgment obtained by Snyder and Shannon.

GALBRAITH U. SHYDER.

Shannon and Snyder excepted to the suit upon two grounds: first, that their domicil is in the parish of Madison, and that they are only suable in that parish; secondly, that the judgment sought to be annulled was rendered in the District Court of the parish of Madison, and no suit can be instituted in any other court to annul the same.

The first ground has not been pressed in argument by counsel, and is clearly untenable, in a case of this nature. The second ground is clearly untenable, with regard to a portion of the judgment upon which the execution issued. That portion of the judgment which adjudged the allowance of \$125 to Shannon, was a violation of a constitutional prohibition, and was a nullity so absolute that no action of nullity was necessary to set it aside. See Constitution, art. 71; and Civil Code, art. 12.

Upon the merits it is clearly shown by evidence admitted without exception, that the attempted seizure was informally made, and although such informality was not one of the grounds set forth in the petition for the injunction, it should have been considered. To permit the consummation by sale of an informal seizure, could lead only to future embarrassment and litigation. The unmatured negotiable notes which the defendants had attempted to seize, and proposed to sell, were not levied upon by the sheriff.

The right of these plaintiffs to stand in judgment as the successors of the bank, and interfere in these unlawful proceedings against its assets, has been disputed by the defendants. It is unnecessary to enlarge upon this matter here. We considered this subject at some length in the case of the *Planters' Bank* against *Bass*, recently decided, ante p. 430; and there held that *Galbraith* and *Cooper*, in their capacity of trustees, were to be regarded as the successors of the bank, and were competent to prosecute suits in eur courts. Whether, if the seizing creditors had made a valid seizure of property, formerly the bank's, we would not have relieved the plaintiffs by arresting the seizure and restoring the property to them, is a question not now before us. Here we arrest the execution, because it is the execution of a judgment unconstitutional and absolutely void in part; and because the execution of so much of the judgment as is not void on its face, has been conducted informally, and in such a manner as could pass no valid title to a purchaser, and could serve no other purpose than to cloud the title, and produce future uncertainty and litigation.

We express no opinion as to the nullity of the judgment obtained in the District Court of Madison by Shannon against the bank, after the charter was declared forfeited; the District Court of Madison is the proper forum for the investigation of that question. Code of Practice, art. 608.

We also express no opinion as to the validity of the assignment to Mandeville and others, who are not before us; nor are we informed in this suit as to the particulars of the assignment for the benefit of creditors, under which they claim. For the purposes of the present suit Galbraith and Cooper stand before us as the successors of the bank, and have, at any rate, such a residuary interest in its assets, as justified their efforts to protect them against an illegal seizure and informal sale.

It is therefore decreed that the judgment of the court below be reversed, and that the defendant *Shannon* be perpetually enjoined from executing the judgment rendered in his favor against the said Planters' Bank, by the District

GALBRAITH F. SSYDER.

Court for the parish of Madison; that the defendant Snyder be perpetually enjoined from proceeding to sell under the pretended seizure, made by the sheriff of the parish of Carroll, as by the record in this cause appears, the interest of the Planters' Bank in the notes therein described; and that the costs in both courts be paid by the said Shannon and Snyder.

OSBURN V. THE PLANTERS BANK OF MISSISSIPPI.

Where an injunction, obtained by a party claiming to be the owner of certain slaves against an order of seizure and sale, has been dissolved, no appeal being taken from the judgment; and, on the removal of the slaves to another parish, and their seizure under a f. fa. issued from the court by which the injunction was dissolved, the same party obtains a second injunction, claiming to be their owner and relying on the title held by her at the time of the first injunction, the second injunction will be dissolved, with damages; and irregularities in the order of seizure and sale, not urged on the trial of the first case, will not be noticed.

A PPEAL from the District Court of St. Mary, Overlon, J. Shannon, for the appellant. Maskell, for the defendants. The matter at issue in this case is res judicata. C. C. 2265. 19 La. 323-328. 10 Rob. 361.

The judgment of the court was pronounced by

SLIDELL, J. In the year 1842, the Planters' Bank obtained, in the District Court for the parish of Madison, a decree against Ozias Osburn, the husband of the present plaintiff, whereby a judgment theretofore rendered in Mississippi, in favor of the bank against Ozias Osburn, was adjudged executory in this State, and a writ of seizure and sale was ordered to issue; and it was further ordered that certain slaves, among which were comprised those now in controversy, should be seized and sold as the property of Osburn. This judgment of the District Court of Madison was thereupon recorded in the mortgage office of that parish, and the slaves were seized. Mary Osburn then, by the agency of her husband, brought suit by injunction, alleging that she was the true owner of the slaves so seized. She prayed that the seizure be set aside, the slaves delivered up to her as her property, and that the injunction obtained be made perpetual. Osburn made a personal appearance in the proceedings, but did not contest their regularity, nor his indebtedness to the bank. Upon the trial of the injunction suit, the court, by a final judgment, sustained the injunction and the title of Mary Osburn as to four of the slaves so seized; but dissolved the injunction as to the residue, which remained judicially sequestered.

By some means these slaves were carried to the parish of St. Mary. The plaintiffs in execution obtained an alias, seized the slaves in that parish, and thereupon Mary Osburn brought the present suit, in which she again restrains the sale by injunction, and asks to be recognised as the owner of the slaves. So far as the plaintiff relied on title existing at the institution of her first suit, the court below very properly dissolved the injunction, with damages. This was an unlawful effort to renew a litigation, which the final decree already stated had effectually barred.

Much has been said in argument, in support of allegations in the petition charging irregularities and errors in the proceedings upon which the decree rendering the judgment executory was obtained. We do not notice them, be-

cause Osburn, the defendant in those proceedings, submitted to them without appeal; the present plaintiff made no complaint on that score in her first suit, and cannot revive such questions now.

OSBURN U. PLANTERS BANK.

The pretended title set up under a deed of donation from the plaintiff's brother, in 1844, is worthless, as against this judgment creditor, as Osburn, it seems, went into bankruptcy, in Mississippi, in January, 1843. In the schedule of his property he enumerates the slaves in question, with but one exception, as belonging to him. He declares in his schedule that the slaves are in Louisiana, and have been levied upon by virtue of an order of seizure and sale issued on a judgment in favor of the Planters' Bank against him and others, and are beyond his control. The assignee never had possession of, and did not pretend to sell, the slaves; but advertised and sold the interest of Ozias Osburn in them, which was struck off to Dean, the brother-in-law of Mrs. Osburn, for thirty dollars, in 1844, and Dean then made a donation of them to the plaintiff, his sister. Dean was aware of the existence of the suit in Madison, for he had been examined as a witness for his sister in that cause. It is idle to contend that the privilege and mortgage acquired before the bankruptcy by the seizure and possession of the sheriff and registry of judgment, was divested by this mere deed, made by the assignee virtute officii, and for which not even an order of the bankrupt court is shown. The deed itself did not purport to convey an absolute title, but only Osburn's interest. Judgment affirmed.

DOWELL v. DAWSON.

Where a witness will be equally responsible however the case may be determined, he is competent; his interest being balanced.

A PPEAL from the District Court of Madison, Curry, J. Frost, for the appellant. Sanders, for the defendant. The judgment of the court was pronounced by

King, J. The plaintiff sues for the amount of an account for merchandise alleged to have been sold and delivered to the defendant, previous to the marriage of the latter, in the State of Mississippi. The defendant admits that a part of the account was contracted for her benefit, but avers that it has been paid and extinguished. There was a judgment against the plaintiff in the court below, from which she has appealed.

During the years in which the account sued on occurred, the defendant was a minor, residing with her brother-in-law, F. H. Claiborne, at whose request the articles were furnished. The evidence leaves no doubt that the credit was given to Claiborne, at whose instance the account was opened. The plaintiff regarded him as her debtor, and requested him to close the account by note, which he did, upon the express condition, that it should be receipted in full and the defendant discharged, that he might be enabled to collect it from the defendant's guardian. The account was subsequently paid to Claiborne by the defendant's guardian, and the latter received a credit for its amount in the final settlement of his accounts with his ward, in the Probate Court of Mississippi. The plaintiff appears never to have called on the defendant for payment prior to the marriage of the latter, when the affairs of Claiborne had become embar-

DOWELL v. DAWSON.

rassed, and his solvency doubtful. Previous to that time the defendant had accounted for the plaintiff's claim in the settlement with her guardian. Nor did the plaintiff ever demand payment of the defendant's guardian, although the latter published notices for several weeks, in a newspaper of the town of Natchez, where the plaintiff resided, of his intention to render his final account of his administration.

The competency of Claiborne to testify has been objected to, on the ground of interest. He will be equally responsible to either of the parties, whatever may be the result of the suit. His interest is balanced, and his testimony was properly admitted.*

Judgment affirmed.

DE GOER et al. v. KELLAR.

Where a promissory note endorsed in blank by the payee and a third person, and delivered by the maker to the syndic of an insolvent in payment of the price of property purchased at the sale of the insolvent estate, is transferred to a third person by the syndic, without any order of court and in violation of his duty, by an endorsement in blank made by the syndic in his individual name, and the note is transferred to a fourth holder, before maturity, in the ordinary course of business, in good faith, and for a valuable consideration, the fact of the transfer by the syndic, without an order of court, will not affect the right of the holder. The creditors of the insolvent must look to the syndic or his sureties.

Where, pending an action against the maker of a note, the defendant deposits the amount, with the interest and costs which had accrued up to the time of the deposit, with the clerk of the court, to abide the result of a controversy between the plaintiff and certain intervenors who claimed to be entitled to the amount, the deposit not being a tender, and the plaintiff not being entitled by its terms to take the amount, the defendant will not thereby discharge himself from liability for further interest and costs.

A PPEAL from the District Court of East Feliciana, Boyle, J. This case was tried before a jury, and the plaintiffs appealed from a judgment, rendered on a verdict, in favor of the intervenors, and against the plaintiffs and defendant. The facts of the case are stated in the opinion of the court, infra.

T. G. Morgan, for the appellants. The note was transferred to the plaintiffs before maturity, and in the usual course of trade. There was nothing on the note calculated to excite suspicion. No notice was given prior to the maturity of the note, tending to show that any third person had any equitable interest therein. The plaintiffs gave a valuable consideration for the note, and are bond fide holders. If they are bond fide holders, they are entitled to recover, and their rights cannot be affected by the acts of antecedent holders. Story on Promissory Notes, ss. 190 to 197. Coolidge v. Payson, 2 Wheaton, 66, 70, 73. Townsley v. Sumrall, 2 Peters, 170, 182, Swijt v. Tyson, 16 Peters, 15, 22. Story on Bills, s. 186.

Z. S. Lyons, on the same side. Muse and Merrick, for the intervenors. No counsel appeared for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff seeks to recover from the defendant the amount of a promissory note, made by the defendant and endorsed in blank by Sandell,

The counsel for the appellant contended that the witness was incompetent from interest, on the ground that, if the plaintiff recovered the witness would be liable to the defendant for the debt and costs, but, in case of judgment for the defendant, his liability to the plaintiff would be for the debt, without costs. The court considered the interest of the witness to have been balanced; and this decision cannot be considered as determining that a liability for costs is not of itself sufficient to disqualify a witness.—Reference.

Sturges and Clark. His claim is resisted both by the defendant, and the Dr Gorn commissioners of the Clinton and Port Hudson Railroad Company, who have intervened in the cause.

The material facts in the case are, that one Samuel Clark made a surrender of his property to his creditors, and at the meeting of his creditors was chosen by them syndic of his own estate. Those who voted for him dispensed him from the duty of giving bond for the faithful performance of his duties as syndic. Among them was the president of the Railroad Company. A sale of the insolvent's estate took place, and Kellar, having become the purchaser of certain lands thus sold, gave notes for the purchase money, among which was the note now held by the plaintiffs. Clark, without any order of court, or tableau of distribution, passed this note to one Morris, and Morris, before its maturity, negotiated it to the plaintiffs, for merchandise sold by them to him.

The principal contest in this matter has been with regard to a question of fact. The defendant and intervenors contend that, although the last endorsement, that of Clark, now exhibits only the words Samuel Clark, that it once was Samuel Clark, Syndic; that the word syndic has been erased, but in such a manuer as that an erasure is apparent.

At the trial in the court below, by agreement of counsel, experts were appointed, who reported that there had been no erasure. The note has been brought up in original. We have examined it, and we are not able to say that there has been any erasure; nor do we see any thing in the appearance of the note calculated to excite suspicion, or justify, in any degree, any imputation of negligence on the part of the plaintiffs in taking the note. It is satisfactorily proved that, the note is now in the same condition in which it was when they received it from Morris; that they took it before maturity, in the ordinary course of business, in good faith, and for a valuable consideration given by them, to wit, merchandise sold to Morris.

In Nicholson, Syndic, v. Chapman, 1 An. R. 222, where a note belonging to the insolvent estate bore the endorsement 'G. W. Pritchard, Syndic,' we said that such an endorsement was notice that the note had once belonged to an insolvent estate, that it was sufficient to put the party on enquiry, and that he was bound to ascertain whether it had lawfully passed from the estate. But here is no such endorsement; and the fact that it once belonged to the estate of Clark, and that he had violated his official duty in transferring it without any order of court, is not sufficient to invalidate the ownership of a bond fide holder. The creditors of the estate must look for their recourse to the syndie, who has proved unworthy of their confidence, and to his bondsman. We could not say otherwise, without overthrowing a doctrine long established, and essential to the accurity of negotiable paper.

The defendant, during the pendency of the proceedings in the court below, moved and obtained leave to deposit in court, in the hands of the clerk, the amount of the debt, interest and costs, up to the time of the deposit, to abide the result of the controversy between the plaintiffs and intervenors. To this the intervenors only assented, the plaintiffs objecting. The defendant now contends that this discharged him from any further responsibility, and that no further interest can be recovered.

This deposit was not a tender; under its terms the plaintiffs had no right to take the money. It was in no way binding upon them. We must treat it as not made, and give the plaintiffs judgment for the debt, full interest, and costsDE GOER KELLAR.

It is therefore ordered that the judgment of the court below be reversed, that the petition of the intervention be dismissed, and that the plaintiff recover of the defendant, George Kellar, the sum of \$3,332 66}, with interest from 19th January, 1833, until paid, at the rate of ten per cent per annum, and costs in both courts.

READ et al. v. WARE.

Where a defendant seeks to dissolve an attachment on the ground of the falseheod of the affidavit made to obtain it, he may proceed summarily, by a rule to show cause. C. P. 25% It is not necessary that such a defence should be set up by plea or exception.

If there be an existing debt, the mere fact that the debt is not due, will not authorise the discharge of an attachment.

A creditor who has accepted, for the accommodation of his debtor, a bill payable a certain number of days after date; drawn by the latter for the amount of the debt, with interest to its maturity, where the bill has been discounted by a bank and the proceeds applied to the extinguishment of the original debt, cannot, before maturity of the bill and its payment by him, be considered as a creditor of the defendant. and as such entitled to an attachment against him. The holder was the creditor; and where, in such a case, an attachment was sued out before the maturity of the bill or its payment by the acceptor, a subsequent payment at maturity, cannot give validity to the attachment previously taken out.

PPEAL from the Commercial Court of New Orleans, Watts, J. Mott, A for the plaintiffs, cited stat. 7 April, 1826, s. 7. Tyson v. Lansing, 10 La. 444. Russell v. Wilson, 18 La. 369. L. Peirce, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. This suit was commenced on the 27th March, 1845, by an attachment, upon an alleged indebtedness, which, with the exception of a smallitem, consisted upon the face of the petition of a claim not yet due. The defendant in attachment made appearance by counsel, and moved to dissolve the attachment on various grounds, among others, that the affidavit was untrue and the suit premature. Upon this rule the plaintiffs appeared and filed an exception praying the dismissal of the rule, because the grounds of the rule could onby be made available as exceptions to the suit; and of this opinion was the court below, and the rule was discharged. There was judgment for the plaintiffs, with privilege on the property attached, and the defendant has appealed.

We think the court erred in sustaining the exception to the rule, and in giving judgment, with privilege, on the property attached. The court states as a reason for its opinion, that the grounds of the rule were exceptions to the action, and were available only by exception or plea. The practice of moving to dissolve attachments has been a very common one. The reasons for the application may be as distinctly stated in the grounds for this motion as in an exception or plea, and the difference in substance between the two modes of preceeding is not obvious. It is true, also, that such motions involve, to a partial extent, the consideration of the merits of the cause; but the practice has arisen from a consideration of the stringent nature of the remedy. It is very clearly sanctioned by the 258th article of the Code of Practice, by which the defendant is permitted to prove, in a summary manner, after having given due notice in writing to the adverse party, that the allegations on which the order for attachment had been obtained were false; and where this is done, the Code directs

READ U. WARE.

that the attachment shall be dissolved, and the party will be allowed to proceed in his defence as in ordinary suits. The expression "garnishee" is used in the english text: but this is a mere mistake of translation, as is evident from the french text and from the context. Similar motions are permitted in the case of arrest. C. P. art. 218. The rule in both cases is founded on the same motive-the propriety of giving summary relief in view of the severe character of the remedy, the operation of which might be ruinous to the defendant if he were compelled to wait the ordinary action of justice. The line which separates a trial upon the merits from a motion to dissolve, may be difficult to define, and we do not desire to lay down any general rule; but we think it a fair subject of enquiry upon motion, whether there was, at the date of the attachment, such an existing debt as authorised the remedy. The plaintiffs had sworn, on the 27th March, 1845, that the defendant was justly and truly indebted to them in the sum of \$3,404 27, and that he was about to remove his property out of the State before the said debt would fall due. Whatever may have been the moral sincerity of the plaintiffs in making this affidavit, if in legal contemplation the defendant was not then indebted to the plaintiffs, the affidavit was untrue, and they had no right to pursue that remedy. To this point we now address an enquiry, premising that under the statute, if there be an existing indebtedness, the mere fact that it is not due does not authorise the dissolution of the attachment.

The state of the case is clearly shown by the plaintiffs' supplemental petition, and by the plaintiffs' own witness, examined at the time on the merits. The plaintiffs had, in the year 1844, accepted for the accommodation of the defendant, three certain bills of exchange, amounting to \$3,311 14, to enable him to purchase goods. The defendant was a resident of Jackson, Mississippi; and by means of these goods it was expected that he would be enabled to control and purchase cotton to be shipped to the plaintiffs, who, out of the proceeds, were to pay the acceptances. At the approach of the maturity of the drafts the defendant was unable to ship cotton to plaintiffs, or place them in funds to meet the acceptances; and the defendant promised, that if they would give him an extension of sixty days, he would either ship them a large amount of cotton, or place them in funds to meet the renewed acceptance. The plaintiffs accordingly did accept the defendant's draft for \$3,413 45, which draft was dated in January, 1845, and made payable the 1st March ensuing. This draft was for the amount of the three acceptances, which fell due early in February, with interest and commissions added; the proceeds of which were applied to the payment of the three previous acceptances. The attachment issued before the maturity of the draft thus drawn in settlement, and employed in the payment, of the three previous acceptances; it was held by the City Bank, and was not paid by the plaintiffs till the 1st April, five days afterwards.

It cannot be said that, at the date of the attachment, the plaintiffs were creditors of the defendant for the amount of this accommodation acceptance. The holder was the creditor; as between the plaintiffs and the defendants, there was not an existing indebtedness payable at a future day. The subsequent payment of the bill by the plaintiffs, which made them the defendant's creditor, could not retroact, so as to give validity to the attachment. An attachment must stand or fall according to the state of facts existing at the date of its issuing, and cannot be cured by a subsequent event. To say otherwise would be to say that the defendant was liable to a double attachment at the same time, one by the

READ W. WARE.

bill holder and one by the accommodation acceptor. See Blanchard v. Grousset, 1 Annual Rep. 98. Black v. Zacharie, 2 Howard, 510. No. R.

We are of opinion that the attachment was improperly issued, and should have been dissolved.

The judgment, so far as it grants a privilege on the property attached, is erraneous; but the plaintiffs had a right to prosecute their suit, independently of the attachment, as the defendant made appearance, and a supplemental petition was filed by the plaintiffs after the draft became due and was paid by them.

It is therefore decreed that the judgment of the court below be so amended as to be a judgment against the defendant personally, but without privilege upon the property attached; that the said attachment be dissolved; and that the plaintiff pay the costs of this appeal, and those of the court below incurred by the attachment.

Bemiss v. Hawkins et al.

The contract of sale requires a concurrence of will both on the part of the vendor and vendoe.

A PPEAL from the District Court of Madison, Curry, J. Thomas, for the plaintiff. T.P. Farrar, for the defendants. The judgment of the court was pronounced by

Rost. J. On the 23d day of January, 1841, Alfred Fowler was arrested for debt, in the parish of Concordia, on the affidavit of one of the defendants, in conformity with the provisions of the act of 1828, which authorised that mode of proceeding, and made it incumbent upon the plaintiff to file, on the following day, the petition setting forth his cause of action. With the consent of Hawkins and Stansbury, Fowler surrendered two slaves to the sheriff, to secure the debt, and was released. On the same day Fowler sold to V. T. Rodgers these two slaves, with a number of others, by an act under private signature. John B. Bemiss, the plaintiff in this suit, was a subscribing witness to that act. Fowler subsequently went before a notary in the parish of West Feliciana, and there acknowledged his signature in presence of the said notary and of two witnesses.

On the 25th of January, 1841, John B. Bemiss, acting as the attorney in fact of Fowler, entered with Hawkins and Stansbury into an agreement, by which the two slaves surrendered by Fowler were to be delivered to the sheriff of the parish of Madison, and to be retained by the said sheriff till the amount of the indebtedness of Fowler to Hawkins and Stansbury should be ascertained, by arbitrators to be chosen by both parties. The arbitration was to take place within sixty days from the date of the agreement; and, if it did not take place within that time, Hawkins and Stansbury were at liberty to proceed with their suit against Fowler, and the negroes were to be restored to the possession of the sheriff of the parish of Concordia. On the 27th of January, Bemiss entered into another agreement, by which he was to keep the slaves in his own possession, and to be responsible to Hawkins and Stansbury for their forthcoming.

The arbitration did not take place within the time fixed, and Hawkins and Stansbury having failed to file their petition as required by the act of 1828, de-

BEMISS E. HAWKINS.

prived themselves of the faculty, reserved to them by the agreement, of proceeding with their suit against Fowler. On the 31st of January, 1842, Hawkins and Stansbury proceeded by attachment against Fowler, in the parish of Madison, and one of the slaves in the possession of Bemiss was attached as the property of Fowler. Judgment was rendered in favor of the attaching creditors, and the slave attached having been seized and advertised to satisfy it, the plaintiff in this suit enjoined the proceedings, on the ground that he had purchased the slave from Rodgers, before the suing out of the attachment; that no property of Fowler had been attached; that the judgment rendered against him was an absolute nullity; and that, if it had been valid, the slave attached could not be sold to satisfy it. The court below perpetuated the injunction, and Hawkins and Stansbury appealed.

The sale from Rodgers to Bemiss is an act under private signature, which has never been recorded, and the appellants contend that it is without effect as to them.* This question is one of great difficulty, but we are of opinion that this case does not turn upon it.

The sale from Fowler to Rodgers was made on the very day on which Fowler gave the two slaves in pledge to Hawkins and Stansbury, and the plaintiff in this suit was a witness to the deed. Rodgers did not accept the sale, and so far from there having been a delivery of those two slaves to him, he was present when they were delivered by Fowler, as his own, to the sheriff, and suffered them to be represented as such.

From that time the plaintiff acted as counsel and agent of Fowler, and throughout the proceedings which took place continued to represent those slaves to the defendants as the property of his clients. Those representations are found in his receipt for the slaves, and in his agreement to submit the claims of the defendants to arbitration. On the 26th of March, 1841, he wrote to them, after stating that he was without advices from Fowler: "I shall, in the mean time, see that the negroes are safely kept to answer your claim, more positively, as I want whatever they may bring over paying you, myself. If your claim was a note, I should like to make an arrangement to take it, and then take the negroes."

Under this state of facts the conclusion is irresistible, that the sale from Fowler conveyed no title to the slave attached, which Rodgers himself could set up. The contract of sale requires the concurrence of the will of the seller and of that of the purchaser. But here neither existed, and we must hold the sale of the slave to have been a mere simulation. Its being acknowledged by the vendor, in the parish of West Feliciana, and recorded in the parish of St. Mary, cannot make it a real contract; and besides, the sale to the plaintiff is anterior in date to these proceedings. The line of conduct pursued by Bemiss induced the defendants to act, and procured the release of his clients from imprisonment. He could not, probably, under any circumstances, avail himself of an outstanding title, which he knew to exist at the time, and in the execution of which he appears to have acted as counsel. 1 Greenleaf, Evid. no. 27.

But we are of opinion that no outstanding title to the slave attached has been shown, and that the defendants are entitled to proceed under their execution. It is therefore ordered that the judgment in this case be reversed; that the injunction be dissolved, with ten per cent interest on the amount enjoined; and

^{*} This act purports to have been executed on the 9th of April, 1841.

BENISS.

U.
HAWKINS.

the defendants allowed to proceed under their execution. It is further ordered that the plaintiff pay the costs of both courts, and that there be judgment in solido against the plaintiff and A. Matthews, his surety in the injunction bond, for the amount of interest allowed.

HENDERSON v. WILCOX.

Where a judgment pronounced by the Supreme Court is absolute and unconditional as to the matters which it professes to decide, its execution cannot be enjoined by a party, while litigating other matters in controversy, which the judgment had reserved.

A PPEAL from the District Court of East Baton Rouge, Burk, J. Elam, for the appellant. T. G. Morgan, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The subjects in controversy between these parties were before the Supreme Court some years since, and a decree was then made which will be found reported in 7 Robinson, 338. When the judgment of the Supreme Court was recorded in the District Court, an execution was issued, and Stephen Henderson then obtained an injunction to restrain the execution. This he had no right to do. The decree of the Supreme Court was not conditional, but absolute, as to the matters which it professed to decide. That judgment should have been satisfied by Stephen Henderson, and he had no right to restrain its execution, while attempting to litigate the other matters of controversy, which the decree of the Supreme Court reserved. See Durnford's Succession, 1 Annual Rep. 92.

The record now presented to us is confused and irregular. This is perhaps in a great degree owing to the course pursued by the appellant, in attempting, in a petition which is obscure in its character, to blend matters finally decided with those which had been reserved. There was a verdict and final judgment in favor of the appellee, which the plaintiff, Stephen Henderson, brings before us for revision.

We have not the means of saying whether this verdict has done justice between the parties. The court below properly dissolved the injunction, and should have also dismissed the suit upon the exception of the defendant. The latter was not done; the court retained the case for trial on the merits; but, in doing so, restricted the testimony within narrower limits than the reservation of the Supreme Court authorised.

We shall dismiss the suit as was originally claimed by the appellees, leaving Stephen Henderson to obtain, by new and independent proceedings, the investigation of the claims reserved by the decree of the Supreme Court.

It is therefore decreed that the judgment of the court below be reversed, and that the suit of the said Stephen Henderson be dismissed as in case of non-suit, he paying the costs of the court below, and the appelles paying those of this appeal.

GIBSON et al. v. FOSTER et al.

In cases of attachment, as in others, all irregularities in the proceedings anterior to the judgment, except an entire want of citation, must be corrected by appeal, or in some direct proceeding instituted before the same court, to set aside such irregular proceedings; their validity cannot be questioned collaterally.

Previous to the promulgation of the Code of Practice, and the repeal of the Spanish laws by the stat. of 25 March, 1898, s. 25, the fact of the judge being interested in the event of a suit did not render the judgment a nullity. Unless the judge was recused on the oath of a party it was his duty to decide the cause. 3 Part. tit. 4, 1.22.

The provision of art. 12 of the Civil Code that, whatever is done in contravention of a prohibitory law is void although the nullity be not expressly declared, is taken from the 5th law, of the 14th title, of the 1st book of the Justinian Code, and must be interpreted in connection with another rule, adopted in the jarisprudence established under that Code, that Multa fieri prohibentur, que si facta fuerint obtinent firmitatem.

Jedicial proceedings before a competent tribunal will not be treated as nullities for defects of form only, but in cases expressly provided for by law, or within the legal intendment of art. 12 of the Civil Code, as fixed by the jurisprudence of the country from which that article was adopted.

After the lapse of twenty years, a probate sale will not be annulled, on an allegation that the judgment ordering the sale was rendered without the citation or appointment of an attorney to represent the absent heirs, supported by the evidence of a judge of the court, subsequently appointed and then in office, that he had examined the records without being able to find the appointment of an attorney to represent the absent heirs, or any citation issued, before the judgment ordering the sale, to any one purporting to be the attorney of such heirs. Per Curiam: The ground taken goes to charge the curator and the court with culpable neglect of duty, and it must be proved by the party maintaining it, though involving a negative. In the remote parishes of this State, for the want of suitable buildings and suitable keepers, proper care has not been taken of judicial records; many have been entirely lost, and, in many cases, those which remain are incomplete; and if the validity of titles acquired under judicial sales within the last forty years were to be tested by the judicial records in existence at any subsequent period, time, instead of healing, as it should, the defects of those titles, would gradually weaken, and eventually destroy, them. The presumption omnia rite acta, which attaches to judicial proceedings, is not to be rebutted by the remote presumption resulting from the evidence adduced in this case.

A judgment ordering the sale of the property of a succession, rendered at the suit of the curator, without the appointment of an attorney to represent the absent heirs, is not a nullity. Per Curiam: The curator represented the succession, and had the capacity to provoke a sale of its property. The stat. of 22 February, 1817, making it his duty to prove, contradictorily with the attorney of absent heirs, that the sale was advantageous or necessary, is merely directory; it contains no prohibitory clause; and although its non-observance may, in cortain cases, subject the curator to damages at the suit of the absent heirs, it is one of those informalities anterior to judgment, which cannot be enquired into collaterally.

A PPEAL from the District Court of Concordia, Curry, J. This is a petitiory action, brought by Simeon L. Gibson and others, against Foster and Reese, to recover a tract of land; they claim as heirs of Simeon Gibson, deceased. Foster disclaimed title, and prayed to be dismissed from the suit, which was done with the consent of the plaintiffs. The other defendant, Reese, filed a general denial; he claims title, but does not mention from what source. Mary Sargent and others filed a petition of intervention, claiming the land against both plaintiffs and defendants. To this petition of intervention, the plaintiffs answered by a general denial. The defendant filed a similar answer. The death of the intervenor, Mary Sargent, having been suggested, her executor,

Ginson v. Fosteu. Sargent, was allowed to intervene. He, as executor, and Stockton, as tutor of the minors Thompson, filed a petition of intervention, adopting the petition theretofore filed by the intervenor. The plaintiffs afterwards filed the following plea: "The plaintiffs plead the prescription of ten years against the estate of Jonathan Thompson, as against a vacant succession; and the prescription of five years against informalities in public sales, and prescription generally against the claim of intervenors."

The capacity of the plaintiffs and of the intervenors was admitted; it was also admitted that Reese, the defendant, is the legitimate son of Ebenezer Reese, the original grantee of the land in controversy. All the parties claim under Ebenezer Reese; the defendant Reese, as son and heir; the plaintiffs and intervenors, in virtue of a sheriff's sale, made to John Taylor, in the year 1812, under an execution, issued in the case of Seth Lewis v. Ebenezer Reese. Phintiffs and intervenors offered the record in that suit to establish said sheriff's sale. It was admitted by the defendant, that the sheriff's deed to John Taylor was duly recorded in the proper office, and that the heirs of Taylor, after his death, conveyed all their interest in the land to Jonathan Thompson, and that their deed was duly recorded. The plaintiffs asserting that they had succeeded to Thompson's interest, set up a probate sale of the land, provoked by Davis, the curator of the succession of Thompson, and for that purpose offered several documents containing. parts of the probate proceedings, among which are the appointment of Davis as curator, the inventory and appraisement, his petition for a sale of the effects of the succession, and the judges order thereon, the proces-verbal of the sale, and the deed of Davis, the curator, to McNeil, to whom the land had been adjudicated at the alleged probate sale; it was admitted that all the interest of McNeil, if any he had, passed by several mesne conveyances, to the father of the plaintiffs. To show that the estate owed debts in Mississippi, plaintiffs offered in evidence proceedings in the Probate Court of Adams County, Mississippi, provoked by the administrator of Thompson's estate in that State. The intervenors contended that the probate sale, provoked by the curator, Davis, was illegal and void, for several reasons, the chief of which was the failure to appoint an attorney to represent the absent heirs. They offered the testimony of the judge of the Probate Court, to show that no attorney for absent heirs was appointed before the year 1831; the probate sale relied on having taken place on the 22d of February, 1825. It was admitted by the intervenors that they did not claim the succession of Thompson till the year 1839, and that they made no application to the Probate Court of Concordia, to be recognised as heirs, &c., till the year 1843. It is admitted by all parties, that no person ever was in possession of the land until the defendant took possession, a few months prior to the institution of this suit. The court below rejected the demand of the intervenors, and gave judgment in favor of the plaintiffs, and against the defendant, for the land in controversy. From this judgment the defendant and intervenors

Stacy and Sparrow, for the plaintiffs. Both the judicial sales were made by virtue of judgments of courts of competent jurisdiction for the payment of debts, which judgments protect the purchasers under them. Those judgments stand unreversed and unannulled, and cannot be attacked collaterally in the manner attempted; and so long as they stand the sales must stand also. See Lalanne's Heirs v. Moreau, 13 La. 432. Thompson v. Tolmic, 2 Peters, 166. 1 Peters, 339. 3 La. 518. McComb's Heirs v. Dunbar, 14 La. 146. Graham's Heirs v. Gibson. C. P. arts. 604, 605, 606, 608, 610, 611. Bank of the United

States v. Bank of Washington, 6 Poters, 8. Voorhees v. Bank of the United

States, 10 Peters, 449. Wise v. Sloman, 3 Cranch, 300.

The only objection to the validity of the sale of the property of the succession of Thompson is the supposed omission to appoint an attorney of absent heirs. There is no proof that one was not appointed. All that is proved is, that the records of the Probate Court do not exhibit proof of any appointment. This at best only furnishes a presumption of the fact alleged. What are the adverse presumptions? As to the proceedings of courts, that omnia rite acta, that they have done their duty. He who alleges the contrary must establish the fact by positive proof. He who charges a culpable breach or omission of duty, especially upon any officer, is bound to prove it, although it involve a negative. Hicks and Wife v. Martin, 9 Mart. 48. Morgan v. Mitchell, 3 Mart. N. S. 576. These proceedings were had more than twenty years ago, before the existence of our present Codes, in a new, sparsely settled country, where the records of the courts were irregularly and carelessly kept. Is not the legal presumption, then, a reasonable one in point of fact, that the legal and necessary acts were done, the appointment of attorney made, and that the papers have been since lost or abstracted? See Fink v. Lallande, 16 La. 556. 16 La. 433. 2 Rob. 377. Purchasers have not the custody of such muniments of title, and it would be hard that they should be made to suffer from their loss. Much must be presumed in favor of ancient titles, and of every link in the chain composing them. 12 Peters, 410.

But were we to admit that no attorney ever was appointed, it could not have the effect of annulling the sale as to innocent and ignorant purchasers. Previous to the act of 1817, the attorney of absent heirs had no voice in making the sales. By that act an advisory power was conferred upon him. The record shows the succession of Thompson to have been deeply insolvent. The heirs of Thompson then had no right to be represented; his succession was a matter of interest only to the creditors. Poultney's Heirs v. Cecil's Executor, 8

La. 321.

Frost, for the defendants. 1. A judgment rendered without citation, or appearance, is a nullity, and may be attacked collaterally. 5 Mart. 465. 6 lb. 756. 5 lb. N. S. 656. 10 La. 328. 8 Mart. N. S. 145. 14 La. 38. 5 Rob. 418. 4 Peters, 474. 2 Peters, 163. 2. A citation or appearance is necessary to give jurisdiction. 5 Howard Miss. Rep. 517. 1 Smedes and Marshall, 368. 5 Wendell, 75. 3. Where a party relies on a judgment rendered by summary or statutory process, the record must show a compliance with the requisites of the statute. 3 Littell, 40. 3 Dana, 373. 10 Yerger, 314. 7 lb. 366. 6 lb. 482. Har. and John. 36, 130. 8 Cowen, 370. 3 lb. 208. 20 Pick. 421. 4 Peters, 359, 466. 4. Where a form is given by statute it must be strictly followed, particularly in summary or statutory proceedings. 11 Mart. 610. 1 Mass. 426. 5 Howard Miss. 299. 22 Wend. 135. 20 lb. 249. 2 Smedes and Marshall, 219. 1 Kent. 466. Plowden, 103. 1 Smedes and Marshall, C. R. 188. 3 Smedes and Marshall, 47.

5. Where a judge is interested his judgment is a nullity. 21 Pick. 105.
6. Lapse of time creates a presumption in favor of the regularity of judicial proceedings; but when the record shows affirmatively irregularities, this pre-

sumption fails. 2 B. Munroe, 457. 4 Binney, 97.

H. A. Bullard, on the same side. Neither the plaintiffs nor the intervenors can succeed in this case, without showing that the ancestor of the defendant was divested of title, by the proceeding in attachment in the case of Lewis v. Reese. We contend that his title was not divested, because the proceedings against him

under the attachment laws existing at that period, were irregular and void.

If there be any principle well settled in all the States, and especially in Louisiana, it is that the forms of law required in cases of attachment against absentees are to be strictly pursued; and that, when the law has required in lieu of a personal citation certain notices and publications, in derogation of the common right to be heard before condemnation, the courts will take nothing for granted, and will require a rigid compliance with all the forms indicated by the statute. The authorities are so numerous on these points, that it is not necessary to refer to them particularly.

sary to refer to them particularly.

This principle applies to tax sales and other ex parte expropriations of property. A remarkable case, decided by Chief Justice Marshall, is referred to in the argument. In cases where there has been a judgment after personal service of process, the rule is that, on the production of a sheriff's deed, or judg-

GIDSON FOSTER. ment and execution, the party setting up title may rely on the presumption, omnia recte et rite acta; but in other cases, such as attachments, he must show the strict regularity of all the proceedings as a substantive part of his title; because otherwise the court would be without jurisdiction ratione persona.

Another principle equally clear is, that the attorney appointed to defend an absentee cannot waive any of the forms of law required to bring the defendant into court. His consent, or neglect, to avail himself of defects in the proceedings, cannot prejudice the absentee.

Starting with these well established doctrines, let us enquire how far the proceedings, as shown by the record, were in conformity with the statutes of

1805 and 1807, then in force.

1st. As to the attachment bond. The act of 1807 requires that the bond should be given in double the amount of the debt sworn to. Now, in this case, the debt sworn to was a certain amount of capital and interest; and the bond was for only double the principal. If the attorney appointed to represent the absentee had moved to set aside the attachment, it cannot be doubted he would have succeeded. This principle was sanctioned by the late court in relation to appeal bonds, when the question arose whether the appeal was suspensive. seems to me to apply with greater force in cases of attachment, in which great strictness is required. The want of such a bond is a nullity, which the party to be affected may urge at any time.

2d. The writ was not such as the statute required. The writ, and its posting up and service at the last place of abode of the defendant, stand in lieu of a cita tion. The sheriff is required to post it up in particular places in french and english. In this case, it is not required in french. At that period petitions were required to be in both languages, whatever may have been the mother tongue of the defendant. See the form of the writ in the statute of 1805. By the existing law, a citation is required. As it stood under the territorial law there was no citation, but the service of the writ in french and english, at the last abode of the defendant, and on the church door, was required in lieu of it-

That cannot be dispensed with.

3d. But admitting that the form of the writ was such as the statute required, it no where appears on the record that it was served, as required. The only return of the sheriff is the word "served." Nothing can be taken by intendment in such proceedings. The facts, the manner of service, should have appeared by the sheriff's return, in order that the court might determine whether there was a sufficient compliance with the statute. I repeat that, in attachment cases, forms are substance; and men cannot be validly deprived of their property without being made parties, either personally by service of citation, or by the publications and notices required by law in cases of attachment.

4th. Suppose, however, the word served fulfils the requisites of the law as toservice of the writ; yet if the writ itself was defective, and did not require notices to be given in both languages, it cannot be inferred from the return that

such notice was given. On the contrary, taking the return as showing a notice as required by the writ, it is not the notice required by the statute.

Stockton and Steele, for the intervenors. 1. The Parish Court of Concordia was a court of competent jurisdiction, and the sale of the land under its process, as the property of Ebenezer Reese, issued on a judgment regularly rendered by said court, conferred a good and valid title on the purchaser, Taylor, from whom it passed, by descent, to his heirs, who transferred it to Thompson.

2. Thompson possessed the land under a good and valid title, which was not legally divested by the pretended probate sale set up by the plaintiffs, and it is,

therefore, the rightful property of the intervenors.

3. The pretended probate sale is illegal and void, because: 1st, there was no sufficient showing made to the Probate Court, of the necessity for a sale; 2d, there was no sufficient inventory; 3d, there was no attorney appointed by the court to represent the absent heirs; 4th, there was no reason assigned for the sale; in the order of the judge; 5th, the property did not sell for two-thirds of its appraised value; 6th, the order of court for the sale, did not fix the terms thereof; and the terms on which the property was sold, were not such as was then required and authorized by law.

The counsel for the intervenors maintained in an elaborate argument, the validity of the sale in the suit of Lewis v. Reese, and the nullity of the probate sale of Thompson's succession.

The judgment of the court was pronounced by

Rost, J. The plaintiffs, alleging themselves to be the heirs of Simeon Gibson, have instituted this action to recover a tract of land from the defendants. Foster disclaimed title. Reese filed an answer containing a general denial, and an averment of title in himself. Mary Sargent and others intervened, claiming the land against both plaintiffs and defendants. The original parties filed a general denial to the petition of intervention. Mrs. Sargent, one of the intervenors, having died after issue joined, her executor, and the tutor of two minor heirs, came into court and adopted the petition of intervention. The plaintiffs subsequently filed the following plea: "The plaintiffs plead the prescription of ten years against the estate of Jonathan Thompson, as against a vacant succession; and the prescription of five years against informalities in public sales; and prescription generally against the claim of the intervenor." The court of the first instance gave judgment in favor of the plaintiffs, and both the defendant and the intervenors appealed.

All the parties claim under Ebenezer Reese, the original grantee; the defendant, Reese, as his son and heir, and the plaintiffs and intervenors, under a sheriff's sale, made to J. Taylor, in 1812, at the suit of Seth Lewis v. Ebenezer Reese. It is admitted by the defendant Reese, that the sheriff's deed was duly recorded in the proper office, and that, after the death of Taylor, his heirs conveyed the land to Jonathan Thompson, by an act also duly recorded. The capacity of the plaintiffs, of the defendant, Reese, and of the intervenors, are admitted. It is also admitted that none of the parties ever were in actual possession of the land, until the defendant entered upon it, a few months prior to the institution of this suit.

I. The judgment in the attachment suit of Seth Lewis v. Ebenczer Reese was rendered by a court of competent jurisdiction, contradictorily with the attorney appointed to represent the absent debtor, and after a reasonable time had been allowed him to correspond with his client and file his answer. Under the laws in force at the time, all errors and irregularities in the proceedings, short of a total want of citation, could only be taken advantage of on a motion to dissolve the attachment, made in limine litis. After the trial had begun, that motion was no longer entertained, and the irregularities were considered as cured. Watson et al. v. McAllister, 7 Mart. 368.

In the case of Cox v. White, 2 La. 422, the plaintiff contested collaterally the validity of an attachment, on the main ground taken in this case, to wit, the insufficiency of the service of the writ. Judge Matheus, in delivering the opinion of the court, said: "Objections are made in the present case to the regularity and legality of the proceedings in the attachment, which, if it were by appeal, or in any other legal shape, now before the court, would perhaps be entitled to great weight. The judgment therein rendered must be considered as res judicata between the parties, and as having settled all disputes between them in relation to the property attached, however irregular the proceeding may have been. All defects in the commencement and prosecution of that suit, must be viewed as cured by the final judgment, in relation to all parties who had no complete and vested rights in the property attached, at the time of rendering it."

In cases of attachment, as in others, the settled jurisprudence of the State is that, all irregularities in the proceedings anterior to the judgment, except an entire want of citation, are to be corrected by some direct proceeding before the same court to set them aside, or by appeal; and that their validity cannot be

GIBSON v.

GIBSON V.

drawn into question collaterally. The absolute nullity contended for, as resulting from the interest of the judge in the event of the suit, was not recognised by the laws then in force. Under those laws, judges could be recused on the eath of a party litigant, that he had miedo y sospecha of them; and, unless the recusation was made, it was their duty, as it is ours, to proceed and decide. L. 22, tit. 4, Part 3.

It is contended that prohibitory laws have been disregarded, and that, by an express provision of the Civil Code, whatever is done in contravention of a prohibitory law is void, although the nullity be not formally directed, C. C. art. 12. This disposition was extracted from the law 5, title 14, book 1st, of the Justinian Code; but the jurisprudence established under it, sanctioned also another rule which has been incorporated in the jurisprudence of all countries; it is the maxim, Multa fieri prohibentur, que si facta fuerint obtinent firmitatem. These two rules should be interpreted by each other; the first being intended for the maintenance of public order, and reasonable certainty in the muniments of title, and the second for the preservation of property and the rights of labor.

The first rule is considered by all commentators as applying to a very small number of cases, and not even to all cases involving considerations of public order. We conceive that the same thing results, not only from the general tenor of our Codes, but from the very institution of property. Under the doctrine contended for at bar, the surest way to destroy private rights would be to ascend to their origin, and the institution of property would in effect be destroyed by the laws made for its preservation.

It is not however necessary to go farther into that enquiry in the present case. We cannot go beyond the judgment; the laws alleged to have been disregarded in the proceedings subsequent to it were not prohibitory. They do not fall under the rule contended for; and where defects of form only are alleged, we disclaim all power to extend nullities to cases, neither expressly provided for by the lawgiver, nor coming within the legal intendment of art. 12 of the Code, as fixed by the jurisprudence of the country from which it is derived.

II. The only serious objection raised to the validity of the probate sale of the land in the succession of Jonathan Thompson is, that no attorney was appointed to represent the absent heirs, and that the decree ordering the sale was not rendered contradictorily with such an attorney, as is required by the act of 1817. The only proof adduced in support of this allegation is the declaration of a subsequent judge of the same court, made at the trial in 1845, that he had searched the records, and had found no appointment of any attorney to represent the absent heirs of Jonathan Thompson previous to the year 1831, and no cutation issued, before the judgment ordering the sale of the property, to any one purporting to be attorney of absent heirs.

The ground taken by the intervenors goes to charge the curator and the court with a culpable neglect of duty, and it must be proved by them, though it involves a negative. 3 Mart. N. S. 576. 1 Greenleaf, Evid. nos. 19, 20, 21, 80.

Considering the time and the locality when and where these proceedings took place, the evidence alleged is not satisfactory, and would probably not be so in in any case. It is well known that in the remote parishes of the State, for the

^{*} The order for the sale was made on the 21st January, 1825, and the sale took place on the 22d of February following.

want of suitable buildings and responsible keepers, proper care has not been taken of judicial records; that many are entirely lost; and that those which remain are often in an incomplete and dilapidated state. Much the greater part of the real property of the State is held under probate or sheriff's sales; and if the validity of the titles thus acquired during the last forty years was to be tested by the judicial records as they might exist at any subsequent epoch, time, instead of healing, as it should, the defects of those titles, would gradually weaken, and eventually destroy, them.

The presumption of omnia rite acta, which attaches to judicial proceedings, is not to be rebutted by the remote presumption resulting from the evidence adduced in this case. The defendant was not the keeper of the records, and is not bound to account for their loss. There may well have been a curator of absent heirs before 1831, as there was one after that time, and he may have waived the formality of citation. The decree ordering the sale was rendered by a court of competent jurisdiction. We are bound to believe, against mere probabilities, that the judge did his duty, and to presume, at this late period of time, that all the parties interested had notice of the proceedings. 1 Greenleaf, Evid. no. 19.

But if it were true that no attorney had been appointed to represent the absent heirs when the decree ordering the sale was made, that decree would not be an absolute nullity by reason of the omission. The curator was the representative of the succession, and had the capacity to provoke the sale of its property. The act of 1817, making it his duty to prove, contradictorily with the attorney of absent heirs, that the sale was advantageous or necessary, is merely directory; it contains no prohibitory clause; and although its non-observance might, in certain cases, subject the curator to damages at the suit of the absent heirs, it constitutes one of those informalities anterior to the judgment which cannot be inquired into collaterally.

There is no error in the judgment appealed from.

Judgment affirmed.

Dupuy, Curator, v. Bemiss.

Whenever the courts of the United States have jurisdiction ratione persone, their jurisdiction ratione materiae extends to all cases within the pecuniary limits fixed by law. Their jurisdiction is not limited or restrained by the local remedies of the different States.

The fact of a succession being under administration in a Court of Probates as constituted under the judicial organisation existing anterior to the constitution of 1845, could not deprive a Circuit Court of the United States of jurisdiction to order the sale of property forming part of the succession.

In proceedings vis executive no citation is necessary. The proceedings are in rem, and notice of the order of seizure and sale is all that is necessary to be given to the debtor.

Where a sale has been made by order of a court, whose jurisdiction over the subject matter appears on the face of the proceedings, errors or mistakes committed by it cannot be corrected or examined when brought up collaterally.

A PPEAL from the District Court of Madison, Curry, J. J. Dunlap, for the plaintiff. Bemiss, appellant, pro se. The judgment of the court was pronounced by

DUPUY 0. BEN188.

Evers, C. J. Claudius Gibson, a citizen of this State, and an inhabitant of the parish of Carroll, died therein, in the month of June, 1841, and, in October following, Thomas V. Davis, a citizen and inhabitant of this State, was appointed administrator of his succession, and took possession of the effects thereof, and undertook the administration of the same, under an order of the Court of Probates of the parish of Carroll. In the month of May previous, Tobias Gibson, a citizen of the State of Kentucky, had obtained a judgment against the deceased in the District Court for the parish of Carroll, for the sum of \$33,100, with interest. In December, 1841, Tobias Gibson filed his petition in the Circuit Court of the United States, for the fifth circuit, district of Louisiana, in which he alleges the recovery of this judgment, and that under an execution issued on said judgment a seizure had been made of certain slaves and movembles, described in the return of the execution, which was made after the death of Claudius Gibson, without selling any portion of the property seized. It is alleged that Thomas V. Davis, curator of the succession of Claudius Gibson, had taken charge of the estate of the deceased, and particularly of the property mentioned in the return of this execution. Executory process is asked against the property seized as aforesaid, for the payment and satisfaction of the judgment, and the petition concludes with a prayer for general relief. An order for the seizure and sale of the property described was made by the judge, dated the 2d December, 1841, which was executed by the seizure and advertisement for sale of the slaves by the marshal.

On the 11th January, 1842, at the instance of Davis, administrator, all proceedings under the process issued in this case were enjoined, by order of the judge. The bill filed by Davis to obtain an injunction, sets forth the pending administration of the succession, the existence of various conventional and judicial mortgages against it, his refusal to recognise the debt claimed by Tobias Gibson, and the pendency of a suit between Gibson and himself, as administrator, for the recognition and enforcement of this very mortgage debt. He charges that the judgment, mortgage, or debt, on which the order of seizure and sale was granted, was fraudulent and simulated; he denies the existence of the debt itself; and alleges that the judgment was given in fraud of the rights of other creditors. The responsibility of the administrator to the Court of Probates under which he was appointed, and to which he is solely answerable, is pleaded; and also the consequent injury to other creditors, whose rights to be paid will be sacrificed by the appropriation of the property seized to the exclusive payment of Tobias Gibson's claim. The power of the judge to grant the order of seizure and sale is expressly denied, and the validity of the proceedings under it are put at issue. Process is prayed for against Gibson and the marshal, and the prayer of the bill is, that the injunction be made perpetual, and the property seized be returned to the complainant, as administrator; that the pretended debt claimed, be decreed to be fraudulent and simulated, or the judgment itself be held to be fraudulent as to other creditors; a decree is also asked for the sum of \$50,000 against Gibson, for the value of the slaves, their hire, costs, damages, &c.

To this bill Tobias Gibson filed an answer on the 29th January, 1842, in which the matters charged in the bill are put at issue, all fraud and collusion are denied, and the validity of the debt, judgment, and mortgage are asserted.

On the 14th March, 1844, the bill, by a decree of the court, was dismissed, "the said bill not averring, nor proof having been exhibited on the hearing o

DUPUY v. Brnus.

this cause, that the said creditors, represented by said Davis, are entitled to resort to the jurisdiction of this court, or that they, or any of them, have exhausted their rights at law, and so rendered the interference of this court proper." The injunction was dissolved, and the proceeds of the slaves sold were decreed to be applied to the payment of the judgment of Tobias Gibson.

It is in relation to the sale of these slaves that the difficulty raised by the litigation in this case arises. On the 22d of January, 1842, a rule was taken ordering the counsel for the defendant to show cause why the slaves and moveables seized should not be sold, the former on a credit of one year and the latter of ninety days, the proceeds to be paid into court, to await its further order; and on the 24th, there being no opposition made therete, it was made absolute, and the property ordered to be sold accordingly; the sale to be made in the parish of Carrol, after thirty days' advertisement. This order of sale does not appear to have been acted upon, and on the 19th of February was rescinded at the instance of another litigant, William Hunt. On the 17th of February, Hunt filed his bill before the same court, representing that he was a creditor of the late Claudius Gibson in the sum of \$10,000, with interest, which debt was secured by a special mortgage on the slaves seized at the instance of Tobias Gibson, which had a priority over that resulting from the judgment which Gibson was seeking to enforce under the order of seizure and sale; that his, Hunt's, was the first mortgage on the slaves; that the act by which it was given imparted a confession of judgment, and contained the pact de non alienando; that the proceedings of Tobias Gibson against Davis, administrator, which had been instituted, and which are made part of the bill, were collusive and for the purpose of depriving him of his priority in the payment of his special mortgage; that said proceedings were unlawful; and that the seizure of the slaves by the marshal was without warrant, the administrator having the sole right to dispose of them under the authority of the Court of Probates. Tobias Gibson, Davis, the administrator, and the marshal, were made parties to this bill, and a decree was asked that the slaves be seized and sold according to law by the marshal, and the proceeds applied to the extinguishment of the complainant's mortgage; and that said sale be made in New Orleans, at the most suitable place. It was alleged that if made as directed by the order of the court, in the order of the 22d January, 1842, the security of the complainant's debt would be endangered, and therefore all proceedings under such order are asked to be enjoined until the further order of the court. Accordingly, on the application of this party, the first order was rescinded, and another was made of date the 19th of February, 1842, by which the slaves were ordered to be removed to New Orleans, and sold at public auction after the usual and legal advertisements, the proceeds to remain subject to the further order of the court. There are directions concerning the security to be given by purchasers, which it is not material to mention in detail.

Tobias Gibson demurred to Hunt's bill, and his demurrer was sustained, and the cause remanded to the rules for proceedings against the other defendants. Judgment, pro confesso, was taken against Davis, administrator, who made no answer, and a final decree was entered and executed, by the payment by preference of the debt and interest out of the proceeds of the slaves, which were sold under the order of the court of the 19th February, 1842. At this sale the present defendant purchased the slaves mentioned in the plaintiff's petition, which are the subject of the present suit.

DUPUT v. Benus. It appears that the present plaintiff, Samuel Dupuy, was appointed curator of the vacant succession of the late Claudius Gibson, and has instituted a petitory action for these slaves against the defendant as belonging to the succession represented by him. The defendant relies upon the validity of the sale under the facts which have been explained.

I. The most important question to be determined, relates to the jurisdiction of the court under which the sale was made. The case arising before the present organisation of the courts of this State, the jurisdiction of the Court of Probates referred to is that which existed previous to the adoption of the present constitution. The proposition is, that the Circuit Court of the United States had no jurisdiction to order the sale of the property of a succession while under administration, and under the superintendence and authority of the Probate Court. This principle is not only maintained in argument with evident conviction on the part of the counsel, but has had, to a certain extent, the support of authority. If it be true, it is most important in its operation on the the judicial power of the courts of the United States, as well as on that of the States, and presents one of the most serious questions which a court can be called upon to determine.

The Circuit Courts of the United States have cognisance, in concurrence with the courts of the States, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds \$500, between the parties designated by law under the constitution of the United States. The latter, in creating the judicial power, intended it to extend to all cases in law and equity, whenever it it had jurisdiction over the persons. And it seems to conflict with this power, that a State, by creating a special jurisdiction over particular classes of cases, should to that extent exclude the jurisdiction of the courts of the United States. Let us suppose that actions of partition were required to be brought before a particular court, and that no other court could, by a State law, take jurisdiction of them, would the judicial power vested in the Circuit Courts of the United States be affected by such a limitation of jurisdiction?

The most obvious impression produced by a consideration of the constitution of the United States, and the laws made under it for the organisation of the judicial power, certainly is, that whenever their courts have jurisdiction by reason of the person, their jurisdiction ratione materiae extends to all cases in law and equity, within the pecuniary amount by which it is limited.

In Suydam and others v. Broadnax and others, 14 Peters' Reports, 75, a case very similar to this, that principal was recognised by the Supreme Court of the United States, and we have mot with no decision other than those we shall notice, in which a contrary dectrine has been maintained. On the contrary, it is the settled jurisprudence of the United States, that the jurisdiction of their courts is not limited or restrained by the local remedies of the different States. Robinson v. Campbell, 3 Wheaton, 212. 4 Ib. 115. There have been several cases decided by the late Supreme Court on this subject, to which our attention has been directed; we have fully considered them and will proceed to notice them.

Lowry, Curator, v. Erwin, 6 Rob. 196. In this case the court came to the conclusion that the Circuit Court of the United States was without jurisdiction, ratione persona. The defendant held under a sale made by the marshal of the United States, under the authority of an order of seizure and sale granted at

the instance of a creditor against a plantation and slaves in the possession of an executor, and the court proceeded and determined that, the Circuit Court of the United States was without jurisdiction or authority to issue the order of seizure and sale against the executor.

The creditor, at whose instance the order of seizure and sale was made, obtained it on an act of special mortgage on the property directed to be seized and sold, and the principal reason which is given for the want of authority in the Circuit Court to grant the order was, that no such process could issue from a State tribunal against mortgaged property in the course of administration, comprising part of the effects of a succession represented by an executor, curator, or administrator. A very careful examination, on another occasion, of a question of this kind brought us to a different conclusion, and we accordingly held, in the case of Boguille v. Faille, 1 Annual Reports, 204, that an order of seizure and sale may be granted, by a court of ordinary jurisdiction, against property specially mortgaged in the hands of an administrator under administration. If, therefore, it be assumed that the jurisdiction of the Circuit Court is co-extensive with that of the ordinary State tribunal in all cases of law and equity, it would appear that the former had the authority to issue the order of seizure and sale in this case. The administration of the executor presented no valid objections to it.

Garrard, Executor, v. William Reed, 5 Robinson, 506. This case has no direct reference to the subject under consideration. An execution was issued on a judgment obtained against the plaintiff's testator, without any attempt to revive or make executory the judgment, and it was held not to be legally issued.

Collier v. Stanbrough, 6 Rob. 234. In this case, which appears to have been very fully argued, and which was determined at the same term with that of Lowry v. Erwin, it was held that the Circuit Court of the United States was without jurisdiction ratione materiæ, by reason of the property seized under execution being under the administration of a curator; and to the same effect is the case of Kennard v. Stanbrough, 9 Rob. 256.

In Schroeder's Syndies v. Nicholson, 2 La. 350, it was determined that, by a voluntary cession of property by an insolvent debtor, it vested in his creditors, and was not subject to an execution issued on a judgment rendered subsequent ly to the acceptance of the surrender.

It seems to us that the principal objection to the jurisdiction of the Courts of the United States is one of inconvenience, and that the exclusive jurisdiction of the State courts is rather of apparent than real necessity. It is said that its exercise will have the effect of destroying the privileges and rights of creditors secured by our laws, for the benefit of the creditor who has the privilege of resorting to the United States' tribunal. We are certain that there is no legal right, privilege, or lien, which the courts of the United States would not respect in giving to the creditor the hypothecary remedy which he should enforce under their process, and which the defendant, be he executor, administrator, or curator, would be competent to assert and vindicate. If there should be any valid objections to the enforcement of the hypothecary rights, there is no ground for supposing that the judicial power of the United States would be improperly exercised, any more than there is for believing that the ordinary tribunals would abuse their powers in ordering the property of successions

DUPUY e. BENUS. under administrators to be seized and sold under special mortgages. It may well be supposed that we are neither insensible nor indifferent to the rights of severeignty of the State, but we have not been under the delusion that its legislation was in all cases supreme; and if inconvenience should result from the conflict between our own legislation and the rights which the courts of the United States are bound to maintain under the constitutution and laws made in pursuance thereof, it is equally our duty to support them. The supposed mischief produced by the paramount authority of the latter, is a necessary consequence of their supremacy on all subjects to which the legislative power of Congress extends, and the objections to it are objections to the constitution itself.

Fischer v. Blight, 2 Cranch, 397. Without going beyond the principles laid down in the case of Boguille v. Faille, before cited, it is obvious that, under the articles of the Code of Practice explanatory of the hypothecary action, we cannot hold the circuit of the United States to be without jurisdiction ratione materiæ in a case of this kind, and its proceedings to be nullified by reason thereof.

That court has determined in favor of its jurisdiction, and has also considered that the case before it was a proper one for its interference in the interest of the party who sought its aid. Judgments have been rendered both in favor of the original plaintiff and *Hunt*, and against the administrator, as has been before said, and they must stand.

It is a very difficult task to undertake to define and limit the authority of the United States' courts under their extensive chancery powers, particularly in the furtherance of rights created under a system of laws like ours. We have held that the hypothecary action, like all real actions, follows the property affected by the mortgage in whosoever's hands it may be found; and we cannot believe that, in any case, rights acquired under our laws, will, in any proceedings before them, be left without remedies, or that more difficulty will arise in this than in other cases of concurrent jurisdiction between those tribunals and those of the State. Vide Gaines et ux v. Chew et al. 2 Howard, 651.

Those rights thus secured, it would be the duty of the court to protect, as well as to control by proper means the execution of its process, so that they should not be infringed or violated; and to this end, at the instance of an administrator or executor, the equitable powers of the court would be called into action, to prevent a disturbance of a pending liquidation, or the recovery by one creditor of more than his share of the proceeds of the common pledge.

We do not feel any apprehension of any injurious result from the concurrent jurisdiction of the State and United States' courts. Our laws contemplate that property should be sold for the satisfaction of debts; and if the action of those charged with the administration of successions, solvent and insolvent, should be quickened by the concurrent power over them to a certain extent, neither the creditors, the debtors, nor the interests of justice, will suffer by it.

II. It is also urged on behalf of the plaintiff that, the order of the court directing the seizure and sale of the slaves was an absolute nullity, because it was made without notice to the party whose property was decreed to be sold, before the court had acquired jurisdiction over the defendant by service of its process, and was unwarranted by the law, of the land.

In executory proceedings, no citation is necessary; the proceedings are in

DUPUY 9. BENISS.

rem, and notice of the order of seizure and sale is all that is necessary to be given to the debtor.

After Davis, the administrator, filed his bill, the order of sale of the 24th January was made, and it is evident that when the court made that order he, Davis, was considered to be in court, and that the order was granted adversely to him. It is impossible for us to suppose that a different state of things existed, for it is expressly mentioned in making the rule absolute, that no opposition was made to it, and the rule itself was taken on the counsel of the defendant. Levy v. Fitzpatrick, 15 Peters, 167. Toland v. Sprague, 12 Ib. 301.

The order of the 19th of February, by which that of the 24th January was rescinded and the sale ordered to be made in New Orleans, was made at the instance of Hunt, and is entered in the case of William Hunt, complainant, v. Tobias Gibson, and T. V. Davis, curator of Claudius Gibson and others, according to the record of that case. But though entered in that case it evidently is not confined to it, for it rescinds an order of sale made in another suit, and the slaves were held under the process of the other suit.

The service of the subpœna in *Hunt's* case was not made on *Davis* until the 26th of February, seven days after the order of the 19th of that month. The sale of the slaves took place on the 26th March in New Orleans, *Davis* residing in the parish of Carroll, five hundred miles from New Orleans. And in *Hunt's* case a final decree was entered on the 22d of June, 1842, against *Davis*, by which the proceeds of the sale were applied to the payment of his mortgage by preference over other creditors.

To this judgment Davis was a party, and this judgment was based on the fact of the sale, for it disposed in its very terms of the proceeds. The sale was made under the authority of a Court of Chancery, of property over which it had jurisdiction and of which it had the control. The defendant stands before us as a bond fide purchaser, holding under the decree. That court would never permit a purchaser to be disturbed in a case of this kind, but would maintain the validity of the sale. The proceeds have been applied to the extinguishment of an encumbrance existing on property of the succession, and holding them to have been lawfully applied, as the judgment imports, the validity of the sale is ratified, so far as relates to the succession of Claudius Gibson, a party to the judgment.

III. In this case, as has been observed, a petitory action has been brought for the recovery of the slaves, without regard to the judicial proceedings before recited, which are held to be nullities. We are not called upon to decide, as we can reach them from a very imperfectly prepared record, that they are in all respects regular; but we are not at liberty to treat them as nullities, and are bound to give effect to them as the proceedings of a court of competent jurisdiction with proper parties to them. In the language of the Supreme Court of the United States: "The jurisdiction of the court under whose order the sale was made over the subject matter, appears on the face of the proceedings, and its errors or mistakes, if any were committed, cannot be corrected or examined when brought up collaterally." Thompson v. Tolmic, 2 Peters, 169.

It is therefore decreed that the judgment of the District Court be annulled and reversed, and that judgment be entered for the defendant, with costs is soth courts.

THE STATE v. HARRIS et al.

The stat. of 1 April, 1835, s. 4, which provides that all bonds and recognisances taken by certain officers in the city of New Orleans, for the public peace or in criminal matters generally, when forfeited, shall be recovered by the city attorneys for the use of the city, is not changed by the stat. of 11 March, 1837, s. 1, in regard to the destination of the amounts of such forfeited bonds or recognisances when recovered; but the latter act authorises a different and more summary proceeding, under the immediate direction of the officers of the State, and in the name of the State, for the collection of such bonds or recognisances as are for the appearance of the parties before the Criminal Court of the First District, though the amount of the forfeiture enure to the benefit of the city. The statute of 1837, is inapplicable where the bond or recognisance is for the appearance of the party before the mayor, recorder, or associate judges of the city; in such a case an action can be maintained only by the corporation and in the ordinary form.

A PPEAL from the First District Court of New Orleans, McHenry, J. Elmore, Attorney General, for the State, contended that the judgment be-

low should be affirmed.

Bodin, for the appellant, urged a reversal of the judgment on the ground, that the 4th section of the stat. of 1 April, 1835, was not repealed by the act of 11 March, 1837. The two acts are not repugnant, and the former cannot be repealed by implication. 10 Mart. 172, 560. 3 Mart. N. S. 190. Farrar's case, 1 Ann. R. 34. The stat. of 1837 applies only where the forfeited bonds are due to the State. State v. Desforges, 5 Rob. 257. Second Municipality v. Labatut, 8 Rob. 33.

The judgment of the court was pronounced by

King, J. Abraham A. Harris was charged before the recorder of the Second Municipality with the crime of forgery, and, after examination, admitted to bail. He gave a bond, with Samuel Moore as his surety, for his appearance before the Criminal Court of New Orleans, to answer to the accusation; and, failing to appear on the return day, the bond was, on the motion of the district attorney, declared to be forfeited, and a judgment was rendered against the principal and surety in solidum, in conformity with the statute of 1837, p. 99. A rule was subsequently taken on the attorney general by Moore, the surety, to show cause why the judgment should not be set aside, on the ground that the State was without interest in the bond. The rule was discharged in the court below, and the surety, Moore, has appealed.

The act of 1st April, 1835, p. 179, s. 4, provides, "that all bonds and recognisances taken by the associate judges, mayor, or recorder, within the city of New Orleans, for the public peace or in criminal matters generally, shall, when forfeited, be recovered by the city attorneys, for the use of the corporation of New Orleans." It is contended that, under this act, the bond vested, immediately upon its forfeiture, in the city of New Orleans, and that the corporation alone could sue for its recovery. In support of that position the appellant relies on the case of the State v. Desforges, 5 Rob. 237. The question now presented did not arise, and was neither discussed nor decided in the opinion pronounced, in the case of Desforges. The bond in that case was for the appearance of the accused before the recorder, to answer certain charges. To a bond of that description the provisions of the act of 1837, p. 99, were not applicable; and, upon the forfeiture of its conditions by the failure of the defendant to appear, the recorder was without authority to recover a final judgment

STATE B. HARRIS.

against the parties. It consequently became necessary to institute an action in the usual form for its recovery, and the court held that, as the city was alone interested in the bond, the action should have been instituted by the corporation, and could not be maintained by the State. In the present instance, the bond is for the appearance of the accused before the Criminal Court of New Orleans, and upon the failure of the party to appear, the proceedings for its recovery are regulated by the statute of the 11th March, 1837, p. 99. The 1st section of that act provides that, "it shall be the duty of the attorney general and the several district attorneys in their respective districts, on the second, or any other day thereafter, of each regular term of the Criminal Court of New Orleans, or of the District Court, leave of the court first had and obtained, which leave shall always be presumed, to call any or all person or persons who may have entered into any bond, recognisance, or obligation whatsoever, for their appearance or attendance at court, and also to call on the surety or securities to produce instanter in open court the person of such defendant or party accused, and upon failure to comply therewith, on motion of the attorney representing the State, the court shall forthwith enter up judgment against both principal and securities in solidum, for the full amount of the bond, recognisance, or obligation," &c. The language of the act is clear and explicit. It applies equally to all bonds, recognisances, and obligations, taken in criminal cases, for the appearance of parties accused before the criminal or district courts, by whatever authority taken, whether they are to enure, when collected, to the benefit of the city or of the State, and provides a summary proceeding for collecting them, previously unknown to our laws, which it is made the special duty of the attorney general and district attorney to conduct. The State has an obvious interest in preserving this control over bonds taken in criminal proceedings, and in enforcing their prompt payment, as a means of coercing the appearance of parties to answer charges preferred against them, and of inducing sureties to produce the persons of their principals for the same purpose. This act is subsequent to that granting to the city the proceeds of certain bonds forfeited in criminal cases, and authorising the collection to be made by the attorneys of the corporation. It makes no change in the destination of the fund when received, but provides a different and more summary proceeding, under the immediate direction of the officers of the State, and in the name of the State, for the collection of such as are for the appearance of parties before the criminal and district courts. To this extent it controls the act of the 1st April, 1835, p. 179. With regard to those bonds which are for the appearance of parties before the mayor, recorder, or associate judges, the action can only be maintained by the corporation and in the ordinary form. Judgment affirmed.

OLIVIER v. BLANCO, EXECUTOR.

Donations of moveables to a concubine are valid, but they may be reduced to one-tenth of the value of all the property left by the testator. C. C. 1468.

A PPEAL from the District Court of Plaquemines, Rousseau, J. Maurian and Lambert for the plaintiff. Lavergne for the appellant. The judgment of the court was pronounced by

OLIVIER Ø. BLANCO. Rost, J. The plaintiff claims from the executor of Barthélemy Favre D'Aunoy: 1st. The amount of a note of \$2,400, executed in her favor by the testator, and acknowledged in his will to be due. 2d. The sum of \$450, for the hire of the slave Nina, during four years and a half. 3d. The sum of \$200, for clothing and food furnished to the slaves of the succession, and personal attention to its concerns. She also prays for interest on those sums, and for general relief. The defendant filed a general denial, pleaded want of consideration for the note, and alleged that the plaintiff was the concubine of the deceased, and incapable as such to receive a donation from him. There was a judgment in favor of the plaintiff, and the defendant appealed.

We have risen from the perusal of the record fully convinced that no serious consideration had passed for the note sued upon, and that the plaintiff had no claim for the hire of the slave Nina. The services of that slave and her own were not an adequate compensation for the support and maintenance of herself and her children by the testator. Persons in her situation are apt to keep their cash accounts balanced; and a very strong case indeed would have to be made out, before courts of justice could allow claims like the present.

But supposting the note to be a disguised donation, that donation is reiterated in the will; and the bequest is not void, because the testator has attempted to conceal the motive which induced him to make it.

It is alleged that the plaintiff was incapable of receiving from the testator a donation of any kind. The law is clearly otherwise. Donations of moveable effects to concubines are valid, but may be reduced to one-tenth of the value of all the property left by the testator. C. C. art. 1468.

In this case it is not shown that the donation is excessive. The plaintiff is therefore entitled to recover the amount of the legacy, with interest. She is further entitled to recover \$40, paid by her on account of the succession.

It is therefore ordered that the judgment in this case be reversed; and that there be judgment in favor of the plaintiff for the sum of \$2,440, with legal interest from the 13th of November, 1846, till paid, and the costs of the District Court; those of this appeal to be paid by the plaintiff and appellee.

McDonogh v. Calloway et al.

Where the owner of ground in a city, in dividing it into lots, reserves a part of it adjoining to a contiguous proprietor and extending the whole length of the property, for a public alley, and after selling one of the lots with reference to a plan on which the alley is described and as fronting on the alley, sells the remaining lot, as well as his property in the soil of so much of the alley as is adjacent to the second lot, subject to the servitude of way previously established in favor of the lot first sold, the second purchaser will hold the property acquired by him, subject to the servitude of way established in favor of the first lot; but the servitude will not exist in favor of any owner of the contiguous property on the other side of the alley; and the purchaser of the second lot and right to the soil of the adjacent alley will have the right, common to every proprietor, of erecting a wall or fence upon this boundary line separating his property from his neighbors, the right not being imcompatible with the servitude of way.

A PPEAL from the Third District Court of New Orleans, Kennedy, J. The facts of this case are stated in the opinion of the court, infra.

McDonogh v. Calloway.

Grivot and Roselius, for the plaintiff. J., and H. H. Straubridge, for the appellant, contended that he had not obstructed the servitude of way established in favor of the lot bought by plaintiff from the appellant's vendor, J. P. Jones. C. C. arts. 497, 654, 823. Servitudes are real rights, and can only be established by written evidence. There is no such evidence of any servitude of way, in favor of the lots owned by plaintiff on the north side of the alley. C. C. arts. 642, 644, 715, 718, 749, 752. The alley was not a public one. C. C. art. 790.

The judgment of the court was pronounced by

Kine, J. John P. Jones owned a lot of ground running from New Levée to Tchoupitoulas street. On the northern side of this lot he made an alley extending entirely through the square, with a width of six feet two inches on New Levée street, and of five feet on Tchoupitoulas street, and divided the remainder of the property into three lots, one fronting on New Levée, another on Tchoupitoulas, and the third on the alley. Of the whole he caused a plan to be made by Pilié, the city surveyor, on which the alley is called a passage commun. McDonogh, the plaintiff, is owner of the lots contiguous to this alley on the north. and when erecting buildings upon them placed his walls about four feet from Jones' line, thus leaving a passage of about ten feet. In 1823, Jones sold to Maloney the lot on New Levée street, representing its front on that street to be twenty-three feet, with a depth of one hundred and nine feet fronting on the common passage. The alley was expressly excepted from the sale, and reference is made in the act to the plan of Pilié This lot, after several mesne conveyances, was purchased by the plaintiff, with all its rights, privileges and appurtenances. The lot on Tchoupitoulas street was sold by Jones to Lamb, also with a reservation of the alley. Calloway and Fischel purchased from Lamb, and Jones intervened in the sale, and conveyed to them his right, title and property in the alley, subject however to the clauses and conditions contained in the sale from Jones to Maloney. Calloway has since acquired the rights of his coproprietor. In 1843, the heirs of Jones, conceiving that they had the exclusive right to the property and use of that part of the alley adjoining the lot sold by their ancestor to Maloney, and now owned by the plaintiff, erected a fence across the entrance at New Levée street, and along the northern line of the six feet alley, thus closing the common passage. About the same time Calloway erected a fence along the northern limit of the six feet passage purchased by him, separating his possessions from those of the plaintiff, but made no cross fence at the extremities, leaving the passage free. MeDonogh commenced this action by an injunction, complaining that the defendants, Calloway and J. E., and Alfred Jones, had disturbed him in his right to the use of this common passage, and prayed that the obstructions should be removed, and the defendants perpetually enjoined from opposing further hindrance to his enjoyment of the right of free ingress and egress through this common way. The cause was first tried between the plaintiff and the defendants, Jones, and was twice taken by appeal before the Supreme Court, where it was determined that J. P. Jones had dedicated the passage to the public, and the obstruction opposed by the defendants, Jones, to its free use were ordered to be removed. In those cases the facts and respective titles of the parties are fully stated. See 7 Rob. 442 and 8 Rob. 92. Upon the trial between the present parties a similar judgment was rendered by the District Court against Calloway, from which he has appealed.

The question between the present parties, differs materially from that which arose between the plaintiff and the defendants, Jones. The latter closed up a

McDonogh v. Callowar. passage subject to a servitude of way in favor of the plaintiff; whereas the present defendant has only erected a fence on the boundary line between his property and that of the plaintiff, and has opposed no obstacle to its use as a common alley. J. P. Jones clearly never abandoned his right of property to the soil of that part of the alley adjacent to the defendant's lot; but, on the contrary, first reserved it from sale, and then expressly conveyed it to the defendant, subject however to the servitude of way previously established in favor of Maloney. His intention to retain the property and preserve the northern line of the passage as his boundary, was further manifested as far back as 1827, when he erected upon it a fence which stood several years. And, in 1832, the defendant Calloway, who had then become the owner of the lot on Tchoupitoulas street, enclosed all of the alley which he had acquired, and in a formal act asserted, not only his ownership of the soil, but his intention no longer to permit it to be used as an open way. The plaintiff, however, has acquired a just claim to the free use of the passage by his purchase from Maloney, in which he must be maintained; but the servitude to which he is entitled has been established only in favor of the lot fronting on New Levée street, and not in favor of the plaintiff's property north of the passage. Calloway, as the owner of the soil subject to this servitude, has the right, common to any other proprietor, of erecting a wall or fence upon his boundary line, separating his property from that of his neighbors. Of this right neither Jones nor his vendors appear to have divested themselves, and the exercise of it is not incompatible with the plaintiff's right of passage.

It is therefore ordered that the judgment of the District Court be reversed and the injunction dissolved; and that the plaintiff restore the fence upon the boundary line between his property and that of the defendant to the condition in which it was when removed by the order of the court; the appellee paying the costs of both courts.

McElrath, Administrator, v. Dupuy, Curator.

Where a partial payment has been made on a note, extinguishing thereby the dobt pro tanto; the parties thereto cannot, by subsequently imputing the payment to another debt, revive the first debt, to the prejudice of third persons.

One who holds a second mortgage on property previously mortgaged to secure the payment of a note, has such an interest in the extinguishment of the note, that a payment made

on it cannot be afterwards imputed to another debt, without his consent.

Where in an action on a note, by an administrator against a third possessor of preperty mortgaged to secure its payment, the latter, through error, confesses judgment for the whole
amount, the fact of a partial payment made by the makers of the note not having been
communicated to him, the judgment will be void to the extent of the error; but the creditors and heirs of the deceased, represented by the plaintiff, not having been instrumental in
producing the error, will be entitled to the benefit of the judgment for the amount really due.

Payment made on a note not due, but bearing interest from date, must be imputed to the principal on which interest was accruing, as the portion of the debt which the debtor had the greatest interest in discharging. As neither principal nor interest was due at the time of the payment, the imputation is not affected by art. 2160 of the Civil Code.

The registry of a judgment, confessed by a third possessor of mortgaged property in favor of the holder of a note secured by mortgage, where neither the confession, nor the judgment readered thereupon, recite, or refer to, the mortgage, will not amount to a re-inscription of the mortgage in the meaning of art. 3333 of the Civil Code.

DUPUY.

An intervention by a third person in an action to enforce a mortgage, will not do away with McELRATH the necessity of re-inscribing the mortgage on the books of the register of mortgages within ten years from the date of the first inscription. Per Curiam: If ten years be permitted to expire without a re-inscription, the mortgage will lose its rank. A litigation between the mortgage creditors does not dispense with this re-inscription.

Where, after the services rendered by an attorney have ended, the compensation is fixed by the mutual agreement of the parties, and no error is shown, effect will be given to the contract. In such a case, the parties having themselves established the value of the servi-

ces, the compensation cannot be withheld on the ground of exorbitancy.

PPEAL from the Court of Probates of Carroll, Harris, J. The facts of this case are fully stated in the opinion of the court.

Stacy and Sparrow, for the plaintiff. By the death of Gibson the rights of the parties were fixed. Buard v. Lemée, 12 Rob. 243. At the time of his death plaintiff had obtained a judgment recognising his mortgage and ordering its execution. The property was seized and offered for sale. Gibson's death prevented the sale. An insurmountable barrier was interposed by operation of law; and he cannot be made to suffer for not doing what he could not do. The An insurmountable barrier was interposed by operation of judgment ordering the execution of the mortgage is res judicata. It gave offect to the vendor's lien, and it cannot now be, directly or indirectly, avoided.

Chinn, intervenor, pro se. No counsel appeared for the defendant.

The judgment of the court was pronounced by

King, J. Cavens and wife, by an act of sale bearing date the 31st of December, 1834, sold to Fowles & Green, a tract of land for \$15,514 60; of which sum \$4,000 was paid in cash, and for the residue of \$11,514 60, a note was given, payable five years after its date, bearing ten per cent interest, and a mortgage retained on the property sold to secure its payment. This land, after several mesne conveyances, was purchased by Gibson. After the death of Cavens, the plaintiff, as his administrator, instituted a suit against Fowles & Green, as the makers of the note secured by the mortgage, and against Gibson as the third possessor of the hypothecated property. A judgment was confessed by Gibson for the sum claimed, with a right to enforce it on the lands described in the sale from Cavens to Fowles & Green; but the mortgage is not recited, nor referred to, either in the confession or the judgment. Fowles & Green made no defence, and no action appears to have been taken in relation to them in the suit. Before a sale could be effected under this decree, Gibson died, and shortly after that event the plaintiff presented an application to the probate court for a sale of the land mortgaged, setting forth the fact of the special encumbrance to which it was subject, and the previous judgment by confession.

In this proceeding R. H. Chinn intervened, alleging that he was a creditor of Gibson, and that his demand was secured by a special mortgage on the land on which the plaintiff was seeking to enforce his claim. He alleged that the judgment against Gibson was fraudulently obtained, by reason of which it was null; that, at the time it was rendered, there was nothing due to the succession of Cavens by Gibson; that the mortgage retained by Cavens was not so recorded as to operate a notice to third persons; and that the rights of the intervenor, as a mortgagee, were not affected by such registry as had been made; and finally, he denied the identity of the note sued on with that described in the mortgage. The claim of the intervenor is resisted both by the plaintiff and the defendant, on the ground that the notes on which he founds his demand were given in error; that the consideration was professional services, for which the charge was exorbitant. The court below rendered a judgment in favor of the plaintiff for the entire amount of his claim, recognising the vendor's mortgage, and giving it

MCELRATH v. DUPUY. priority over that of the intervenor; and a judgment in favor of the intervenor for the sum claimed by him, with a right of mortgage next in rank after that of the plaintiff. From this judgment the intervenor has appealed.

The evidence adduced by the plaintiff in support of his claim in the court below, was the judgment rendered by the District Court upon Gibson's confession, the act of sale from Cavens; with the mortgage retained, certified to be duly registered in the mortgage office, and a note corresponding in amount and in the time of its maturity with that described in the mortgage, but bearing date a day later. The evidence leaves no doubt that this note is the same intended to be secured by the mortgage. No credit appeared upon the note when offered in evidence, and no reference is made in the pleadings or judgment to any credit to which it is entitled. During the progress of the trial a paper was discovered to be pasted over the back of the note; on the removal of which the following endorsement appeared:

"Received of T. J. Green, Esq., a note of James R. Blunt, for eight thousand three hundred dollars, due Jan'y , eighteen hundred and thirtynine, bearing interest at eight per cent. Principal and interest up to first June, 1839, \$8,604 34. May 12, 1839.

Warren county, Miss. (Signed) G. W. of the estate of Elijah Cavens, dec."

Lines are drawn across this endorsement, and the pen passed heavily over the signature, leaving only the two initial letters, G. W. of the plaintiff's name distinguishable. This endorsement is shown to be in the hand-writing of McElrath.

The plaintiff has endeavored to show that the endorsement was made in error, and subsequently stricken off for that reason, and the credit given on another note of Fowles & Green, of which he, as administrator of Cavens, was the holder, to which the payment was properly imputable. The evidence forbids that conclusion. The note on which it is contended the credit should have been given was not executed until June, 1840, long after the transfer of Blunt's note, and more than a year after Blunt's administrator had made a large payment on account. The debt itself had no existence for more than a year after the payment made to the plaintiff, and whether it was to arise depended on a future contingency, the happening of which could not have been forseen by the parties. At the date when the payment was made, there was a large subsisting debt from Fowles & Green to Cavens, bearing the highest rate of conventional interest, and encumbering a valuable estate with a mortgage, both of which the debtors had the strongest interest in extinguishing. Is it to be presumed, in the absence of proof, that, with such motives to discharge a subsisting debt of the most onerous character, the debtors intended to apply their funds to the payment of a debt which did not exist, and which it could not positively be forseen ever would? The evidence rejects every other conclusion than that the credit was endorsed on the note sued npon, in strict accordance with the intention of the parties when the payment was made; and other facts disclosed by the evidence, to which it is not necessary to advert, support this view. The debt and mortgage were extinguished to the extent of the payment affected by the transfer of Blunt's note, and it was not in the power of parties to revive them to the prejudice of third persons, by consenting that the payment should be imputed to another debt. The position assumed, that the credit was stricken rom this note and placed upon another with the consent of the only parties interested in the imputation, is equally untenable. At that date Gibson was the owner of the land mortgaged to secure the payment of the note, and the intervenor held a mortgage on it to secure his demand. Both of these parties were therefore interested in the reduction of the encumbrance.

McElrath U. Dupuy.

The fact of this payment was not communicated to Gibson, and the evidence seaves no doubt that he confessed the judgment in error, and in utter ignorance of the partial discharge of the debt and mortgage. To the extent of that error the judgment rendered by the District Court is void. But this nullity is not to be visited on the creditors and heirs of Cavens, who were not instrumental in producing the result. They are entitled to the benefit of the judgment, for the amount really due.

Neither the principal, nor the interest, of the note sued on was due at the date of the payment. The credit is, therefore, not to be applied in accordance with the 2160th art. of the Code, to the interest, but to that part of the debt which the debtor had the greatest interest in discharging, which was the principal, as upon that interest was accruing. This payment deducted from the principal leaves \$2,910 26, due on the 1st June, 1839, bearing interest at ten per cent from that date; and the further sum of \$5,085 60, interest which accrued previous to the 1st June, 1839, which bears no interest.

It is contended that the mortgage retained to secure this note has become extinct, not having been re-inscribed within ten years from its first registry. It was recorded on the 4th of February, 1836. The plaintiff urges: first, that the recording on the 11th of May, 1841, of the judgment rendered by the District Court, was a re-inscription; secondly, that from the date of Chinn's intervention in the suit in 1842, he had notice of the existence of the mortgage, and that, pending the litigation, the object of which was to enforce the mortgage, no prescription ran between the parties.

Neither the confession of Gibson, nor the judgment rendered upon that confession, recite, or make any reference whatever to, the mortgage in favor of Cazens' succession. The registry of that judgment was clearly not a compliance with the 3333d art. of the Code, and was not a re-inscription of the mortgage.

After this case was first taken under consideration, the question which presents itself relative to the peremption of mortgages, underwent an elaborate argument in the case of Shepherd v. The Orleans Cotton Press Company, ante p. 100. We there held that, with regard to inscribed mortgages, "the delay of ten years is in all cases fatal, and, if it be permitted to expire without a re-inscription, the mortgage loses its rank; and that a litigation between the mortgage creditors does not dispense with this re-inscription." We conclude, therefore, that the plaintiff has lost all the hypothecary rights resulting from the mortgage retained by Cavens, as regards other creditors, and can only rank as a creditor of Gibson, with a judicial mortgage to take effect on the 11th of May, 1841. This conclusion renders it unnecessary to consider several questions originally deemed of importance in the cause.

The intervenor founds his claim upon three notes for \$4,500 each, dated the 3d of February, 1840, bearing seven per cent interest from their date, the payment of which is secured by mortgage. The consideration for which they were given was professional, and other, services, rendered to Gibson, for which the charge is alleged to be exorbitant. Those services were rendered in efforts to collect claims amounting to about \$135,000, the recovery of which Gibson, at the time, considered to be doubtful. The intervenor, in answer to an interroga-

MCELBATH 9. Dupuy. tory propounded to him, says, that by the terms of the agreement between Gibson and himself, his compensation was made "wholly contingent upon successfully pursuing the claim; that it was to be commensurate therewith, liberal and adequate; and, if unsuccessful, he was to receive nothing for his skill, toil, and expenditure of time and money. "In the prosecution of the claim he instituted three several suits; left the city of New Orleans, where he resided and exercised his profession, and repaired to a distant part of the State, where he performed various and laborious duties, many of them not strictly appertaining to his professional engagement; and finally affected a compromise, which was entirely satisfactory to his client. After the services were completed, the compensation was fixed by the mutual agreement of the parties, and the sum agreed upon was secured by a mortgage. Witnesses were called on the trial below, to estimate the value of the intervenor's services, but the parties themselves having established their value, and no error having been shown, effect must be given to their contract.

After this cause was heard in this court, the intervenor died; and since that time his administrator has been made a party to this appeal.

For the reasons assigned, it is ordered that the judgment of the Probate Court be reversed. It is further ordered that the plaintiff, as administrator of the succession of Elijah Cavens, deceased, be adjudged to be a creditor of the succession of Claudius Gibson, deceased, for the sum of \$2,910 26 cents, with ten per cent interest thereon, from the first day of June, 1839, and for the further sum of \$5,085 60 cents, without interest; both of said sums to rank as a judicial mortgage claim, to take effect on the 11th of May, 1841. It is further ordered that Nathan Jarvis, as administrator of the succession of the intervenor, Richard H. Chinn, have judgment and recover from the defendant, the sum of \$13,500, with seven per cent yearly interest thereon, from the 3d of February, 1840, until paid; and that he be adjudged to be a creditor of the succession of said Claudius Gibson, by a mortgage to have effect from the 3d day of February, 1840, on a tract of land lying in the parish of Carroll, fronting on the Mississippi river, bounded above by lands of William Henderson, and below by land sold by Gibson to John Mitchum, containing about 1,580 acres, being the same conveyed by J. M. January to Claudius Gibson, and described in a certain act of mortgage executed by Claudius Gibson to the said R. H. Chinn, on the 3d day of February, 1840, before Eli Harris, notary public; and that said land be forthwith sold according to law, to pay and satisfy the aforesaid mortgages according to the rank aforesaid, and that the proceeds of sale be so applied. It is further ordered that the succession of Claudius Gibson, pay the coats of both courts.

LARTHET v. FORGAY et al.

Where, under color of a warrant to search for stolen goods in a certain house, the parties charged with its execution force their way into an adjoining dwelling, against the remonstances of the occupant, and search it without finding the stolen property, they will be responsible jointly, in damages, for the injury done thereby to the property and feelings of the occupant, and for the disturbance of his family; and where, in such a case, the damages are assessed by a jury, the verdict will not be disturbed, unless they are palpably excessive. Such warrants must be construed strictly.

A PPEAL from the Parish Court of New Orleans, Maurian, J. Preaux and Soulé, for the plaintiff, T. H. Howard, for the appellant. The judgment of the court was pronounced by

LARTHET C.

SLIDELL, J. A search warrant was obtained by Forgay, which, after reciting that Forgay had made affidavit that a breast-pin and a gold piece stolen from him, were secreted, as he believed, "at a cabarct at the south-west corner of Girod and Carondelet streets," commanded the officer "to make diligent search in and about said premises for the said articles." This suit is brought against Forgay and others, for damages sustained by the plaintiff by the unlawful conduct of the defendants, who have attempted to justify under this warrant.

It appears by the testimony that under the same roof there were two dwellings. One, which was immediately at the corner of the streets named in the warrant, was occupied by one Marcel, who kept a cabaret there. The other was occupied by Larthet, who kept a cigar shop. The respective premises appear to have been distinct, the yards being divided by a fence, and a door by which the premises communicated being nailed up. After making search in the cabaret, and in the other apartments of Marcel's tenement, in one of which the breast-pin was found, the officer, who was accompanied by Forgay, and appears to have acted under his instructions, proceeded to force the communication into the plaintiff's premises. Against this the plaintiff protested, and opposed the attempt, but not violently; upon this, at the suggestion of Forgay, he was taken into custody and carried before the magistrate, where he was kept for about two hours, till he was bailed. After leaving Larthet at the magistrate's office, the parties forced open the door, and searched his shop and apartments; but the other stolen article was not found. The wife of the plaintiff was much alarmed by these proceedings, and fell ill in consequence of the nervous excitement occasioned by the search of the house, and the imprisonment of her husband. The plaintiff appears from the testimony to have been a man of good character and of some means, and had pursued his calling of a tobacconist in the city for several years. The case was tried by a jury, who found a verdict for the plaintiff of \$2,000, upon which judgment was entered against each of the four defendants for \$500; and the defendant, Forgay, alone has appealed.

The court below charged the jury in substance, and, we think, correctly, that the breaking into and search of the plaintiff's shop and dwelling were not authorised by the warrant. The search should have been confined to the cabaret, or at most to the premises of Marcel. Such warrants must be construed strictly. The law regards the dwelling and the domestic repose of the citizen with too much jealousy, to trust the place of execution of such process to the discretion of police officers. So important is this subject that it has been deemed worthy of express notice in the constitution of the United States, which declares that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but on probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Amendments Cons. United States, art. 4. This article is an affirmance of a great constitutional doctrine of the common law, which had nevertheless been occasionally violated by general warrants; and to prevent this abuse the solemn written prohibition was framed. A principle so indispensable to the full enjoyment of personal security and private property, should be enforced in its full spirit and integrity; but it would be violated if courts FORBAY.

should sanction such a latitude of construction, as is invoked by the defendant for the warrant in question. See 13 Mass. 286. 3 Story on the Constitution, 748.

The damages assessed by the jury appear to have exceeded the injury done in searching and putting into disorder the plaintiff's goods; but the jury undoubtedly assessed them with reference also to the injury to the plaintiff's feelings, and the disturbance of his family. Such subjects are peculiarly within the province of a jury, and a verdict must be palpably excessive to justify our interference.

Judgment affirmed.

NEW ORLEANS GAS LIGHT AND BANKING COMPANY v. WEBB, Administrator.

Slaves belonging to the succession of a deceased mortgagor, corresponding in names, ages, and sex, with those described in the mortgage, in the absence of any evidence throwing doubt upon their identity, will be presumed to be the slaves included in the mortgage.

Where a bank authorised by its charter to seize property mortgaged to it, in whosesoever hands it may be, and notwithstanding any sale or change of possession, as if still in the hands of the mortgager, claims to be paid out of the proceeds of the sale of property so mortgaged to it, which had been sold by order of the Probate Court, it will be an affirmance of the sale, and the bank can no longer proceed against the property; but it does not thereby forfeit any of the rights it would have had to be paid out of the proceeds of the sale, as if made at its instance.

In an action against an administrator, by one entitled to be paid out of the proceeds of property sold at a probate sale by a former administrator, for the price of which notes were given, and one of which fell due before the appointment of the defendant, the latter will be presumed, after the notes have become due, and in the absence of evidence to the contrary, to have received the proceeds of the sale; and if any part was received by the first administrator, it is incumbent on his successor to show that he was unable to compel the former to account and pay over the amount so received; this fact is a matter of special defence, which it is for the defendant to prove.

A PPEAL from the Court of Probates of St. Helena, Leonard, J.

A. Hennen, for the plaintiffs, cited acts of 1835, p. 105, s. 28. Qui hy-

pothecam habet, rem ipsam habere videtur. Jourdan's Juris Regulæ, no. 239, Merrick, for the appellant. The judgment of the court was pronounced by

King, J. The defendant is sued in this action as the administrator of the succession of *Presley Stephenson*, for the residue of a loan of money made by the plaintiffs to the deceased, the payment of which was secured by a special mortgage on a tract of land and several slaves. The prayer of the petitioners is, that the sum claimed be paid by privilege out of the proceeds of the hypothecated property, of which a probate sale has been made, and that the defendant render an account of his administration. A judgment was rendered in accordance with this prayer, from which the defendant has appealed.

It has been contended on the part of the defence, that the property adjudicated at the probate sale of Stephenson's succession, has not been identified with that subject to the plaintiffs' mortgage; that there is error in the judgment allowing the plaintiffs a privilege on the proceeds of the property; that the defendant was not appointed administrator for some time after the first instalment became due; and that no proof has been adduced that the proceeds of the sale have gone into his hands.

Eight of the slaves, George, Squire, Sam, Hannah, Maria, Kate or Cathd- NEW ORLEANS rine, and her two children, adjudicated at the probate sale of Stephenson, correspond in name, age, and sex, with those described in the mortgage, which, coupled with the fact that they were found in the succession of the mortgagor, sufficiently establishes their identity, in the absence of proof bringing their identity in question. We think also that the evidence fixes, with sufficient certainty, the identy of the tract of land sold with that described in the mortgage. These slaves, with the tract of land, produced a sum more than sufficient to satisfy the plaintiffs' demand.

AND BANKING COMPANY

We have been referred to no law which confers upon the plaintiffs the privilege claimed. The 28th section of the act of incorporation (Session Acts of 1835, p. 105,) gives the plaintiffs the right, on all mortgages executed under that act, to seize the mortgaged property, in whatever hands it may be, in the same manner that it could be seized in the hands of the mortgagor, notwithstanding any sale or change of possession by descent or otherwise, but confers no privilege. The plaintiffs, by claiming the price in the hands of the administrator, have affirmed the probate sale, and can no longer proceed against the property in the possession of the purchasers. But by this affirmance the bank has forfeited none of its rights to be paid out of the proceeds, which it would have had if the sale had been made at its instance; and the fund in the hands of the administrator is subject to no other charges than those it would have been liable to, if the plaintiff had provoked the sale. The judge erred, however, in decreeing the payment to be made by privilege.

The defendant appears not to have assumed the administration until more than a year after the sale took place, previous to which time the first instalment had become due. Many years intervened between the date of his appointment and the inception of this spit; all of the instalments have long since fallen due; and he must be presumed, in the performance of his duty, to have collected the entire proceeds of the sales. If any part of them were received by his predecessor, it was his duty to have held the latter to account; and if he has been unable to compel him to account or to coerce payment, this should have been made a matter of special defence, which it was incumbent on the defendant to prove. No such defence has been set up in the answer, and no such proof exhibited.

It is therefore ordered, that so much of the judgment of the court below as decrees a privilege to the plaintiffs be reversed; and, in other respects, said judgment is affirmed; the appellee paying the costs of this appeal.

LABOURDETTE v. THE FIRST MUNICIPALITY OF NEW ORLEANS.

Where, on counting the votes put into the ballot-box in an election for an officer by a municipal council, it appears that thirteen votes were put in, when the members present were only entitled to give twelve votes, and that seven were in favor of plaintiff and six for another person, there is no election.

PPEAL from the Second District Court of New Orleans, Canon, J. On 1 the 11th day of May, 1846, the Council of Municipality No. 1 balloted for a wharfinger. On opening the ballot-box and counting the votes, it appeared that there were: for Labourdette, 7 votes; for Dupaty, 6 votes. WhereLABOURDETTE upon Labourdette was proclaimed duly elected wharfinger of the Municipality

FIRST
No. 1. On the .25th of the same month, the sureties offered by Labourdette
MUSICIPALITY. were approved by the Council: and on the 4th of June he executed his official bond, which was accepted by the mayor of the city. Labourdette then entered upon the discharge of the duties of wharfinger. Dupaty protested against the election of Labourdette. On the 8th of June, 1846, the Council adopted a resolution, in which they declared the protest of Dupaty well founded. They accordingly pronounced the election of Labourdette null and void, and resolved to proceed at their next meeting to the election of a wharfinger for the municipality. The resolution was in the following words: "Résolu que le Conseil reconnait que le protêt de Mr. Texin Dupaty contre la nomination de Mr. Labourdette est fondé; que la dite nomination est nulle et non avenue; et que le Conseil procédera, Jundi prochain, à l'élection d'un wharfinger pour cette municipalité." On the

office of wharfinger of the municipality. At the expiration of the month of June, Labourdette applied to the municipal treasurer for the payment of a month's salary. He was answered that there was no salary due him, as he was not the wharfinger of the municipality. On the 2d of July, he wrote to the Council offering to continue to discharge the duties of wharfinger. At the same time he demanded payment of a month's salary as wharfinger, and stated that if the Council failed to comply with his demand, he would claim a whole year's salary. The Council refused to recognise Labourdette as wharfinger of the municipality; but they adopted a resolution, in which they offered to pay him three hundred dollars for his services as acting wharfinger prior to the election of Dupaty. This offer was rejected by Labourdette, and the resolution was repealed. On the 28th of July, 1846, Labourdette instituted the present suit, to recover from the municipality one thousand dollars, a year's salary, upon the grounds, that the ordinances creating the office of wharfinger and fixing the salary attached thereto, made the office annual, with a yearly salary; that he was legally and duly elected wharfinger, in May, 1846; and that he had been dismissed from office, without any cause or complaint.

15th of June, the day of the next meeting, the Council elected Dupaty to the

The defendants, in their answer, pleaded a general denial, and alleged that the phintiff had no just cause of action, that they owed him nothing, and that in electing Dupaty wharfinger they had duly and justly exercised the powers conferred upon them by law. The plaintiff offered in evidence the minutes of the proceedings of the Council of the First Municipality; the bond executed by plaintiff; and a letter from the latter demanding the payment of his salary as wharfinger for the first month, and expressing his readiness to continue to discharge the duties of the office. The record also contains a bill of exceptions, taken by the defendants to the rejection of the evidence of Geneis, the recorder of the First Municipality, offered to establish the fact that he had voted in the election of Labourdette. This evidence was objected to, on the grounds a lat, that the facts attempted to be proved were not alleged in the pleadings; 2d, that parol proof was inadmissible to establish the proceedings of the Council; and 3d, that no parol evidence could be offered by defendants, to contradict their own official records. The evidence was rejected.

There was judgment below for the plaintiff, for \$1000, a year's salary as wharfinger, with interest from judicial demand. The defendants appealed.





FIRST

Benjamin and Micou, for the plaintiff. The facts of this cause are simple and LABOURDETTE uncontested. The plaintiff was employed, for a year, at a fixed salary, and was discharged without any fault or complaint urged against him, about one month afterwards. He claims his year's salary, under the well known legislation and MUNICIPALITY. jurisprudence of this State. He relies on art. 2720 of the Civil Code. Orphan Asylum v. Mississippi Insurance Company, 8 La. 181. Sherburne v.

Orleans Cotton Press, 15 La. 360.

R. Hunt, for the appellants. I. The first question which arises in this case is, was Labourdette duly and legally elected wharfinger of Municipality No. 1, on the 11th day of May, 1846? I contend that he was not. The 8th section of the act of March, 1836, amending the acts incorporating the city of New Orleans, vested "the exclusive right in the councils of each of the municipalities, to appoint all efficers thereof." Bul. & Cur. Dig. 124. The 10th section of the act of March, 1840, still further amending the charter of the city, provided, that "thereafter the council of Municipality No. 1, should be composed of twelve members only." Bul. & Cur. Dig. 132.

On the 11th of May, 1846, all the members composing the council of the Municipality No.-1, met, and all voted at the election for a wharfinger. It required a majority to elect. The lex majoris partis is the law of all public couneils, elections, &c., where there is no express provision to the contrary. The majority, here, means the major part of those who are present at a regular corporate meeting. Bacon's Abr. Title Corporation E. no. 7, of the concurrence required in corporate acts. 2 Kent's Commentaries, 293. 1 Kyd on Corp. 308, 400, 424. Jef. Man. s. 41. Now, the plaintiff has shown by the journals of the council, that there were six votes against him at the balloting on the 11th of May. It follows that there was not a majority of the twelve in 's here was therefore no election of a wharfinger. It it true that on counting the ballots, seven votes were found in the ballot box in favor of Labourdette. But these, added to the six against him, made thirteen votes ; thirteen votes given by a "council composed of twelve members only," each of whom had a right to one vote only! The thirteenth vote was clearly an illegal vote, and avoided the election. 2 Kyd on Corp. 7, 8.

The judge a quo says, that the recorder of the municipality voted for the wharfinger; and that he "voted in the election of all officers, because the 18th article of the supplemental regulations of the council, especially gives him the right to vote in all elections." This court has solemnly decided in the case of the recorder of the Municipality No. 2, that the recorder is not a member of the council, and that he has no right, under the charter of the city, to vote, except in committee of the whole, or in giving a casting vote. Sec. 5, act of 1805, Bul. & Cur. Dig. 93. Reynolds v. Baldwin, 1 As. R. 162. It is not pretended that, at the election of a wharfinger on the 11th of May, 1846, the council resolved itself into a committe of the whole, nor that there was a tie in the votes, and that the recorder gave the casting vote. The evidence clearly establishes that the thirteen votes were deposited in the ballot box and counted out, without any reference to a tie or a casting vote. If then the recorder voted,

he voted illegally.

It is well settled, that a presiding or chief officer of a corporation has no powers except those which the charter confers upon him. To enlarge or restrict those powers would be to change the charter. He cannot be vested with a right to vote by a by-law, where the charter does not confer the right. This was the point decided in the case of *The King v. J. Ginever*, 6 Durnford & East's Rep. 732-735; and it is sustained by the reasoning of the court in *The King v. Bird*, 13 East's Rep. 384; and in all the later cases. The effect of such a by-law, it is plain, would be to constitute a different mode of election from that pointed out by the charter. It is the right of the legislature to erect corporations and prescribe their constitutions. If corporations take upon them to vary their constitutions or charters, they act from that moment without authority. The bylaw, referred to and relied on by the judge in this case, is not a mere regulation of the time and mode of election, but it creates a right of election contrary to the charter. The case amounts to this: The charter provides that the election shall be made by "a council composed of twelve members only," or by the majority of them voting by ballot. Such is the law given by the only power that could give it. But the council of the Municipality No. 1, not liking that mode of election, or the limited and restricted powers conferred upon the recorder, have chosen to alter and enlarge his powers, and to vest him with the right

LABOURDETTE 9.
FIRST
MUSICIPALITY.

to vote as a component part of the council. This is changing and reversing the provisions of the law, and putting the election of officers into different hands from those in which the legislature chose to place it in the first instance. This cannot be tolerated. If the recorder voted, he acted illegally. His vote was informal, unauthorized; a violation of the charter of the city, and an usurpa-

tion of power.

But there is not a tittle of evidence to show that the recorder did vote. When the defendants offered to introduce recorder Genois as a witness, for the purpose of proving whether he had voted or not, the plaintiff, through his counsel, objected to the introduction of the witness, upon the ground, that what was done in the council can only be proved by the journals of the council: and the court sustained the objection. There is nothing in the record to prove that the recorder voted. "De non existentibus et non apparentibus eadem est ratio," is a maxim of law as well as of philosophy. In the absence of proof to the contrary we must presume that a public officer did not act illegally. The thirteenth vote then, the illegal vote which avoided the election, must be regarded as a duplicate vote, accidentally or fraudulently placed in the ballot-box, by some person other than the recorder. The judge a quo says, "the recorder voted without opposition," and thence infers that Labourdette's election was valid. To this it is answered: 1st, There is no evidence, as we have just seen, that the recorder did vote. 2d, If the recorder did vote without opposition, the culpable ignorance or negligence of the council in permitting him to do so, cannot render his illegal vote legal. And 3d, Although Labourdette was proclaimed duly elected wharfinger on the 11th of May, 1846, yet Dupaty protested against the election; and, at a subsequent meeting, to wit, on the 8th of June, the municipal council sustained the protest, and set aside the election of Labourdette; and, on the 15th of the same month, regularly and duly elected Dupaty wharfinger.

But the judge below argues that the council, by approving the sureties and accepting the bond of Labourdette, "cured all irregularities, if any had existed," in the election of Labourdette, and ratified his election. This is not law. No issuing of commissions, no approval of sureties, no acceptance of bonds, can confer a right to an office, or render an irregular or illegal appointment to office valid. By means of a writ of mandamus or of quo warranto, an usurper or intruder into an office in a corporation may be ousted; or a person who has a right to hold an office in a corporation may be put in possession of it, although the party illegally in office may have been sworn and admitted into it. C. P. arts. 829, 834, 844, 867, 868 et seq. 6 La. 598. How then can the acceptance

of a bond from one claiming to be an officer, affect his appointment?

In the case of the United States v. Maurice et al., Chief Justice Marshall decided that the appointment of Maurice to be an agent of fortifications, by the Secretary of War, was irregular and void; but at the same time it was held that the bond given by said Maurice for the faithful discharge of the duties of agent of fortifications, though void as a statutory obligation, was valid as a contract with the United States. 2 Brockenbrough's Reports, 108-113. In Rex v. The Corporation of Bedford Level, the court granted a mandamus, upon an affidavit that one of two candidates for a corporate office had obtained a majority, only by means of illegal votes: although the party who had the majority had been sworn and admitted into office. 6 East's Reports, 356. It is clear that the council of the Municipality No. 1 could only appoint to office in the mode prescribed by the legislature of the State, and that mode is by ballot.

The 8th section of the act of September 1, 1812, entitled, "An act to determine the mode of electing the mayor, recorder and other public officers, necessary for the administration of the police of the city of New Orleans, and for other purposes," provided as follows, viz: "The mayor shall nominate, and by and with the consent of the council shall appoint, to all places which now are, or may hereafter be created in virtue of the act of incorporation," &c. Bul. and Curry's Digest, 100. The 6th section of the act of March 14th, 1816, amendatory of the act of September, 1812, provided that, "the council shall name by ballot its clerk and its other private officers, as also the treasurer of the city." Bul. and Curry's Digest, 102. The 2d section of the act of March 8th, 1836, enacted that, "all the powers (now) then vested by law in the City Council of New Orleans should appertain to, be invested in, and be exercised by, the councils of each of the municipalities created by this act, within their respective limits," &c. Bul. and Curry's Digest, 122. And the 8th section of the same act of 1836, further provided, "that the councils of each of said municipalities

shall have the exclusive right to appoint all officers thereof." Bul. and Curry's LABOURDETTE Digest, 124. Applying the sound rule of construction laid down by this court in relation to the municipal councils of New Orleans, in the case of Reynolds v. Baldwin, we must consider the statutes of 1816 and 1836, statutes in pari ma-Municipality. teria, to be construed with a reference to each other. C. C. art. 17. Indeed all acts upon the same subject matter are to be taken together as if they were one law, and should be so construed, that, if it can be prevented, no provision or clause in them shall be void. The acts of 1816 and 1836, therefore, must both stand, so far as they are consistent with each other. Now, the power to elect certain officers, conferred upon the council in 1816, was enlarged and merged in the exclusive "power granted to the councils of each of the municipalities in 1836, to appoint all officers thereof." But the mode of appointment, to wit, by ballot, was left unchanged; that mode of appointment or election being most consistent with the constitution and general laws of the State, and with the habits of the people. It is too clear for argument, that the acceptance of Labourdette's bond, and the approval of his sureties, could not do away with the necessity of electing him legally, by ballot, to the office of wharfinger. The law must be observed.

II. But suppose Labourdette was duly elected wharfinger, the next point submitted is: That the council of Municipality No. 1 had the power to remove him from office at will. The council of Municipality No. 1 being the appointing power, have the power to remove from office. 6 La. 597, argument. Labourdette, if he ever was in office, was removed by the resolution of the council, declaring his election null and void. At all events, the election of Dupaty was, in law and in fact, a rightful removal of Labourdette from the office of wharf-

inger. But this subject requires a deeper dissertation.

The municipal corporations of New Orleans, are public corporations, created for political purposes; and are invested with subordinate legislative powers, to be exercised for local purposes connected with the public good. These powers, with the exception of those conferred by the constitution of the State, are subject to the control of the legislature of the State. C. C. arts. 420, 422. 2 Kent's, Comm. 275. In Edgerton v. Municipality No. 3, this court said: "Constitutions are but the frames of social organisation; they define the objects of government, and establish the great powers which the people intend to be permanent. But the establishment of the subordinate powers, &c., is left to the wisdom and discretion of the legislative department." 1 An. R. 435. After referring to the institutions which provide for the police of towns, neighborhoods, and for the local government of towns, as instances of the exercise of these subordinate powers by the legislature, the court continues: "But it is a remarkable fact, and one that belongs to the cause, that the people of Louisiana, in convention assembled, have twice considered the local government of this great metropolis as too important to be placed among those subordinate institutions, and have recognised the city of New Orleans in its corporate capacity, as entitled to peculiar political powers and privileges; the political franchises granted to it by the constitution stand upon the same ground as any other constitutional powers; and the city of New Orleans and its officers are, for purposes of police and good order, permanent functionaries of government. The constitutional and good order, permanent functionaries of government. The constitutional powers of the government are all trusts. It has been argued that the Municipality No. 3 is not a civil or political corporation under the definition given by the Civil Code. We have already shown that the constitution vests them with that character. The definition relied on from the english side of one of the articles of the Code, proves nothing but the ignorance of the person who translated it from the french. The city of New Orleans is a public corporation, clothed by the constitution (and laws) with important powers of government.'

Government is an agency for the benefit of the people. Offices are created, not for the advantage of those who hold them, but for the public good. Officers are agents, mandataries, and trustees, for the people. The office of wharfinger, now under consideration, forms no exception to this principle. In Bacon's Abridgment, verbo Offices A, it is said that, "the word officium principally implies a duty, and in the next place the charge of such duty; and that it is a rule that, where one man has to do with another's affairs against his will and without his leave, that this is an office and he is an officer." In 2 Brockenbrough's Rep. 102, Chief Justice Marshall said: "An office is defined to be a public charge or employment, and he who performs the duties of the office is an officer. Although an office is an employment, it does not follow that every employment

LABOURDETTE V.
FIRST
MUNICIPALITY.

is an office. But where a duty is a continuing one, defined by rules prescribed by the government and not by contract, and an individual is appointed by government to perform that duty, which continues, though the person be changed, the charge is an office, and the person who performs the duty is an officer."

By the act of 25th of March, 1813, police juries were granted "full power and authority to appoint the constables and other officers necessary to carry into execution the city regulations, and to remove them from office." Sections We have seen that by the act of 1836, the councils of the several municipalities have an exclusive right to appoint all officers thereof. The power to appoint necessarily implies the power to remove, where there is no express provision to the contrary. Officers appointed for an unlimited period, are removed by a new choice made by the appointing power. The removal takes place by mere operation of law. 13 Peters, 402. 5 Rob. 402. 3 Story's Com. on Const. 338. The power to appoint to offices created by the municipal councils, is vested in them absolutely. The legislature has affixed no term of duration to those offices. In other words, the legislature has made the tenure of those offices a tenure at the will of the council, who are authorised to create and suppress such offices, and to appoint and remove the officers at pleasure. The council has no power to change the tenure. A corporation is a mere creature of the law. It has no powers except those conferred upon it by its charter. It must exist and act in the mode ordained by its creator. It can neither rightfully enlarge nor restrict its duties or its powers, but must continue such as the law constituted it. The unlimited power to appoint to certain offices, and to remove therefrom, was conferred upon the council for the public good. interests of the community are concerned in preserving this power undiminished. It may be necessary to remove an officer for neglect, or incompetency, without waiting the tedious process of law. It may be sometimes necessary to remove an officer for causes, which, if susceptible of proof at all, can only be proved with great difficulty. It may be necessary to suppress an office. It may be necessary to amalgamate two offices into one. The office of wharfinger, for instance, whose duties are to superintend the police of the wharves, and to regulate the order of mooring vessels, &c., may, perhaps, be beneficially amalgamated with the office of wharfmaster, whose duty it is to collect wharfage dues, &c. Will it be seriously argued that the council can, by fixing a particular tenure to each of these offices, deprive itself of the power to amalgamate them for the public good? That the council can, by these means, diminish its power of accomplishing the ends for which it was created ? That it can thus emusculate itself? We contend that, as the corporation cannot extend, so it cannot deprive itself of, the powers confided to it for the benefit of the community.

The power, then, to appoint to office, and thereby to remove at will, conferred upon the council by the charter of the city, cannot be abandoned or surrendered, or bartered away, or in any manner impaired by the council. It must be exercised according to the charter, the organic law, the very constitution of the corporation. The President of the United States having been entrusted with certain powers of appointment, has been held to possess the power of removal; and a question has arisen whether Congress can give any duration of office in such cases, not subject to the exercise of this power of removal. It was held, that the power of removal could not be abridged by legislative action; at least where the power to appoint cannot be delegated by the legislature. 3 Story's Com. on Const. 390. It seems to be clear and beyond doubt that the municipal council cannot alter the tenure of office created by the legislature of the State, and cannot surrender or impair its power to remove at will.

Nor is the council of Municipality No. 1 justly chargable with any violation of law in this respect, when its acts are fairly and legally interpreted. It is true, the second section of the ordinance creating the office of wharfinger, approved the 11th November, 1834, says, "the term of duration of said office shall expire on the fourth saturday in May next, a period at which said officer shall be annually elected." City Law, 1836, p. 247. But this did not make it an office for the year certain; it only created it an office for the year, unless the corporation should determine their pleasure within that time.

In the case of the Corporation of Bedford Level, already cited, 6 East's Rep. 356, it appeared that the corporation was empowered to appoint and remove officers at will; that it had accordingly elected its officers annually, and, among others, a register annually for thirty-seven years; that the minute of the last

FIRST

election stood thus entered on its books: "The corporation then proceeded to LABOURDETTE the election of officers for the year ensuing," and then followed the list of names of officers. Lord Erskine said, arguendo: "This is not to be considered as an appointment for a year certain, for the members of the corporation are to be MUNICIPALITY. elected annually; yet, the officers appointed by them are removable at pleasure, and therefore the appointment may be determined at any time." Lord Ellenborough, C. J., said: "It must be considered as an office for a year, according to the terms of the appointment, unless the corporation should determine their

pleasure within that time. That would be the legal effect of the appointment, controlled by the act of parliament."

It may be argued, that the power to remove from office is vested in the council, on the complaint of the mayor, in the manner prescribed by the act of 1836, sec. 8, viz,: "The mayor may, by lodging a complaint before any section council, remove forthwith any officer of one municipality; provided, that in case said officer should be re-elected by said council, then the mayor shall have no right to remove the same officer during the term of service for which said officer shall have been re-elected" (Bul and Cur. p. 124); and by the first section of the act of March, 14, 1839, amending the act of 1836, which provides that any treasurer or comptroller who shall refuse to furnish the mayor with any statements concerning the finances of either of the municipalities, may be removed from office, and shall not be re-appointed, except upon the recommendation of the mayor, or by four-fifths of the members composing the council (Bul. and Cur. p. 130); and that, therefore, the council alone has no power to remove. answer, the mode prescribed by the acts of 1836 and 1839, is an additional mode of removal. It does not destroy, nor in any way affect, the right of the council to remove at will.

It is possible that an officer who may not incur the displeasure of the mayor may be guilty of conduct that ought to forfeit his place. His bad actions may be connived at, or be overlooked, by the mayor. So that the power to remove on the complaint of the mayor, is a supplemental security to the people against the continuance of improper persons in office. But it is not the only mode of removal. Under the power to appoint to office conferred upon the council, an incumbent may be superseded at any time by a new appointment made by the council. This plain and obvious construction is supported by authorities in analagous cases. The constitution of the United States provides that, "all civil officers of the United States shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors.' It was contended in the Congress of 1789, that this was a particular mode prescribed for removing, and that, inasmuch as there was no other mode directed, the constitution contemplated only this mode. But it was the opinion of a large majority, that the declaration in the constitution was intended as a supplemental security for the good behaviour of the public officers, and that there was another mode of removal. Lloyd's Deb. 352, 451.

In the case of the Portwardens of New Orleans, Nicholson et al. v. Thompson et al., it was contended that the constitution of Louisiana had prescribed the mode by which certain public officers should be removable, in art. 6, sec. 8, (Const. of 1812), and that there was no other mode of removing them. But it was decided that there was another mode of removal, and that these officers

might be removed by appointing others in their places. 5 Rob. 367.

III. But suppose the council had a right to surrender its power of removal at will, and thus to annul the tenure of office created by the act of the legislature, and to substitute a tenure of its own; and suppose the council of 1834 intended to exercise, and did exercise, this right, in passing the ordinance of the 11th of November, 1834, the question still remains, was the council of 1846 bound

by this ordinance?

On the 20th of August, 1838, the council of Municipality No. 1 adopted an ordinance in relation to the officers of the municipality. The second section of that ordinance is in the following words: "The council of the First Municipality reserves the right of amending, when they shall think it necessary, all ordinances fixing the salaries of the officers of this municipality; and no officer shall have the right of claiming any salary after the date of his removal from office, or suppression of his office, notwithstanding all ordinances contrary to the pre-First Municipality Laws, p. 122, sec. 372. It is evident that this ordinance of 1838, resumed for the council, and re-asserted, its power to remove its officers at will; and that if there is any thing in the ordinance of 1834 conflict-

LABOURDETTE ing with this, it is repealed. Leges posteriores priores contrarias abrogant. It cannot, for a moment, be pretended that, the council of 1834 could abridge the MUNICIPALITY. IN TO the council of 1838.

IV. The judge a quo says, that he has examined closely the effect of the ordinance of 1838 on the present suit, and that the 2d section as understood by defendants would be a derogation to article 2720 of the C. C., which, he argues, is the law of this case. And petitioner's counsel, declaring that they rely on the well settled jurisprudence of the State, refer to the same article of the Civil Code, and to the decisions thereon in 8 La, 183; 12 La. 67; and 15 La. 360.

Article 2720 of the Civil Code is as follows: " If, without any serious ground of complaint, a man should send away a laborer whose services he has hired for a certain time, before that time has expired, he shall be bound to pay to such laborer the whole of the salaries which he would have been entitled to receive, had the full term of his services arrived." The decisions referred to simply show, that the late Supreme Court of this State considered the case of a lawyer employed by a private corporation by the year, and the case of a superintendent and engineer of a cotton press, hired for a certain time, as falling within the equity and spirit of this article, and analagous to the case therein provided for. But we are at a loss to conjecture by what process of reasoning the learned judge, and the able counsel of the petitioner, can come to the conclusion that the article of the Civil Code, and the decisions quoted by them, are applicable to the present case; a case in which the council, by an express and public ordinance, reserved to themselves the right of determining at will the office to which plaintiff was elected, of suppressing the same, or of removing from office any incumbent thereof, without rendering themselves liable for any salary after the date of such removal.

But there is another view of this matter to which the attention of the court is respectfully invited. Among the excellencies of our Civil Code, its order, its lucid method, has been deemed worthy of high commendation. Article 2720 will be found under the title of Letting and Hiring, which is subdivided into two species: 1st, the letting out of things; and 2d, the letting out of labor and

industry. C. C. 2643.

Now, labor may be let out in three ways. 1st. Laborers may hire their services to other persons. 2d. Carriers and watermen may hire out their services. And 3d. Workmen may hire out their labor to make buildings or other works. Article 2720 falls under the head of the hiring of servants and workmen, and is intended to apply to workmen employed in manufactures or on plantations, as is evident from the preceding article, 2719, and from the language in the french text of article 2720. It is unnecessary to express any opinion as to the correctness of the supposed analogy between the case provided for in that article, and the cases decided by the late Supreme Court. But the political character of the municipal corporation, the nature and duties of its public officers, and the general policy of the law and government, which have already been developed, show conclusively that the plaintiff has no right of action against the defendants in this case, and that article 2720 is wholly inapplicable. When the plaintiff accepted office, he accepted it on the express condition that he should not have the right of claiming any salary after the date of his removal from office. If a corporate officer is disturbed in his office, or is improperly ousted by an usurper, or is shut out from his office, the law gives him a remedy by quo warranto, by mandamus, or by an action to recover his fees and salaries from any one who improperly receives them. But this is only in case he has a The idea that he can recover a salary from the pubclear legal right to office. lic when he performs no duty, and that when he is legally removed by the due exercise of the appointing power, in substituting a successor, he is entitled to a

continuation of his salary, appears to be little short of an absurdity.

The amount involved in this case is comparatively of little importance, but the principles upon which it depends are of high public concern. They comprise questions concerning the due and proper mode of electing public officers, the power of the municipality over its officers, and the right of removal, with

all which the public welfare is intimately blended.

We trust that we have shown that the election of Labourdette, on the 11th of May, 1846, was irregular and void. That this irregularity was not cured by the acceptance of his official bond, on the 4th of June. That the election of Dupaty; on the 15th of June, was a rightful exercise of power by the council. That the council of the Municipality No. 1, being the appointing power, have the power to remove from office. That this power of removal is essential to the LABOURDETTE public welfare, and cannot be impaired or surrendered by the council. the ordinance of 1834, on which the plaintiff relies, did not create the office of wharfinger an office for a year certain, but left it determinable at the will of the Mesicipality. That the ordinance of 1834, even if it did create the office for a year certain, was repealed by the ordinance of August 20th, 1838, by which the council expressly resumed to itself the right of removing any of its officers, and stipulated that no officer should have any right of claiming salary after the date of his removal from office. And finally, that article 2720 of the Civil Code, in relation to laborers hired for a definite period of time, is inapplicable to public officers, holding office at the will of the government, whether municipal, state, or national.

FIRST

Morel, on the same side.

The judgment of the court was pronounced by

EUSTIS, C. J. This case is presented with great ability in the argument of the counsel for the defendants; and concurring with him in the view which he has taken of the illegality of the election of the plaintiff as wharfinger of the Municipality, we think the judge of the District Court erred in deciding against the defendants.

It is unnecessary to decide on the question, concerning the authority of the municipal appointing power to remove from office.

Any claim which the plaintiff may have against the defendants for services rendered, is to be considered as reserved.

It is therefore ordered that the judgment appealed from be reversed, and judgment is rendered for the defendants, with costs in both courts.

ROBERT v. HIS CREDITORS.

The question as to which of two creditors of an insolvent is entitled to be paid by preference out of the proceeds of property sold by the syndic, must be litigated on the filing of a tableau of distribution; the matter cannot be determined by an opposition to an account filed by the syndic.

PPEAL from the District Court of St. Mary, Voorhies, J. Maskell, for the appellant. Dwight, syndic, pro se. The judgment of the court was pronounced by

The litigation presented by this record appears to us prema-SLIDELL, J. ture and informal. The principal contest between Phabe Wooster, the opponent, and the syndic, relates to the price of certain real estate of the insolvent. which the syndic has sold, but left the price in the hands of the purchaser, the insolvent's wife, who claimed to be a first mortgage creditor. The opponent claims to be a creditor upon the same proceeds by superior mortgage, and asks a personal judgment against the syndic. This opposition was made upon the filing of an account by the syndic.*

The proper occasion for the litigation of these questions would be on a tableau of distribution, which the syndic should immediately file. Upon such a tableau the contest between these mortgagees can be determined. If the purchaser, the insolvent's wife, should be adjudged to be the first mortgage creditor, she will be entitled to retain the proceeds subject to such deduction as may be law-

^{*} The opponent appealed from a judgment in favor of the syndic, and dismissing her opposition. R.

ROBERT E. CREDITORS.

ful and necessary for privileged expenses. If, on the contrary, the present opponet, *Phabe Wooster*, should establish a superior right, the purchaser would be bound to pay the price. Whether there has been *laches* on the part of the syndie, to the injury of the creditors, is a question upon which we have not at present the means of expressing an opinion, and which is reserved for future consideration. See *Rodriguez* v. *Dubertrand*, 1 Robinson, 538. *Goodale* v. *His Creditors*, 8 La. 302.

There are some small items, in the syndic's account, of payments made by him; the propriety of these payments can also be considered when the tableau is filed. The proper course to be pursued by the appellant is, to compel the filing of a tableau of distribution.

Judgment affirmed.

PALMER v. DINN.

The evidence of a single witness is sufficient, in an action by the holder against the maker of a note for an amount exceeding five hundred dollars, to defeat a recovery on the ground that plaintiff is a fraudulent holder. Art. 2257 of the Civil Code is inapplicable to such a case, which must be governed by the general rules of evidence.

A PPEAL from the Second District Court of New Orleans, Canon, J. Denis, for the appellant. Roselius, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The defendant, who is sued as the maker of a promissory note, sets up the defence of fraud against the plaintiff, alleging that this, with other notes, had been put by him into the hands of plaintiff as a broker to obtain the discount of them, and that the plaintiff has no title as holder for himself.

The case was tried by a jury, who found a verdict for the defendant. The jury was the proper judge of the credibility of the witness who established the defence. The only point which we have to consider is one of law, raised by the plaintiff's counsel. The demand of the plaintiff was for a sum exceeding \$500, at the date of the suit; the defence rests on the testimony of a single witness. It is said that the facts constituting the defence should have been proved by two witnesses, or by one witness and corroborating circumstances; and the counsel relies on article 2257 of the Civil Code. We consider that article inapplicable. It prescribes the amount of testimony necessary to establish a liability in cases of contracts for the payment of money, and agreements relative to personal property, involving a pecuniary amount of \$500. Here the effort is to escape from a liability-to defend, and not to attack. The testimony defeats the apparent title of the plaintiff as the holder of a written instrument. There might have been some policy in requiring as strong testimony to sustain such a defence, as to establish a liability; but the legislature has not so declared. The case is not within that article of the Code, and falls under the general rules of evidence. We find nothing either in our own written law, or in the law merchant, which forbids a defence of fraud in the holder of a promissory note to be proved by a single witness. If the jury believed the witness, the law permitted them to decide the issue on his testimony.

Judgment affirmed.

DIMOND v. PETIT.

In the absence of any evidence of the recognition by the government of the United States of a state of war, as existing between a foreign government and an insurgent province, the rights of the latter as a belligerent cannot be admitted. *Per Curiam*: The proceedings of courts in such cases depend entirely on the action of the general government.

One concerned in capturing an American vessel under color of the insurgent military authority of a foreign province, in the absence of proof of the recognition by the government of the
United States of a state of war as existing between the insurgent province and the power
to which it belonged, will be responsible to the owner of the vessel for the damage sustained by the capture.

A PPEAL from the District Court of the First District, Buchanan, J. Preston, for the plaintiff. Benjamin and Micou, for the appellant. The judgment of the court was pronounced by

Eustis, C. J. The Margaret Ann, an American vessel belonging to the plaintiff, with a full cargo of provisions, was captured by a gun-boat on the coast of Mexico, in March, 1843, and taken to Campeachy. She was bound for Laguna, about a hundred miles distant from Campeachy; and, the persons in authority in the latter place refusing to permit her to proceed to her port of destination, her cargo was landed and sold, the voyage broken up, and the vessel returned empty to New Orleans. The defendant, an American citizen, was one of the captors; indeed, from the evidence, we should infer him to have been the leader of them, and he is sued for damages by the plaintiff, who was the owner of the vessel and of one-half of the cargo. The district judge gave judgment for \$1,640, with interest from judicial demand, and costs, and the defendant has appealed.

In fixing the amount of damages we cannot be guided by the allegations of the petition, but must follow the evidence adduced on the trial without objection. We have not been able to find any thing which would authorise us to give the plaintiff a larger sum than he has himself sworn to be due as damages, to wit, the sum of \$1,000.

This capture was made under color of an insurgent military authority at Campeachy, in the Mexican province of Yucatan. We directed the attention of counsel to the necessity of furnishing the court with information as to the course taken by the government of the United States in relation to the belligerent rights of the province of Yucatan, which is said to have been in a state of rebellion against the republic of Mexico, at the time of the capture. No justification has been exhibited to us for this outrage upon our flag, and the capture can be viewed in no other light by the court than as an act of lawless depredation.

It is well settled that the proceedings of courts in cases of this kind, depend entirely on the action of the general government. There being no evidence that a state of war was recognised by our government as existing between this insurgent power and Mexico, the rights of the former as a belligerent cannot be admitted by this court. *United States* v. *Palmer*, 3 Wheaton 635.

The judgment of the District Court is therefore reversed, and judgment entered for the plaintiff against the defendant, for the sum of \$1,000; the plaintiff paying the cost of this appeal, and the defendant those of the District Court.

Hogan, Curatrix, v. Thompson.

The validity of a decree appointing a curatrix of a vacant succession, cannot be enquired into collaterally.

It is the duty of the curatrix of a vacant succession to sell the moveable effects belonging to it at once, whether there be any debts due by the succession or not.

A PPEAL from the Court of Probates of New Orleans, Bermudez, J. Gaiennié, for the plaintiff. Livingston, for the appellant. The judgment of the court was pronounced by

Rost, J. The plaintiff, in the capacity of curatrix of the vacant succession of Andrew Thompson, her husband, has instituted this action for the partition of certain moveable effects, held in common by the deceased and the defendant. The court below, upon due proof that the property could not be conveniently divided in kind, ordered a licitation for cash. From that decree the defendant has appealed.

The grounds upon which he asks a reversal of the judgment, are untenable. The decree of the court appointing the plaintiff curatrix, stands unreversed and unappealed from. We cannot enquire collaterally into its validity, or the correctness of the reasons which induced the decision of the judge. The plaintiff administers the succession for the benefit of the creditors and heirs, whoever they be. If there are no debts, the heirs, if present or represented, may take possession of the succession at any time; but until they do, it is her duty to administer it according to law; and the first act of her administration must be, the sale of the moveable effects belonging to the succession.

Judgment affirmed.

THE FIRST MUNICIPALITY v. PEASE et al.

In appeals from decisions of justices of the peace, in cases involving the constitutionality of legality of a municipal ordinance imposing any tax or impost, the power of the court is limited to the question of the constitutionality or legality of the ordinance. Const. art. 63. The General Council of the city of New Orleans are authorised to establish by ordinance an uniform rate of wharfage, to be paid by ships, steamers, and other vessels, moored in front of any part of the city. The authority to impose a wharfage, or charge on vessels moored in the port of New Orleans, to defray the expenses of the erection and maintenance of wharves and other works necessary for the loading and unloading of vessels, and to secure a convenient access to them, is not inconsistent with any law of the State or of the United States, nor with the 8th or 10th sections of the first art. of the constitution of the United States.

Where a municipal corporation is anthorised to impose a wharfage charge, as a compensation for keeping the wharves in a proper condition for the safe and expeditious shipping and landing of merchandise, a court will not undertake to fix any limit to the amount which the municipal authorities may exact for that purpose. The question of the extent to which this right may be exercised, is purely administrative.

A PPEAL from the Parish Court of New Orleans, Maurian, J. The facts of this case are stated in the opinion of the court, infra.

Roselius, for the plaintiffs, I. The ordinance is legal. The 20th section of the act of 1836, dividing the city into three municipalities, provides: "The Municipalities." following are declared to be the powers of the city counsel thus constituted, and all other powers shall be vested in the councils of the separate municipalities: 1st. To fix a uniform rate of wharfage, to be paid by ships, steamboats,

and other crafts, mooring in front of all parts of the city."

So far, therefore, as the State legislation is concerned, the power has been expressly delegated to the General Council. This law, however, is not the origin of the right to claim wharfage. It is well known that, by an ordinance of O'Reilly, enacted shortly after Spain took possession of Louisiana, this right was recognised; and it has never been seriously questioned since that period, until the institution of this suit. In nearly all the other seaports in the Union, wharfage is paid to private individuals, who own the wharves, and keep

II. The ordinance is not contrary to the constitution of the United States, nor to any law of Congress. The constitutional provisions relied on by defendants are: Art. 1, sec. 8, § 1. "The congress shall have power to lay and col-

lect taxes, duties, imposts and excises, to pay the debts, and provide for the common defence and general welfare, of the United States."

Also, § 3 of the same article and section: "To regulate commerce with foreign nations, and among the several States, and with the Indian tribes." And the same article, sec. 9, § 5: " No tax or duty shall be laid on articles

exported from any State."

Finally, the same article, sec. 10, § 2: " No State shall, without the consent of the Congress, lay any imposts, or duties, on imports and exports, except what may be absolutely necessary for executing its inspection laws. No State shall,

without the consent of Congress, lay any duty of tonnage."

The wharfage claimed is either a tax, impost, or duty, in the proper and legal acceptation of these terms? The Supreme Court of Louisiana, in the case of The State v. The New Orleans Navigation Company, 11 Mart. 324, say : "These words, we think, must be confined to the idea they commonly and ordinarily present to the mind-exactions to fill the public coffers for the payment of the debts, and the promotion of the general welfare of the country; not a retribution provided to defray the expenses of building bridges, erecting causeways, or removing obstructions in a water course, to be paid by such individuals only who enjoy the advantage of such labor and expense." See also 11 John-

son, 80. Story on the Constitution, vol 2, p. 419, § 947, et seq.
In Petersdorff's Abridgment, vol. 15, p. 393, we find the following definition, or rather description, of a wharf: "A wharf is a convenient place for landing, warehousing, and shipping of goods. Natural ground on the bank of a canal, though used for the purpose of a wharf, is not a wharf; neither is the seabeach. Rex v. Regent's Canal Company. The term, in its ordinary and legal beach. Rex v. Regent's Canal Company. The term, in its ordinary and legal import, means a place built or constructed for the purpose of loading and unloading goods, and for the use of which wharfage, or compensation, is paid to the owner." The word wharfage is also used to mean the money paid by vessels for the privilege of mooring, or making themselves fast, at a wharf; in some of the cities of the Union, this is called dockage. Wharfage is, therefore, a remuneration or compensation for the use of a wharf, and can with no propriety of language be confounded with a tax, duty or impost.

The collection of wharfage is not a violation of the constitutional provision which gives Congress the power to regulate commerce. See 2 Peters, 252. 12 Ib. 446. 6 Peters, 315. 11 Ib. 143. 9 Wheaton, 235. 9 Wheaton, 195.

10 Peters, 662.

Elmore and W. W. King, for the appellants. The ordinance of the city council of May 23d, 1843, imposing a tax upon vessels landing or mooring withn the incorporated limits of the port, is void. The power conferred upon the city by the act of 1836, s. 20 (B. & C.'s Dig. p. 127), does not, by its terms, grant a new power. It was merely intended to regulate the manner of exercising a power previously in existence. The only power previously in existence was the right to receive the old spanish dues prescribed by the act of incorporation in 1805. These dues were very small in comparison with the taxes levied by the ordinance of 1843.

The power conferred by the act of 1836, was repealed by the act of 1843, p. 55 of Acts. The right of vessels to land or moor on the banks of the river, is secured to them. C. C. 442, 443, 446, 448. Act of Congress of 1812, ad-

PEASE.

FIRST PEASE.

mitting Louisiana into the Union. Also Ord. of 1811 of the convention of Louisiana. The act of 1843 deprived the city of the power of laying a wharf-

The city council must regulate the port so as to admit steamboats to moor at the levée, between certain points. Act of 1835. City Laws, pp. 493, 425. The ordinance is in contravention of these laws, for it imposes a most oppressive tax upon steamboats, for the enjoyment of this right. The ordinance is not authorised by the act of 1836, because it does not import on its face to be a wharfage tax. It is a tax for mooring or lauding within the incorporated limits of the port of New Orleans.

The port of New Orleans extends from the line of the parish of Jefferson to a point three miles below the centre of the public square, called the Place d'Armes, taking in the whole width of the river and both shores. In other words, a section of the river of about five miles in extent. See Act of 1821, Moreau's Dig. p. 259. Acts 1834, p. 106. Steamboats are liable to the tax, whether they land on this, or on the other, side of the river. Whether they moor to a wharf or not. There are no wharves on more than half of the two shores, They are liable whether they discharge a cargo or not. The ordinance calls these taxes, levée taxes. The levée and the wharves are very distinct things. The money received from these taxes goes into the public coffers, and is not appropriated for the benefit of the wharves. The tax in amount is greatly beyond a fair compensation for the use of the wharves.

These considerations show that the tax is not a wharfage tax, nor a remuneration for the use of the wharves in dicharging and receiving cargoes. It is not then a tax warranted by the law of 1836. It is not pretended that there is any other law. The tax is imposed by the city upon property not within the limits of the city. The port of New Orleans is not within the incorporated limits of the city. Act of 1836, B. & C.'s Dig. p. 121. Act of
1812, Martin's Dig. vol. 2, p. 288. Act of 1818, City Laws, p. 317. Act of 1819,
City Laws, p. 319. 5 La. 466. 17 La. 576. C. C. arts. 444, 446, 448. Consequently the city has no right to lay the tax, under any general authority or

power conferred upon it.

The ordinance is void because it is contrary to the 6th section of the constitution of the United States, which prohibits any State from imposing any tonnage The charge imposed by the ordinance is essentially a tonnage duty. States which have imposed such duties, have first obtained permission from Congress. See Gordon's Dig. no. 2265 and note. Georgia, South Carolina, and Maryland have obtained such licences, by temporary acts. It is contrary to art. 1. sec. 8, of the constitution of the United States, which gives Congress the right to regulate commerce among the several States. This power in Congress is exclusive, and embraces the regulation of navigation. Gibbons v. Ogden. 9 Wheat. 186 et seq. United States v. Coombs, 12 Peters, 72. Brown v. State of Maryland, 12 Wheat. 419. Act of Congress of 1812, admitting Louisiana into the Union. A tax upon the importer is a tax upon the goods. 12 Wheat. 419. A fortiori, a tax upon the ship, is a tax upon the goods.

It is contrary to art. 1, sec. 10, of the constitution of the United States, which forbids any State laying imposts or duties on commerce, or any duty on tonnage. The ordinance lays a duty on the internal commerce of the States,

12 Wheat. 419. 9 fb. 186, et seq.

It is in contravention of the acts for the admission of Louisiana into the Union. See act of Congress of 20th Feb. 1811, and 8th April, 1812. Act of Louisiana Convention. 11 Mart. 324, note to decision.

The judgment of the court was pronounced by

Eustis, C. J. This is an action for the recovery of the sum of \$82, alleged to be due for the wharfage of the steamer Sultana. It is before us on an appeal from the late Parish Court of New Orleans, which rendered judgment for the plaintiffs, in affirming the judgment rendered by a justice of the peace of New Orleans, before whom the suit was originally brought. Under the constitution, the power of this court in appeals of this kind is limited to the legality and constitutionality of the ordinance, under which the claim of the plaintiffs is sought to be enforced. The Third Municipality v. Blanc, 1 Annual Rep. 385,

I. The General Council of New Orleans has power to fix one uniform rate of wharfage, to be paid by ships, steamers, and other water-craft, mooring in front of any portion of the city. Act of 1836, § 20. So far as the authority of the State is concerned, the plaintiffs have a right to exact wharfage from a steamer moored in front of the municipality within its limits; and our opinion is that, so far as the ordinance establishes an uniform rate of wharfage, it is not in violation of any law of the State or of the United States.

II. But it is alleged to be in violation of the constitution of the United States in this, that it is contrary to the 8th section of the first article of that instrument, which gives Congress the power to regulate commerce with foreign nations, and and among the several States, and with the Indian tribes, and to lay and collect taxes, duties, imposts and excises; and conflicts with the tenth section of the same article, which provides that no State shall, without the consent of Congress, lay any duties on imports or exports, except what may be absolutely necessary for executing its inspection laws, and that no State shall lay any duty of tonnage without the consent of Congress.

There is no charge authorised by law for the landing or shipping of goods, or for any other use of the land or fixtures adjacent to the water; and the wharfage claimed by the plaintiffs is placed on the ground of its being a compensation for the artificial facilities which are afforded to vessels, in mooring them in safety, in loading or unloading their cargoes, and in furnishing an easy and convenient access to them. The landing and shipment of the bulky produce of this mart, is effected by means of stages which extend from the vessel to the shore. In some parts of the port there are floating bridges between them, and without the means provided for that purpose the port, as a place for shipping, could only be used at a very advanced rate of expense over its present rates, and accompanied with such inconvenience and loss of time, that it may surely be assumed that the works, which the municipality have caused to be constructed with their apparatus, may be considered necessary and useful. This, as a fact, we do not understand to be drawn in question, and we think that it may be assumed that, the exaction of wharfage, as a fair remuneration for the expenses thus incurred, and those which are probably to continue for the same object, is, under no view that can be taken, contrary to the letter or spirit of the constitution of the United States.

But it is contended by the learned counsel, that the amount of the wharfage exacted under this ordinance, is entirely out of proportion to any such object; that it is a tax levied on the commerce of the country, for the general benefit of the inhabitants of New Orleans; that it is a source of revenue and profit to them; and that the form in which it is imposed is a mere pretence to cover what is in fact an unconstitutional tax or impost, levied on objects which neither the municipal nor State authority has the power to reach or interfere with.

In the present case, it is in evidence that the steamer Sultana, a licensed coasting vessel of the United States, of upwards of five hundred tons burthen, was employed in the Vicksburg and intermediate trade with this port; that she made one voyage a week, between the two places; and that the sum of \$82 is exacted for wharfage, on her mooring in any part of the limits of the municipality. It is urged that the aggregate thus exacted in the course of a season is such a tax upon the navigation, foreign and internal, as to be a palpable and flagrant violation of the constitution of the United States.

We consider it competent for the legislature to authorise the receipt of

FIRST MUNICIPALITY U. PEASE. wharfage, as a compensation or remuneration for keeping the bank of the river in such a condition as to ensure the safe and expeditious shipment and landing of merchandise and produce, by the construction of a spacious and convenient levée and quay suitable for a mart like this, and for projecting wharves with necessary appendant machinery. Wharfage is exacted, it is believed, in all the maritime ports of the United States; its exaction has never been considered unlawful, nor in derogation of any right secured under the constitution of the United States, so that the question before us is one of degree. Wharfage may lawfully be demanded; but beyond a reasonable renumeration—a compensation for an equivalent—it is said to be unconstitutional.

There are statements in evidence by which it appears that, from June, 1836, to February, 1845, the expenses of the port fell short of the receipts from wharfage, by \$43,939; and from February 28th, 1845, to the 31st March, 1846. though the statements are not definite, it is apparent that the receipts far exceeded the expenditures. The gross receipts from that source were \$74,000, and the "fournitures diverses pour le port, pavage, et autres travaux de reparation pour la municipalité," are put down at "a peu pres" \$61,120. On the other hand it is proved, that on account of the abrasion of the soil on the border of the river, which takes place on the fall of the water in the summer, the bridges are liable to be destroyed; that the wharves between Custom-house street and Hospital, were destroyed four times in five years, in 1840, 1841, 1843, 1844. It is also contended that the statements do not contain all the charges that ought to be made to the account of the port, and that the receipts from wharfage do not exceed the expenditures chargeable to the port expenses direct, and those incidental, and a reasonable sum to meet those caused by the destruction and injury of the wharves and the repairs of the port, according to the usual action of the river upon the bank and batture in front of it, on which some of the wharves are constructed.

The matter we are thus called to decide is purely administrative. We are called upon to fix the sum which the municipality may receive as wharfage; and to refuse to award any sum beyond what we may deem lawful, as a fair remuneration for their port expenses, actual, prospective, and contingent. There could scarcely be a stronger illustration than this case offers, of the wisdom and truth of the dictum of Chief Justice Marshal, in the case of McCulloh v. The State of Maryland, 12 Wheaton, 430: "We are not driven," says he, "to the perplexing enquiry, so unfit for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to the abuse, of the power." The functions of that department are, under the true theory of our government, confined to those cases in which its authority cannot be questioned, and its action will be consequently effectual. Second Municipality v. Duncan, ante. p. 182.

If the court were to reduce the amount as asked by the defendants, an accident might render its judgment not only contradictory to the very principle on which it would be founded, but its execution an unwarrantable interference with things over which the municipal government must necessarily have the control.

The government of each municipality is charged with the administration and police of its portion of the port, the preservation of the levée, as well as with its own financial affairs. The authority delegated to them for the former object

is a portion of the political power of the State, and its exercise appertains to the public order, and involves the safety of the city in certain seasons of the year. The reasoning of the Chief Justice in the case cited, may be applied to a certain extent to the case under consideration. The government of the municipality has determined that the rates of wharfage are due, as such; from this the State has not dissented. The responsibility of the act rests with the municipal government. The consequence of the interference of the judicial power in the details of its finances, can be readily foreseen. If it be appealed to in cases in which the amount of its imposts, taxes, or dues, are drawn in question, and should exercise its authority in matters of detail, or those which may be considered as administrative, it is obvious that the administration of municipal affairs must be arrested, unless the judicial power took upon itself the responsibility of conducting them, and provided against the consequences of its decrees.

It would seem, therefore, to be true that, within a certain range, which however it is not easy to define or limit, where there is an acknowledged right which is necessary for the performance of a public function and which is liable to abuse, that the measure of its use and abuse is rather a matter of legislative discretion than for judicial decision; where there is no right, however small the burden or laudable the purpose to which it is applied, the judiciary must interfere. If this wharfage is a tax on commerce, or on imports or exports, it is unconstitutional, however small the amount. If it be not per se unconstitutional, the unconstitutionality depending according to the argument on the unreasonableness of the amount, the action of the judiciary is brought directly in conflict with the municipal administrative power on an administrative question, over which, it must be conceded, that the city government is called upon to exercise to a certain extent discretionary power. The judicial action is put forth in favor of absolute, positive, legal rights; they must be separated by a distinct line of demarcation from those which are subject to the action of other branches of the government, the interference with which must be avoided. Such is, as we understand it, the theory of our sytem; and upon the observance of the principle of leaving to each branch of the government the performance of the functions with which it is invested, its success and durability depends.

The force of the argument addressed to us presupposes that a proper case has been made out for the judicial power. The impolicy of this ordinance, the disastrous consequences of imposing burthens on commerce, and the inevitable effect of such a course of exaction on the interests of the State and city, may be as serious and as certain as is contended for on the part of the defendants.

We are far from believing that the charges imposed by the ordinance, are consistent with a proper and considerate view of those interests. The remedy for this can be had elsewhere than from the judicial power. With more enlarged views of public policy, the electors may apply at once a remedy to the evil; or the legislature itself may confine the exactions of the municipalities within fixed and reasonable limits. The States of the Union bordering on the waters of this great valley, and the great shipping interest of the north, whose interests are most affected by our port charges, will be sure, in case of necessity, to call into activity for their protection the power of Congress to regulate commerce.

It cannot be believed that, if it were attempted, a State holding the great entrance from the ocean to large and populous internal States and cities, would be

FIRST MUNICIPALITY W. PRASE. permitted, under our present political organisation, to embarrass foreign and domestic trade by unreasonable and unnecessary burthens; which would be alike inconsistent with our settled policy, the principles of our government, and the laws of nations, as we understand them. 1 Kent's Com. 35. Wheaton's Law of Nations, p. 508.

But the sole question with us in this point is, whether, under the evidence, it is competent for the judicial power to declare the ordinance unconstitutional? We are under the necessity of saying that, we have nothing before us on which we can determine that the wharfage claimed by the plaintiff is contrary to the constitution of the United States, by reason of its amount.

III. It is contended by the defendants that the ordinance is in contravention of the acts of Congress, for the admission of Louisiana into the Union, of February, 1811, and the 8th of April, 1812. The reasons for which we have considered the ordinance as not conflicting with the constitution of the United States, apply to the acts referred to, giving them all the effect which the defendants assign to them.

It is the wish of the defendants that the opinion of the Supreme Court of the United States should be had on the subject involved in this suit, in which we cordially acquiesce. We have therefore confined our decision exclusively to the propositions submitted and argued, without presenting many obvious considerations in support of our views, which result from the constitutional jurisprudence of the United States, as established by the decisions of that tribunal.

Judgment affirmed.

LANATA v. PLANAS et al.

In an action by a creditor to annul a contract made in fraud of his rights, the record of an action in which he had obtained a judgment against the original debtor is admissible in evidence as prima facie evidence of the claim, though the defendant was not a party to the action; but the latter may contest the demand of the plaintiff, though liquidated by a judgment, in the same manner that the debtor might have done before the judgment; and it is his duty to do so. C. C. 1971. Per Curiam: The cases in which it has been held that the burthen of proof is on the judgment creditor, are those in which wives have obtained judgments against their husbands. They are exceptions to the general rule that, whoever alleges fraud must prove it.

A PPEAL from the District Court of the First District, Buchanan, J. Latour and Roselius, for the plaintiff. Dufour, for the appellants. The judgment of the court was pronounced by

Rost, J. This is a revocatory action. The plaintiff seeks to avoid three acts of mortgrge, and an act of sale, from Ramon Planas to the other defendant, on the ground that they were executed in fraud of his rights as a creditor of Planas, and for the purpose of giving an unjust preference. The answer of Presas denies the claim of the plaintiff, and alleges collusion and fraud between him and Planas. There was a judgment in favor of the plaintiff, and the defendant Presas, for himself and Francisco Alzina, another party interested, appealed.

On the trial below, the plaintiff offered in evidence two records of the court from which this appeal is brought up, in order to prove the claims upon which this action is founded. *Presas* opposed the introduction of those records on

the following grounds: 1st. That one of the judgments obtained in those cases was rendered on the confession of Ramon Planas, made in open court, after Planas had filed an answer claiming a large sum in reconvention. 2d. That the defendant, Presas, has pleaded fraud and collusion between Planas and Lanata, whom he alleges are combined against him. 3d. That he was not a party to those suits, and that he knows the allegations of Planas and his answers to be true. The court admitted the records and judgments as primâ facie evidence of the claims, and the defendant Presas took a bill of exceptions.

We concur in the view taken by the judge in relation to this evidence. Under art. 1971 of the Civil Code the presumption resulting from those judgments was not, in relation to Presas, juris et de jure. He might controvert the demand of the plaintiff, although liquidated by a judgment, in the same manner that the debtor might have done before the judgment; but it was his duty to do so. He avers that the allegations of Planas in his answers could be proved. It was incumbent upon him to prove them. The cases in which it has been held, that the burthen of proof was on the judgment creditor, were cases in which wives had obtained judgments against their husbands; they form exceptions to the general rule, that whoever alleges fraud must prove it. Moreover, it is clearly shown, that Presas was apprised of the claims of the plaintiff, and that it was for the purpose of defeating them that the mortgages and the sale complained of were made.

On the merits, we concur fully with the court below. The evidence in support of the plaintiff's allegations is as full and satisfactory as can be desired; and the conduct of *Presas* throughout those transactions cannot be too severely censured.

Judgment affirmed.

LABENELLE v. DECONET.

One who purchased certain lots, jointly with defendant, executing his notes with her in solido for the price, and who afterwards paid the notes at maturity, cannot recover from the latter her proportion of the notes so paid, where the evidence shows that defendant had been debauched by the plaintiff, and was living in concubinage with him at the time of the payment, which was made as a reparation for the injury he had done to her.

A PPEAL from the First District Court of New Orleans, Preston, J. Rousseau, Robert and Collens, for the appellant, cited C. P. 19. 10 Duranton, pp. 260, 267 et seq. 2 Kent's Comm. p. 467. 1 Lib. Law and Equity, p. 180. Kinne's Compend. vol. 1, p. 221, § 7, and authorities cited.

Train, for the defendant, cited 10 La. 204. 1 An. Rep. 121, 230, 232. 6 Mart. 695. 19 La. 235. 10 La. 167. Pothier, Oblig. vol. 2, pp. 34, 84, 123, 129, 370. 15 Sirey, part 1, p. 32. C. C. 1945-7, 1951, 2195. 20 Sirey, 1, 420. 4 Sirey, 2, 543. Dalloz, 5, 253, 248. 22 Sirey, 2, 223. 25 Sirey, 2, 136. 1 Sirey, 2, 13. 3 Maule and Selwyn, p. 463. Comyn on Contracts, p. 29. 1 Ann. Rep. 69, 177, 194.

The judgment of the court was pronounced by

Rost, J. The defendant was hired as a house servant by the plaintiff and his partner, at the rate of \$12 per month. After some time, the plaintiff, abusing her dependent situation, seduced her, and she became pregnant. When

DECONST.

LABERRALLE for advanced in pregnancy she censed to receive wages, and continued for several years to live with him without any stipulated compensation, save the promise he made to her to give her some property. This occurred before 1840. In the months of July and November of that year, the plaintiff and defendant purchased jointly four suburban building lots, of small value; a part of the price was paid in cash, and for the balance they gave their notes, in solido. The plaintiff took certified copies of the acts of sale, and delivered them to the defendant, representing them to her as the muniments of her title. At maturity he took up all the notes, and lived five years with the defendant afterwards, without making any claim for the sums paid, giving her and others to understand that she was the owner of one-half of the lots. The defendant mended her ways by becoming the lawful wife of another man; and the plaintiff, immediately after, instituted this action, to recover from her the undivided half of the notes mentioned, with interest, at the rate of ten per cent per annum, since they became due. There was a judgment against him, and he has appealed.

> The judgment is undoubtedly right. Had the defendant sued the plaintiff for damages when she became pregnant, she would have been entitled to recover from him a much larger sum than that which he claims, and he cannot be relieved against his voluntary payment of the price of the lots, conveyed to her by way of reparation. He wronged the woman it was his duty to protect, and courts of justice would make themselves the accomplices of his villainy, if they enabled him to commit a fraud, by taking back from her the sum he paid as the penalty of his lust. We are satisfied that the promise of the plaintiff for reparation was executed by the payment of those notes. The fact that they were given in solido with her, raises no contrary presumption. They were, no doubt, given in the form required by the vendors.

The plea in reconvention of the defendant, was properly disregarded.

Judgment affirmed.

GIROD v. HIS CREDITORS.

A claim for real estate cannot be compensated against sums due by promissory notes. C.

Reconventional demands are not exceptions within the meaning of the rule, Quæ temporalia sunt ad agendum, perpetua sunt ad excipiendum. The only exceptions to which that rule applies, are those which are attached to the action and inseparable from the demand.

The rights of the creditors to plead prescription against notes of an insolvent which had been prescribed before the failure, cannot be affected by the fact of the insolvent's having placed them on his bilan. C. C. 3429.

Where an appeal taken from a judgment homologating a tableau of disribution filed by the syndic of an insolvent estate was not granted in open court, none but the parties cited will be presumed to have had notice of it.

Arts. 592, 888, of the Code of Practice, which authorise an appellee, though he had not appealed from the judgment of the lower court, to pray that it may be reversed on those points in which he believes that he has been aggrieved, apply only where all the parties have been cited on the appeal, and all the issues tried in the first instance are appealed

In the general administration of the effects of an insolvent, the syndic represents the creditors, but in the concurso they act in their own names. The decision upon each claim is a separate judgment, belonging to the party in whose favor it is rendered, which cannot be disturbed on appeal unless that party be cited. The syndic may appeal from the judgment rendered upon any one claim, and litigate it with the holder; if he does not, any creditor may; but if neither appeal, there can be no adjudication upon their rights in the Supreme Court.

PPEAL from the Fifth District Court of New Orleans, Buchanan, J. The facts of this case are stated in the opinion, infra.

Rosclius, for the appellants. Biron, one of the appellees, pro se.

L. Janin, appeared for himself, for the syndic, and another appellee. The notes made by the insolvent were prescribed at the time of filing his bilan; the acknowledgment of them on the bilan cannot affect the creditors. Larthet v.

Hogan, 1 An. R. 330.

To e plea of compensation is inadmissible. Art. 2263 of the Civil Code, the same as art. 1291 of the French Code, says: "Compensation takes place only between two debts, having equally for their object a sum of money, or a certain quantity of consumable things, of one of the same kind, and which are equally liquidated and demandable." Here, real estate, and not a sum of money or a quantity of consumable things, was due by Nicolas Girod. See also Pothier, Obligations, no. 624. Toullier, vol. 7, nos. 364-6. Rolland de Villargues, vol. 2, Vo. Compensation, p. 258. The two debts, were not equally liquidated and demandable, which can take place only in relation to sums of money and " consumable things." 12 Duranton, p. 512, nos. 398, 399. Lacoste v. Bordères et al. 7 Mart. N. S. p. 516. The debt of the insolvent was prescribed, when Girod's executors proposed to compensate it. Rolland de Villargues, verbo Compensation, vol. 2, p. 258, no. 21. 12 Duranton, p. 516, no. 408. Merlin, Questions de Droit, Vo. Compensation. These authorities show, that under such circumstances as are exhibited by this case, a prescribed debt cannot be offered in compensation.

Art. 2207 of the Civil Code (the same as art. 1293 of the french Code) says: "Compensation takes place, whatever be the causes of either of the debts, except in case: 1st. Of a demand of restitution of a thing of which the owner has been injustly deprived. 2d. Of a demand of restitution of a deposit, &c. &c. The circumstances from which this plea of compensation arises show, that the executors attempt to offer in compensation real estate, of which the heirs of Claude François Girod had been injustly deprived, since 1813. Rolland de Villargues, vol. 2, p. 259, no. 24. And finally, this real estate was in the hands of Nicholas Girod, as testamentary executor, that is to say as a depositary. the authorities above cited, and Pothier, Obligations, no. 625. Amelung's Syn-

dics v. Bank of the United States, 1 Mart. p. 3.

The judgment of the court was pronounced by

Rost, J. The executors of Nicholas Girod have appealed from a judgment homologating a tableau of distribution filed by the syndic in this case, and setting aside their claim to compensate the sum of \$2.807, being the amount of five promissory notes subscribed by the insolvent in favor of Nicholas Girod, in 1833, against an equal amount of the share of the insolvent in the succession of Claude F. Girod, for which the appellants are bound to account, under the decree of the Supreme Court of the United States in the case of Michou et al. v. Girod et al., 4 Howard's Rep. 503.

The claim of the heirs of Claude F. Girod was for real estate, and cannot be compensated with sums of money due on promissory notes. C. C. 2205. The claim of the executors of Nicholas Girod is in the nature of a reconventional demand, tending to establish compensation, and affecting in no manner the rights of the insolvent under the judgment of the Supreme Court of the United States. Reconventional demands are not exceptions within the meaning of the rule Quæ temporalia, as contended by the appellants. If the laws of prescription could be evaded, by thus disguising principal demands, those laws would become in most cases inoperative. The only exceptions to which the rule Qua temporalia applies, are those which are attached to the action and inseparable GIROD U. CREDITORS.

from the demand. They must, in the language of commentators, be visceral. 2d Troplong, Presc. no. 833.

More than five years had elapsed after the maturity of those notes when the insolvent failed; and the fact that he placed them on his bilan cannot affect the rights of the other creditors in the fund to be distributed. They may plead prescription, if he does not. C. C. 3429.

The appeal in this case was not granted in open court, and none but the parties cited are presumed to have had notice of it. The only issue formed before this court, is in relation to the claim which we have already considered; and although any of the parties cited may come into court and ask that the judgment be amended in relation to that claim, they cannot do so for the purpose of litigating the claims of creditors not made parties to the appeal, or of establishing claims rejected by the court below, and having no connection with that of the appellants. The error which has produced this confusion, arises from considering the decree homologating the tableau as one entire judgment, whilst it is in reality composed of many distinct adjudications, one of which only is appealed from.

The dispositions of art. 592 and 888 of the Code of Practice are exclusively applicable to cases in which all the parties have been cited, and all the issues made in the first instance are appealed from.

In a case lately determined all the parties but one were before us, and, as the appeal had been taken by motion, we held that this party had notice of it, and should be considered as an appellee within the intent of the articles of the Code of Practice. The opposing creditors in this case cannot be so considered, beyond the single issue appealed from.

In the general administration of the effects of the insolvent, the syndic represents the creditors; but in the concurso, the creditors act in their own names. The decision of the court upon each claim is a separate judgment, which belongs to the party in whose favor it is rendered, and which cannot be disturbed on appeal, unless that party be cited. The syndic may undoubtedly appeal from the judgment rendered upon any one claim, and litigate it with the holder; if he does not, other creditors may. But if neither the syndic nor any of the creditors appeal, the parties are not properly before us, and we cannot adjudicate upon their rights.

The very object of the proceeding in concurso would be defeated, if, after the creditors had established their claims contradictorily with each other in the first instance, those claims could be adjudicated upon, ex parte, in the last resort. The parties before us have taken this view of the law, as they have not deemed it necessary to make the syndic a party to the appeal.

In cases like this, parties considering themselves aggrieved by a judgment, must appeal, and make proper parties. It is our endeavor to foster liberality in the professional intercourse of the bar, but we deem it a duty to discourage looseness of practice, on all proper occasions.

Judgment affirmed,

THE FIRST MUNICIPALITY v. HALL.

Privileges exist only in those cases in which they have been expressly granted by law. To entitle a party to the benefit of the privilege established by the Code in favor of architects, contractors, masons, workmen, and furnishers of materials, for the construction and repair of buildings, the amount due, or to become due, must be fixed in the contract, where it exceeds five hundred dollars. C. C. 2727, 3239.

PPEAL from the Fifth District Court of New Orleans, Buchanan. J. The plaintiffs obtained an order of seizure and sale, under a special mortgage granted to secure the payment of the price of certain lots of ground sold to the defendant. The amount due to the plaintiffs is \$3,400, with interest at ten per cent, from the dates of the notes sued on, until paid. Before the property was sold, Moores filed his opposition, and applied for a separate appraisement of the buildings and the lots of ground, on the allegation that he was entitled to be paid in preference to the plaintiffs out of the proceeds of the sale, under a building contract, to the amount of \$3,321 81. The municipality denied that Moores had any privilege on the buildings and improvements on the lots; and averred specially, that if Moores had made any advances, he has been fully reimbursed out of the rents he has collected, &c. The contract between Hall and Moores, under which the latter sets up his claim to a privilege, is in the following words: "Agreement between Robert Moores and T. D. Hall. T. D. Hall agrees to furnish the lot of ground situated at the corner of Custom-house and Franklin streets, free of all expense, for the term of ten years; and agrees jointly with Robert Moores to erect six one story tenements. The said Robert Moores binds himself to erect the buildings complete, and render bills at prime cost. The whole of the expense of building, however, is not to exceed \$4,000. When the buildings are completed, each of the parties is to receive the rent in proportion to the amount he has put in the buildings. This agreement to last ten years, at the end of which time, T. D. Hall agrees to assume the whole of the buildings, by paying said Robert Moores the half of what two disinterested persons shall say they are worth, one of whom is to be appointed by each party; and in case of their not agreeing, they to call in a third. T. D. Hall, however, is to have the privilege, at any time after the completion of the buildings, to purchase Robert Moores' interest therein, by paying said Moores the amount which he has invested in the buildings.

Witness, "[Signed]" "T. D. Hall, "Robert Moores.

This contract is without date; but by reference to the certificate of the recorder of mortgages, it appears that it was acknowledged before J. Cuvillier, a notary public, on the 7th of May, 1842, and recorded on the 9th of the same month. Hanable, a witness for the third opponent, proves that the buildings were commenced in April, 1842.

The erection of the buildings at the expense of *Moores* is not contested; but his claim is resisted, on the ground that his contract with *Hall* was not a building contract, giving him a lien for his payment, but a lease and partnership, which gave him no privilege. The court below gave judgment against the opposition, and *Moores* has appealed.

HALL

The claim of Moores for a privilege under this FIRST Roselius, for the plaintiffs. The claim of MUSICIPALITY pretended building contract, is unfounded. The agreement is destitute of every essential requisite for a building contract. There is not even a fixed or certain price stipulated. C. C. art. 2727. It may perhaps be difficult to classify this contract, with strict legal accuracy; but it seems to present more of the features of a particular partnership, or joint undertaking, than of any other agreement. But even if it could be regarded as a building contract, it cannot avail against the municipality: 1st, because it is not dated, and it cannot, therefore, be ascertained within what time it was recorded; 2dly, because the evidences establishes that the buildings were commenced in April, from which it must be inferred that the agreement was passed during that month; and it was not recorded in the mortgage office, until the 9th of May; the recording of it could therefore operate only as an ordinary mortgage, inferior to that of C. C. art. 3241. the municipality.

Benjamin and Micou, for the appellant. The question is, whether the vendor can put an end to the lease of *Moores*, without paying for the buildings? Hall certainly could not do so, and it would seem that his creditors could not exercise a greater power than himself. The seizure and sale of the property must be considered as equivalent to the exercise of the right reserved to Hall, to end the lease, by paying for the improvements. The vendor can do so, on terms more favorable to himself than Hall could do, as the vendor is bound to pay only the proportional share of the proceeds, and Hall was bound to pay the whole demand of the builder; but it would seem unjust that the vendor, by the exercise of his privilege, should entirely exclude that of the builder. From the sale of the property, the partnership being dissolved, nothing remains in the contract but the builder's privilege for re-imbursement; which certainly stands, with all its consequences, as if no partnership had ever existed.

The judgment of the court was pronounced by

EUSTIS, C. J. Moores erected six tenements on a lot purchased by Hall from the plaintiffs, and mortgaged for the price, which was unpaid. It was agreed that Moores should retain the premises for ten years as lessee, the rents being in lieu of interest, according to the statement made in the opposition filed by Moores. He claims his privilege as a builder, for the improvements made on the lot by virtue of his contract. A separate appraisement was made, according to article 3235 of the Code, and the conflict is between the privilege asserted by Moores and the vendors' mortgage, which has remained unsatisfied. The district judge dismissed the opposition of Moores, and he has appealed.

We think the district judge did not err. Privileges can be claimed only for those debts to which they are expressly attached by the Code. Art. 3153. The Code, in establishing privileges in favor of architects, contractors, masons, workmen, and those who furnish materials, contemplates that the amount due, or to become due them, should be fixed in the contract, when it exceeds \$500. Arts. 2727, 3239.

In this respect the contract under consideration is radically defective; for it not only has no price fixed for the work, but provides for the contingency of the owner furnishing a portion of it, and his receiving a proportionate benefit. There are other obvious reasons for not allowing the privilege claimed by the appellant. Judgment affirmed,

THE CHARITY HOSPITAL OF NEW ORLEANS v. STICKNEY.

The stat. of 12 March, 1838, s. 4, making it the duty of the mayor of the city of New Orleans, before authorising exhibitions in any theatre in that city, to require from the manage, the production annually of a receipt from the treasurer of the Charity Hospital, showing the payment by the manager of the sum of five hundred dollars for the use of the Hos. pital, is not unconstitutional. The exaction of a price for the license so granted, is not, in its proper legal sense, a tax.

CHARITY HOSPITAL W. STICKNEY.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. J., and H. H. Strawbridge, for the appellants. C. K. Johnson, for the defendant, contended that the statute under which plaintiffs claim was repealed by the constitution of 1845, arts. 109, 127. The judgment of the court was prenounced by

EUSTIS, C. J. The petition charges that, by an act of the legislature, approved March 12th, 1838, an annual tax of \$500 is imposed on every theatre and manager thereof, payable to the treasurer of the Charity Hospital; that the defendant, as manager of the American Theatre, in Poydras street, is liable to pay said tax, for the year 1846. An exception was filed by the defendant that the act of the legislature, under which this suit is brought, is contrary to the constitution of the State, adopted in 1845. The district judge was of that opinion, sustained the exception, and gave judgment accordingly, from which the plaintiffs have appealed.

By a statute of 7th March, 1814, s. 9, persons having the administration of theatres open to the public of New Orleans, were bound to give four representations per annum for the benefit of the Charity Hospital, under the direction of its administrators, who were, through persons appointed by them, to receive the proceeds of said representations. The section containing this provision was subsequently repealed by the act of March, 1838, which provided that, instead of exacting from the managers of theatres four representations annually, \$500 be exacted from each; from every circus \$150, and from every menagerie \$50; and it was made the duty of the mayor of New Orleans, in authorising any of these exhibitions, to require the receipt of the payment of said sums from the treasurer of said hospital.

The case having been presented to us on the validity of these acts, we overlook the misnomer given to the exaction in the plaintiffs petition. By a statute of the 18th March, 1816, the municipal authority has the power to permit or forbid theatres, balls, and other amusements, and to cause play-houses, and other places for shows and exhibitions, to be closed, whenever the preservation of public order require it. This power is believed to be vested in the government in all countries, and is, throughout the Union, exercised both as to the permission and superintendence of theatrical representations open to the public, which are only exhibited under license.

The law requires that the license shall not be granted except on the condition of a certain contribution to a public institution, which it is necessary for the public weal to maintain. In this we can perceive no violation of any vested right, nor of any provision of the constitution. The views which we have taken of the intendment of the article of the constitution concerning taxation, and the recognition of the rights and privileges of the city of New Orleans by another article of that instrument, expressed in the cases of The Second Municipality v. Duncan, ante p. 182, and Egerton v. The Third Municipality, 1 Ann. R. 435, were adopted after mature consideration of the subject. We do not think that the price of the license for theatres, is, in its proper legal sense, a tax. Vide 11 Johnson's R. 80.

The judgment of the District Court is therefore reversed, and the case remanded for further proceedings; the defendant paying the costs of this appeal.

Robe et al. v. Ports.

In proceedings via executiva the creditor must bring himself within the letter of the law.

A judgment having been obtained against the owner of a city lot, in proceedings instituted by one of the municipalities of New Orleans, under the stat. of 3 April, 1832, for the opening of a street, establishing the amount of his contribution, defendant purchased the lot, and assumed to pay the judgment in favor of the municipality, patting himself in the place of his vendor. Plaintiffs having become subrogated to the rights of the municipality, took out an order of soizure and sale against the property. Held, that defendant, in assuming the debt, merely put himself personally in the place of his vendor; that plaintiffs can entorce against him only the mortgage which existed on the property at the time of his purchase, and that that must be done via ordinaria; that if the claim, on which the order of seizure and sale was obtained, still belonged to the municipality, it could not, under the act of 1832, resort to proceedings via executiva, without having previously passed a resolution requiring the issuing of the process by the court in which the assessment was confirmed; and that the right to proceed via executiva, even after passing such a resolution, is personal to the corporation, and cannot be transferred to its éreditors.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Lockett and Goold, for the plaintiffs. Elmore and W. W. King, for the appellant. The judgment of the court was pronounced by

Rost, J. The plaintiffs allege that, in the case of the Mayor and Council of Municipality No. 2, praying for the appointment of commissioners, and for the opening of Lafayette street, the said municipality obtained, under the act of 1832, a judgment against Asher Philips, establishing the amount of his contribution, which judgment was duly recorded. That they have obtained a judgment against Municipality No. 2, to satisfy which the judgment against Philips has been sold under execution, and adjudged to them. That Asher Philips having died, his widow and heirs have sold to the defendant the property assessed for the opening of Lafayette street, and affected by the judgment and judicial mortgage. That the defendant assumed in the act of sale to pay said judgment to the municipality, and has agreed to put himself in the state and place of the widow and heirs of Asher Philips. That by their purchase of the judgment they have become subrogated to all the rights of the municipality, and are entitled to avail themselves of the assumption of the defendant. They pray that executory process may be issued, and that the property mortgaged be seized and sold for cash. The order of seizure was granted, and the defendant appealed.

The executory process is a harsh remedy, and whoever resorts to it must make out a clear case, and bring himself within the letter of the law. If the claim on which the order of seizure was obtained in the present instance were still the property of the Municipality No. 2, that corporation could not, under the act of 1832, resort to the executory process, without previously passing a resolution requiring the issuing of the process by the court in which the assessment was confirmed. The right to proceed vid executiva, after passing this resolution, is personal to the corporation, and cannot be transferred to its creditors. If the defendant, in assuming the payment of the debt, had given a special mortgage on the property to secure it, the plaintiffs might, perhaps, proceed as they have done, on that mortgage. But no such mortgage is found in the sale under which defendant holds He has simply assumed the debt, and put him-

self personally in the place of his vendors. The plaintiffs, therefore, can only enforce against him the mortgage which existed on the property at the time of his purchase, and this must be done in an ordinary suit. For the reasons assigned, the appellant is entitled to relief.

ROBB v. POTTS.

It is therefore ordered, that the order of seizure and sale in this case be set aside and annulled, and that the plaintiffs pay the costs in both courts.

MOLINARI et al. v. FERNANDEZ, Tutrix.

Art. 368 of the Civil Code, which authorises a husband, though a minor, to appear in court in all cases, is an innovation on the former laws on the subject, and forms an exception to the dispositions of arts. 376, 377, 1235, and 1236 of that Code; and these articles now apply only to cases of ordinary emancipation. A similar power is conferred upon the wife who is under age, provided she be authorised by her husband, by sec. 12 of the stat. of 25 March, 1828, amending art. 999 of the Code of Practice.

Where a mother, who had forfeited the natural tutorship of her children by marrying a second time without having been legally authorised to retain it, after the death of a tutor appoint ed in her place and of her second husband, is re-appointed tutrix by the advice of the family meeting, she will not be bound to give bond. The rule exempting the father or mother from giving security before acting as tutor or tutrix, is a general one, to which an appointment under such circumstances forms no exception. Per Curiam: Under art. 950 of the Code of Practice, the judge might have appointed her tutrix without the advice of a family meeting; the submission of her application to such a meeting, and its decree declaring her worthy of the trust, can impose no additional burthens on her.

The designation of a notary before whom the inventory and appraisement are to be made is only necessary where a partition is to be made in kind. In cases of licitation it is unnecessary; in such cases an appraisement made before the sale, in the mode usual in seizures under execution, is sufficient.

PPEAL from the First District Court of New Orleans, McHenry, J. Antoine Molinari died in 1833, leaving three minor children; Antoine, Theresa, and Paul. His widow was confirmed as the natural tutrix of these minors. She proceeded to settle the estate, and on its final liquidation the only property left for the children was a house in Hospital street, in this city. The widow afterwards contracted a second marriage with Rufino Fernandez, and afterwards surrendered her tatorship, and caused a dative tutor to be appointed, agreeably to the forms required by law in such cases. Her second husband, Fernandez, died in September, 1843; and shortly after, the tutorship having become vacant, Mrs. Fernandez was appointed, on the recommendation of a family meeting, and confirmed as natural tutrix of said minors Molinari. She took the oath required by law, but gave no bond, and has since acted as the legal representative of said minors, in all matters appertaining to the administration of their estate. The two eldest children, Antoine and Theresa, having been emancipated by marriage, instituted suit against Mrs. Fernandez, as tutrix of their brother Paul J. Molinari, for a partition. She answered in her capacity of tutrix, but made no defence; she admitted the plaintiffs' right to obtain the partition by licitation, as prayed for, and submitted the case to the judge, who gave judgment accordingly. The property was advertised, appraised, and, at the sale, adjudicated to Omer Gaillard, for a sum considerably exceeding the appraisement; but this purchaser now refuses to comply with the terms of sale. A rule was taken against him, which was made absolute, and he has appealed.

MOLINARE

S. L. Johnson, for the appellant. I. Mrs. Fernandez was not duly qualified to represent, as tutrix, the minor Paul J. Molinari. The children of the first marriage would have had a prior legal mortgage on the property of their mother, if she had not forfeited the tutorship; by her fault their mortgage is now inferior to that of the children of the second marriage. Under these circumstances, it is contended that she is not duly qualified as tutrix of the minor, Paul J. Molinari; that she must give security like any other dative tutor, in order to be qualified; and that the exemption, in article 330, of the father and mother from giving security, avails them only when they hold the tutorship by right, the only species of tutorship which the Code supposes the father and mother to hold. C. C. 272, 288, 330. Tutorship of Mossy, 3 Rob. 390. Article 951 of the Code of Practice, would seem to favor the idea that she might have claimed the tutorship by right; but it would not authorise her to claim the appointment in a case like the present, where, by her neglect, she has incurred the penalty of art. 272 of the Civil Code, and has given the children of the second husband, a prior mortgage on all her property, even that which she may have derived from the first community.

Moreover, she did not claim the tutorship of right, but accepted the dative tutorship as it was conferred upon her. The question is, whether the exemption in art. 330 of the father and mother from giving security, can avail the mother, when dative tutrix. Upon this point, there appears to be no authority. It was not raised in the case of the Tutorship of Messy, because, as we are informed, the maternal grand-father of those minors, offered to be security for his daughter, as their tutrix. In the French Code, security is not required from tutors of any kind. Art. 288 clearly shows that the framers of our Civil Code did not contemplate the father or the morther's becoming a dative tutor. The facts of this case show that there might be serious prejudice to the issue of the first marriage, by the doctrine contended for by our opponents. The minor, Paul, is not represented in the rule, and was not a party to the original suit; there was, therefore, no defendant, and no contestatio litis; the judgment was

consequently null, and could not authorise the sale of the property.

II. The plaintiffs also were minors, emancipated by marriage, and were not specially authorised by the judge, on the advice of a family meeting, to sue for the partition of their property, as required by law in such cases. C. C. 1236,

1235, 376, 377. Breaux v. Carmouche, 9 Rob. 36.

III. No public inventory of the property to be divided, such as is required for the basis of a judicial partition, was made during the pendency of the suit, nor within one year preceding it. C. C. 1246-9. This inventory might have been made after the decree of partition, and at any time before the sale. Millaudon v. Percy, 5 Mart. N. S. 554. Lalanne's Heirs v. Moreau, 13 La. 433. This was not one of those errors of proceeding, which are covered by the judgment of the court. 13 La. 433. But we are told that the appraisement which was made, was a substantial compliance with the law; and that art. 1247 is applicable only to partitions in kind, and not to those to be effected by a sale. An appraisement made without the presence of the parties interested, or that of a notary or witness, evidenced by no public act-by nothing but a slip of paper filed in court, containing a proces-verbal under private signature, purporting to be signed by the appraisers alone, is far from being a substantial compliance with the law prescribing the form of public inventories. Arts. 1247, 1093-9, 1101-3. Art. 1247 makes no distinction between partitions in kind, and those which are made by a sale of the property.

IV. It is urged by the plaintiffs in the rule, that the purchaser cannot refuse to take the property and pay the price, unless he be disturbed in his possession. In support of which position, they cite the following authorities: Arts. 710, 711, C. P., and the cases of Collins v. Daly, 4 Rob. 113. Abat v. Vallet, 3 Mart. N. S. 220. Foster v. Murphy, 5 Ib. N. S. 82. Freret v. Meux, 9 Rob. 416. Stille v. Bronson, 5 Mart. N. S. 47.

All of these authorities except Freret v. Meux, are inapplicable to the present case. Arts. 710, 711, C. P. apply to sheriffs' sales made under writs of fi. fa., in cases where the property is subject to legal or judicial mortgages. These in cases where the property is subject to legal or judicial mortgages. mortgages do not prevent the sale under a fi. fa., nor excuse the purchaser for not complying with the conditions of the sale, saving the cases excepted in art. 710. All of the cases above cited, except that of Freret v. Meux, relate to sheriffs' sales made under writs of fi. fa. The general expression of judicial sales, which is applied as well to sales in execution of writs of fi. fa., as to those MOLIMARI ordered by a court in matters of succession or partition, could alone give rise to the error of confounding this case with those above cited. Our Code, art. Fernandez. 2594, says that: "Sales which are made by authority of law, are of two kinds: 1st. Those which take place when the property of a debtor has been seized by order of a court, to be sold for the purpose of paying the creditors. 2d. Those

which are ordered in matters of succession or partition."

Sales under execution do not give rise to the redhibitory action, but may be set aside, in cases of fraud, and declared null in cases of nullity. C. C. 2597, They transfer only the rights of the debter, such as they are. On the contrary, "all the warranties to which private sales are subject, exist against the heir in judicial sales of the property of successions. Art. When the court, in Freret v. Meux, say that the vendee, " may refuse to pass the sale until a good title is tendered to him, and must be relieved if his

vendor is unable to give one; it is otherwise with regard to judicial sales," citing Code of Practice, art. 710, 3 Martin N. S. 221, it is evident from the authorities cited by the court, that the first class of judicial sales specified under

art. 2594, was alone intended.

The heirs of Molinari wish to sell their property to effect a partition. If of age, they might agree to sell it by an auctioneer, or an attorney in fact. might in that case, refuse to accept a sale of real estate, until the auctioneer or attorney in fact was shown to be authorised in writing, by all the parties in interest to sell; until a good title be made out to us; until, in fine, such title be tendered to us in writing. C. C. 2584, 2255, Freret v. Meux, above cited. Not being of age, they can sell only through legal representatives and with legal formalities. What should forbid us in this case, to examine the qualifications of those soi-disant legal representatives, and the reality of the alleged authorisa-Ours is not the case of a purchaser who has accepted a deed and taken possession of the property, and is trying to see how long he can enjoy it without paying the price; so that art. 2535 does not apply to us. Pontchartrain R. R. Company v. Durell, 6 La. 485. Freret v. Meux, above cited. We have not taken possession of the property, because we believed that the judgment and sale conveyed to us no title. The tender of title in the rule, by the minor plaintiffs in the rule, can add nothing to the previous formalities. If the judgment and public sale have divested the minors Molinari of their rights, and transferred them to us, we are willing and ready to pay the price.

Collens, for the plaintiffs, and Pecquet, for the tutrix, in reply. Mrs. Fernandez never claimed the dative tutorship provided for by art. 272. She preferred to surrender the tutorship; and, at her own request, a dative tutor was appointed in her place; but after the death of her second husband, her incapacity to hold the tutorship, by natural right, having ceased, she prayed for and obtained the natural tutorship provided for by art. 268. Art 272 is intended as a protection against the second husband. The mother cannot be suspected of any such bias, all the children are her's, and she must feel for them equal solicitude. During the second marriage, she might yield a great deal to the influence of her husband; but after his death she occupies in the eye of the law the same position with regard to all her children. There being, after the death of the second husband, no existing legal cause of exclusion, article 288 could no longer apply. If, after the death of the second husband, Mrs. Fernandez had a right to the natural tutorship, no family meeting was necessary, though indeed one was held, and it advised her appointment. right" entitled to the tutorship, it being then, vacant. C. C. 265, 268. No cause of exclusion could be urged against her; no other person could claim a preference. The circumstance requiring the call for a family meeting, provided for by arts. 272 of the C. C., and C. P. 951, could not apply to the widow; for, at the time, there was no marriage existing or intended. She was not therefore

required to give security. C. C. 269, 330.
The cases of Mossy, 3 Rob. 390, and Robinson v. Weeks, 5 Mart. N. S. 379,

do not apply. In those cases, the second husband was living.

Boileux, in his "Commentaire sur le Code Civil," under art. 395, C. N., says : " A la mort du deuxième mari, la mère qui n'a pas été maintenu, recouvre-t-elle la tutelle? Nous le pensons : cessante causà, cessat effectus.

Letters of tutorship are mere certificates of the fact of appointment or confirmation; and their existence or non-existence cannot disturb the legal character and validity of the appointment by the judge. It is the confirmation duly

MOLINARI FERNANDEZ, made, followed by the oath required by law, which invests the natural tutor or tutrix with his or her official charge and responsibility. The assumption that, if Mrs. Fernandez gives no other security than the tacit mortgage, Paul Molinari's mortgage must be necessarily inferior to that of the minors Fernandez, as being of subsequent date, is an error, for the "confirmation" as natural tutrix must date, in relation to the children of both marriages, back to the time when the tutorship was actually assumed, or was vested by law, to wit, to the date of the death of the second husband. C. C. 268. But if it were not so, in all cases of this kind the minors of the first bed, for all acts of administration previous to the mother's re-appointment, are always fully secured, either upon the estate of the second husband (C. C. 272), or by the bond of a dative tutor (C. C. 330), and in this case, Paut Molinari has both guarantees.

The appellant relies on articles 1235, 1236, 376, 377 of the Civil Code, to sustain his second position. These articles do not apply to the case, but are intended to govern minors emancipated otherwise than by marriage. wife had a right to sue for a partition, and no curator was required to assist her. Her husband was the proper person to authorise and assist her. A suit for a partition cannot be viewed as a voluntary alienation, to which the prohibitions of arts. 375, 377 apply, nor does art. 1236 apply as to the mode of authorisation, to the minor wife emancipated by marriage. Her curator is her husband. C. Code, 378, 123 et seq., and 1779. Code P. 106, 107. Art. 1239 of the Civil Code is conclusive in our favor; it admits of no distinction between the minor wife, and the wife of age. The right to sue, in a case like this, is clearly established in the case of Hooke v. Hooke, 6 La. 472. Art. 1240 declares that the husband can, with the concurrence of his wife, sue for the partition of immovable property. See also arts. 368 of the Civil Code; and art. 999 of the C. P. and amendment thereto. Bullard & Curry, p. 154, sec. 14. The word "even" in this amendment makes the rule general. As to the alienation, if it can be so called, by means of the partition-it is clear that it can be made by minors, Civil Code, 1235, 1236, 1237, 1238, 1239 and 1240. C. P. 1023. In 14 La. p. 22, it is decided that a licitation to effect a partition is not a sale as between the heirs, and does not change the character of the thing to be di-

This suit is instituted by two persons: 1st, a minor husband; and 2d, a minor wife, assisted by her husband, who is of age. Admitting the defendant in the rule to be correct, in drawing a distinction between these two, as to their right of demanding a partition, still, it being admitted that the minor husband had that right, under art. 368 of the Civil Code, the judgment ordering the partition is valid, for it could have been rendered upon the petition of the minor husband alone.

't he authorisation of the judge, if required at all, in relation to minors emancipated by marriage, is necessarily involved in the judgment rendered, decreeing the partition.

It is contended that there should have been an inventory preceding the sale or partition. Arts. 1246, 1247 and 1248, are quoted. These articles can apply only to cases where the partition is to be made in kind. The use to be made of the inventory is shown by articles 1278, et seq. Its object is also to enable the notary to make the collations between the heirs, and this is expressly excluded from such a case as the one before the court, by art. 1304 of the Civil Code. This is a licitation; and the rules applicable to it are entirely different. In licitations the judge "orders a sale at public auction," in which case an inventory is perfectly useless. Cessante ratione legis, cessat ipsa lex. Of what use could the inventory be? Why take an inventory of a single town lot, fully described in the petition and judgment, and ordered to be sold for cash, when the proceeds are to be distributed equally among the heirs, without collation? It would have been a work of entire supererogation. Even an appraisement, in cases of licitation, can have no effect. Jacobs v. Lewis, 8 La. 179. Fowle v. Weekes, 7 La. 312. Civil Code 339, 1863.

Even did the technical informalities spoken of exist, the minor is bound, and could not disturb the purchaser. Michel v. Michel, 11 La. 154. Lallane v. Moreau, 13 La. 433. Tolmie v. Thompson, 2 Pet. 106. The purchaser cancot refuse to take the property and pay the price. The sale was a judicial one. In judicial sales the purchaser cannot withold the price, unless he is disturbed in his possession. Abat v. Vallet, 3 Mart. N. S. 220. Stille v. Brownson, 5

Ib. N. S. 47. Foster v. Murphy, 5 Ib. N. S. 82. Collins v. Daly, 4 Rob. 113. Freret v. Meux, 9 Rob. 416. See also C. P. 710 and 711. It is true that in judicial sales, made to effect partitions, the rules of warranty are different from those of sales made under fi. fa.; but all judicial sales possess in common this feature, that the adjudication is a complete title to the purchaser. Civil Code, arts. 2594, 2598, 2601. See also C. C. 2535 et seq.

MOLINARI U. FERNANDEZ.

The judgment of the court was pronounced by

Rost, J. The defendant has appealed from a judgment condemning him to comply with the terms of an adjudication of real estate, and prays for its reversal, on the following grounds:

1st. The property was sold under a decree rendered in an action of partition, which had been instituted by two of the heirs against their mother, as tutrix of the other heir. The plaintiffs were both minors, and, although married, it is alleged they could not sue for a partition of real estate, without the authorisation of the judge, given on the advice of a family meeting.

2d. The mother of the defendant had lost the natural tutorship, by marrying without having been legally authorised to retain it, and another tutor had been appointed. This tutor, and the second husband, both died; a family meeting advised that the mother should be re-appointed tutrix, and she was so appointed, but did not give bond. The appellant contends that she could not act until that formality was complied with, and that she did not represent the minor in this suit.

3d. It is further alleged that the appraisement made before the sale, is not such as the law requires in cases of partition.

Art. 368 of the Civil Code is an innovation on the former laws on the same subject. It athorises the husband under age to appear in court in all cases, and was intended as an exception to the dispositions of arts. 1235, 1236, 376, 377 of the Civil Code, relied on by the defendant. Those dispositions apply now to cases of ordinary emancipation only. The amendment to art. 999 of the Code of Practice, found in the 22d sec. of the act of 1828, amending various articles of the Codes, gives a similar power to the wife under age, provided she be authorised by her husband. Session Acts, p. 154.

The rule that all persons except the father and mother shall be bound to give bond before they can act as tutors, is general in its terms, and there is no warrant of law for making a distinction in cases like the present. Under art. 950 of the Code of Practice, the judge was authorised to appoint the defendant tutrix, without the advice of a family meeting; the circumstance that she submitted her application to them, and was decreed worthy of the trust, cannot impose additional burthens upon her.

The appraisement made before the sale was in the usual mode in cases of seizures under execution, and satisfies the requisitions of the law. When a licitation takes place, there is no notary designated before whom the inventory and appraisement can be made. Those formalities only take place in partitions in kind.

There is no error in the judgment appealed from.

Judgment affirmed.

LEDOUX et al. v. Anderson et al.

Where a factor, is notified that cotton consigned to him by a third person, was made on plaintiffs' plantation and belongs to them, and is directed not to pay over the proceeds without their consent, the notice will render the factor liable for any subsequent payment made to the consignor, not depending on a superior right. Art. 2926 of the Civil Code is inapplicable to the liability of factors receiving goods for sale. Their liability is fixed by commercial usage.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Wharton, for the appellants. Benjamin and Micou, for the defendants. The judgment of the court was pronounced by

Rost, J. This is an action for the proceeds of several parcels of cotton, shipped to the defendants, as factors, under the following circumstances: The plaintiffs purchased a plantation, with a crop of cotton then hanging by the roots upon it. Certain articles of agreement were subsequently reduced to writing. by which J. A. Cotton, the former owner of the land, was to gather the crop and prepare it for market with his hands, and ship it to M. D. Cooper & Co., factors, in New Orleans, for sale; out of the proceeds, the plaintiffs were to receive \$5,000, and afterwards to convey the land back to him, on the conditions agreed on between them. This agreement never was signed by the parties. Cotton gathered the crop with his hands, and shipped 104 bales of it to the defendants, at different times. The plaintiffs having been apprised of these shipments, notified the defendants not to dispose of the proceeds without their concurrence, as the cotton came from their plantation in West Feliciana, and had been shipped to them by Cotton, without authority. They stated, at the same time, that they did not object to the defendants, as factors. The defendants, after being thus notified, made advances to J. A. Cotton, to the amount of \$981 28, and were authorised by him to pay over to the plaintiffs the balance in their hands. The plaintiffs obtained a judgment for that balance in the court below, and being dissatisfied with it they appealed.

It is unnecessary to determine whether parol evidence was properly received in support of any part of an agreement contemplating a transfer of real estate. The shipments made by Cotton to the defendants, in his own name, were a direct violation of his contract, and he cannot claim their proceeds under it. We cannot consider him as a partner. The light most favorable to the defendants in which he can be viewed is, that of agent of the plaintiffs; and there can be no doubt of the legal right of the latter to intercept the funds in the hands of the defendants, by giving them notice not to pay them over to him. That notice renders them liable for any subsequent payment made to the agent, and not depending on a superior right. Story on Agency, § 429. In cases of ordinary deposit, where the thing deposited is to be returned, art. 2926 of the Civil Code requires the depositary to return the deposit in all cases, unless it is arrested in hands by legal process, at the suit of a third person. The decision in the case of Oneto v. Delaunay, 6 La. 32, was made upon that article/and is inapplicable to the liability of factors receiving goods for sale. That liability is fixed by commercial usage.

The defendants must account to the plaintiffs for the amount of the advances made by them to Cotton, after they were notified.

LEDOUX ei. Anderson.

It is, therefore, ordered, that the judgment in this case be reversed, and that there be judgment in favor of the plaintiffs, and against the defendants, for \$1,682 20, with interest at the rate of five per cent per annum, from the 4th January, 1845, till paid, and costs in both courts.

PERRET v. SAUVINET.

A consignee will not be liable for the freight of property which was never delivered to him, where it is not shown that he ever accepted the consignment, or authorised the entry of the property at the custom-house by the consigner, who took possession of it.

A PPEAL from the Parish Court of New Orleans, Maurian, J.

Eyma, for the appellant, cited Lex Mercatoria Americana, p. 204. Trust
v. Duvall, 4 Wash. C. C. R. 181. 2 Peters' Dig. p. 375, no. 36. Blagg v.

Phanix Ins. Co., 3 Wash. C. C. R. 5. 1 Peters' Dig. p. 365, no. 9.

Marsondel, for the defendant.

The judgment of the court was prenounced by

Rost, J. The plaintiff claims from the defendant the freight of 805 hampers of potatoes, shipped in Havre on board of the Austerlitz, by one Racine Delay, and consigned to the defendant. Delay came to this city on board of that ship, and through some irregularity in the custom-house, was permitted to make the entry in his own name, and take possession of the potatoes, which were delivered to him by the officers of the ship. It is not shown that the defendant took any any part in the entry of the goods, nor that he was at all aware of the consignment, until called upon to pay the freight. The court below, considering that the plaintiff had failed to make out his case, gave judgment against him, and he appealed.

There is no error in the judgment. It is true, as contended by the appellant, that the consignee on a bill of lading is bound to pay the freight, unless the consignor has bound himself to do so by the charter party. But it is equally true that the person designated in the bill of lading, as the consignee, does not in reality become so, till after the goods are delivered to him. The facts that the consignment in this case was accepted by the defendant, and the entry made by his authorisation, not being brought home to him, he is not bound for the freight.

Judgment affirmed.

Weld et al. v. Shaw et al.

Where the bills of sale for a crop are made out in the name of the factor, and the receipts of payment are signed by him, he will be liable personally to the purchaser for any deficiency in the quantity actually delivered, though the purchaser knew, at the time of the sale, that the party from whom he bought was acting as agent.

Where money has been paid to a factor for the use of his principal, to which it is afterwards discovered that the latter is not entitled, the factor will be liable to an action at the suit of

WELD V. SHAW. the person from whom he received it, unless he has, before action brought, actually paid over the amount to his principal, or done something equivalent thereto. The mere passing of the money to the credit of the principal or the factor's books, will not exonerate the latter from liability.

A PPEAL by the defendants from a judgment of the Commercial Court of New Orleans, Watts, J,

G. B. Duncan, for the plaintiffs, cited Story on Agency, 266-9. 2 Kent, pp. 629-30, s. 41.

C. M. Randall, for the appellants, contended that they are not liable, having acted as agents, and their principal having been made known to plaintiffs. C. C. 2981, 2982. Zacharie v. Nash, 13 La. 21. Hazard v. Lambeth, 3 Rob. 378. Story on Agency, § 263. Plaintiffs contracted with the principal, defendants being only agents for the delivery of his crop.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs seek to recover from the defendants damages, for the alleged violation of a contract respecting certain sagar and molasses, produced on the plantation of *Nolan*, a planter in this State, and also to get back certain alleged ever payments. The claim consists of three items, to wit: the value of one hogshead not delivered; the difference between the quantity of molasses charged and that actually received; and the loss of profits by the non-delivery of twenty hogsheads of sugar, alleged to have formed part of the lot sold, but which, it is contended by the defendants, was not included in the sale.

The question to be considered, before examining the items in detail, is, whether the action is properly brought against Shaw & Co., or whether, as they contend, Nolan is alone liable.

The material facts affecting the general question are, that the plaintiffs had sent their agent into the country to visit sugar estates and make bargains for crops. This agent went, in March, 1845, to the plantation of Nolan, examined a portion of his crop, and made an offer for it. No bargain was made, but Nolan told him Shaw & Co. were his agents. The witness returned and reported to the plaintiffs, who went to Shaw & Co. and made a contract with them for the sugar and molasses at Nolan's plantation. It was agreed that the sugar should be weighed at the plantation, on the 10th April, 1845, and the molasses guaged at the same time. The sugar, after being weighed, was to remain on the plantation, if the purchasers chose, but at their own risk. No precise quantity of sugar and molasses was stipulated. Early in April the plaintiffs' agent went with Shaw, and a weigher employed by the plaintiffs, to Nolan's plantation. One hundred and seventy hogsheads were weighed, and a portion of the molasses barrels were guaged, by Nolan's nephew, in the presence of the weigher, who had been requested by the plaintiffs to supervise the guaging. After the agent and Shaw returned to the city, Shaw & Co. gave the plaintiffs a written order on Nolan for the sugar and molasses, on the 19th April, 1845. Upon this order the plaintiffs received the principal part of the molasses soon afterwards, and the residue, with the sugar, in August following. The bills of these sales were made out as "bought of John R. Shaw & Co.," and the receipts of payment were signed in the same way. In these bills and receipts Nolan is not named as principal, and the only way in which his name is mentioned is, that the sugar and molasses is stated as being on his plantation. The payment for 270 hogsheads of sugar was made to Shaw & Co., on the 10th April, 1845,

and moneys were paid from time to time to them, in like manner, on account of the molasses; the principal payment being made on the 10th April.

Under this state of facts we consider Shaw & Co. as personally liable to the plaintiffs. By giving the invoices and receipts in their own name, and as for goods bought of themselves, they are precluded from sheltering themselves under the plea of agency, although it was known at the time to Weld & Co. that they were Nolan's factors. See the case of Jones v. Littledale, 6 Adolphus and Ellis, 482. Hastings v. Lovering, 2 Pickering, 221. Besides, if there could be a question as to the personal liability created by these acts, there is another well settled principle which the plaintiff has a right to invoke. Where money has been paid to a factor for the use of the principal, to which the latter is discovered afterwards not to be entitled, the factor will be hable to an action at the suit of the person from whom he received such money, as for money had and received to his use, unless he has, before action brought, actually paid over the money to his principal, or done something which is equivalent thereto. See Buller v. Harrison, Cowper, 566, and the cases cited in Russell on Brokers and Factors, 565. Nor is the case aftered by the fact, that the money has merely been passed to the credit of the principal on the agents' books. Now, in the present case, the defendants appear to have had notice of the plaintiffs' claims before the institution of this suit. The suit was brought on the 21st November, 1845, the accounts of defendants with the planter had been settled on the 20th November, by striking a balance; but it was in Nolan's favor for \$1,000, being more than the whole amount claimed by plaintiffs; and so the balance appears to have stood, when the defendants were cited.

As to the items of plaintiffs' claim, we think the defendants are clearly bound to refund the value of one hogshead of sogar. Their invoice was for 270 hogsheads sold, and for this they were paid in full, on the 10th April, 1845; and they gave the plaintiffs an order on Nolan for 270 hogsheads. Only 269 hogsheads were really delivered. Under the agreement, the plaintiffs had a right to leave the sugar on Nolan's plantation until August. It is true, it was weighed in April, and was from that time to be at the plaintiffs' risk. If it had been destroyed by a fortuitous event, the loss would have been the plaintiffs'; but as the non-delivery of this hogshead is wholly unaccounted for, the defendants are liable.

We are satisfied also that there was a short delivery of the molasses, and for this item also judgment was correctly rendered by the court below.

As to the other item, the difference in price of 20 hogsheads, being the alleged residue of Nolan's crop, for the whole of which the plaintiffs say they contracted, we do not think the case made out against Shaw & Co. It appears that, besides the 270 hogsheads which Nolan had in the purgeries, and which were exhibited to plaintiffs' agent, at his first visit, there were twenty hogsheads in another building; it is left doubtful, under the testimony, whether this was comprehended in the contract. We have held Shaw & Co. liable, because they made out the invoices and other vouchers in their own name as vendors. They never nade out invoices, receipts, or orders, for more than 270 hogsheads; and there is nothing in the evidence to show that they were aware that the plaintiffs looked to them, or even to Nolan, at the time, for more than that number. The claim for damages on that score, if it exists, must be litigated with Nolan. Even if the present suit were against him, as the evidence stands, it is not clear that the plaintiffs could be considered as having made out that part of the case.

WELD E. SHAW. It is therefore decreed that the judgment of the court below be reversed, and that the plaintiffs recover of the defendants the sum of \$168 28, with interest from the 22d November, 1845, and costs in the court below; the plaintiffs paying the costs of this appeal.

DUPUY, Curator, v. HUNT et al.

One who has a cause of action against an absentee, cannot bring him before our courts by merely causing a curator to be appointed to represent him. Conceding that article 57 of the Civil Code, under the term absentee, applies to persons who have never resided in the State, it presupposes that the absentee has property in the State, or that an action has been instituted against him. If an absentee leave his property without an administrator or agent, if it be attached at the suit of a creditor, or if the absentee become a necessary party to an action between other persons lawfully in court, a curator may be appointed to represent him. Art. 57 of the Civil Code is not changed by art. 116 of the Code of Practice. The articles of the Code of Practice concerning the appointment of curators presuppose something upon which the jurisdiction of the court can properly be based. Arts. 194, 195, 924, 963, 964, of that Code must be taken together, and be construed with reference to, and infurtherance of, the provisions of the Civil Code.

Decision in the case of Dupuy, Curator, v. Bemiss, antep. 500, affirmed:

A PPEAL from the First District Court of New Orleans, Buchanan, J. The facts of this case are stated in the opinion of the court, infra, and in that pronounced in the case of Dupuy, Curator, v. Bemiss, ante p. 509.

Dunlap, Prenties and Finney, for the appellant. The Circuit Court of the United States has no jurisdiction to order the sale of the property of a succession, while subject to the jurisdiction of the Probate Court, and in the due course of administration, in the hands of its officer, the curator. 6 Rob. 230: Lowry, Curator, v. Erwin, 9 Rob. 254. C. C. 1105. C. P. 924, ss. 9, 13. Elliott v. Pearsoll et al., 1 Pêters, 340. Thompson v. Tolmie, 2 Peters, 169. Schroeder's Syndics v. Nicholson, 2 La. 355. 4 Ib. 83. All the cases cited by the defendants are from common law States, where the administrator is seized of the goods of the estate, and is, by law, capable of standing in judgment in any court of general jurisdiction. 2 Blackstone's Comm. 126, 410, 426. He can be sued in any of the State courts, and therefore is amenable to the federal tribu-The only question which has ever arisen in the federal courts, in regardto jurisdiction over administrators, has been in relation to their citizenship, not as to their capacity to stand in judgment and execution. In this State, curators do not occupy the position of administrators at common law; they do not hold the goods of the intestate in full and absolute property, but only sub modo, as agents and officers of the Probate Court, to whom alone, by the very law of their creation, they are responsible for such goods. The State courts of general jurisdiction cannot seize and sell the property of a succession, in due course of administration.

The federal courts come into the State to administer its laws; they are, prohac vice, State courts. It is true, they are not subjected to the modes of procedure imposed upon the State tribunals: but, so far as the rights and qualities of property are concerned, they act wholly under the State laws. If, by the State law, any particular species of property is exempted from execution, could the federal courts execute their judgments upon such property?

The State law creates a certain court, giving it exclusive jurisdiction and control over vacant successions, and authorises it to appoint a certain officer, who shall be accountable to it alone, for the goods of a succession placed in his hands by the court. This curator has no seizin or absolute title in the goods of the succession; he has only the charge of them; he is the mere officer of the Probate Court, and by the law of his creation, accountable to it alone. The federal

court, by pretending to assume jurisdiction over him, cannot increase either his power or his liability. He is a State officer, accountable to a particular State tribunal, for the property entrusted to his charge. In no other State tribunal can he stand in judgment, so as to render the goods of the succession in his hands subject to an execution, even though he permit a judgment to go against him in such tribunal. Such judgment might bind him personally, but could not be executed against the goods placed in his custody by the Probate Court, where the succession was opened, and from which he derived his authority.

But, it is said, if the federal court had power to render judgment, it had, necessarily, the power to execute it. That, as a general rule, we admit; but there are exceptions to it. The judgment of a federal court cannot be executed on property already seized by the sheriff, under process from a State tribunal. This has been expressly decided, in the case of Hagan v. Lucas, 10 Peters, 400. Again: a judgment cannot be executed on property not subject, by law, to execution. Suppose the legislature of this State should change entirely the the character of immovable property, and subject it to entailment. No one will pretend that, upon a judgment rendered after the passage of such a law, immovable property could be seized and sold under execution, either from the federal or any other court. If, then, the State law can exempt property from execution in toto; a fortiori, the same power can exempt it during the period of its administration, and while in the custody of the law.

If the United States Circuit Court was without jurisdiction, either ratione personæ or ratione materiæ, the decree ordering the sale of the slaves in controversy was a nullity, not only voidable, but wholly void. See authorities cited before. If the order, or decree, directing the sale, was not merely erroneous, but absolutely void, it follows that the sale made by virtue of said order or decree was equally null and void. 1 Pet. 340. 2 Howard's U. S. Rep. 43.

2 Mart. N. S. 1. 8 lb. N. S. 176.

Grymes, for the defendants, contended that the Circuit Court of the United States had jurisdiction, and that its judgment was conclusive, citing Const. U. S. art. 3, sec. 2. Act of Cong. of 1789. Gordon's Dig. 149, no. 575. 5 Cond. Rep. 542. 4 Dallas, 12. 1 Cond. Rep. 210. 3 Wheaton, 212. 4 Ib. 108. 8 Ib. 642. 10 Ib. 152. 1 Peters, 623. 6 Ib. 291. 14 Ib. 72. 1 Kent's Com. 295, 342, 348.

The judgment of the court was pronounced by

EUSTIS, C. J. This suit was instituted for the recovery of certain slaves alleged to belong to the succession of Claudius Gibson, and for damages for their caption and detention. William Hunt and A.S. Robertson are made defendants, and the sum of four thousand dollars is sought to be recovered from them, in solido, being the alleged value of the hire of the slaves, since March 26th, 1842, the time of the taking possession of the slaves by the defendants. Judgment is prayed for against Hunt for the slaves, which are alleged to be in his possession, or their value, the sum of \$7,000. Hunt resided in the State of Mississippi. No service of the petition or citation was made on him, nor were the slaves in dispute, or any other property of his, reached by the process of the court. By a supplemental petition judgment was prayed for against Robertson, for the value of the slaves, and also the appointment of a curator ad hoc to represent William Hunt. Process was served on the attorney appointed curator ad hoc, who, in his capacity as curator only, appeared, and prayed that the suit might might be transferred to the Circuit Court of the United States for this district, Hunt being a citizen and resident of Mississippi. It was objected to this application that, the removal of the cause could not be ordered at the instance of a curator ad hoc merely; and the application was disallowed.

The curator ad hoc then pleaded formally to the jurisdiction of the court, neither the person nor property of *Hunt* having been reached by the process of the court, he being a citizen and inhabitant of Mississippi, and having had no residence or domicil in Louisiana. This plea was overruled, and the questions involved in it have been argued on the appeal.

DUPUY v. HUNT. DUPUY e. HUNT. It is to be observed that, in order to insure to the plaintiff the full benefit of his claims against the defendant Robertson, there is no necessity of making Hunt a party to this suit. The action against Robertson is simple, and it can have its lawful effect without making Hunt a party, and the question presented is, as to the power of the court to bring Hunt before it, for the purpose of judgment against him, under the appointment of a curator ad hoc. There was judgment for the defendants on the merits, and the plaintiff has appealed. We have stated the matters involved in the plea to the jurisdiction of the court made in the interest of Hunt, for the purpose of having it understood that we cannot assent to the correctness of the opinion of the judge of the District Court in overruling it, and in order that our assent might not be implied from our silence in regard to this point, which the conclusions to which we have come on the merits do not render it necessary to determine.

We have not been successful in finding any enactment of the legislature, or any recognised principle of law, which authorizes a plaintiff who has a cause of action against an absentee, to bring him before our courts by causing a curator to be appointed to represent him.

Conceding that article 57 of the Code, under the term absentee, applies to persons who have never resided in the State, that article presupposes that the absentee has property in the State, which of itself would give a court jurisdiction, or that a suit be instituted against him. In our opinion it only authorises the appointment of a curator in suits which may lawfully be instituted against the absentee, and which are pending before the judge who is called upon to make the appointment, but confers no power to bring absentees into court, on the simple demand of a creditor. If the absentee leaves his property without an administrator or agent, if it be attached at the suit of a creditor, or if an absentee becomes a necessary party to a suit between other persons lawfully in court, in the furtherance of justice the law authorises a curator to be appointed to represent him. There is then something on which the jurisdiction of the court is based, and the judgment rendered would be within the recognised and ordinary prerogatives of the judicial power. But that a court in Louisiana should render a judgment against a citizen of London or of New York, who had never set his foot in the State, nor had property within it, and was entirely unconnected with any pending or possible litigation, and on a simple matter between himself and his creditor, appears to us in conflict with all sound views of the administration of justice. What effect would be given to a judgment rendered in such a case, in other courts of the Union? Can we expect that other States will recognise for an instant an infringement on the exclusive jurisdiction and right of protection, which they have over their own citizens and property within their own limits? Nor do we think that the intendment of article 57 of the Code is changed by article 116 of the Code of Practice. The several articles of that Code concerning the appointment of curators to persons presuppose something upon which the jurisdiction of the court can properly be based. C. P. arts. 194, 195, 924, 963, 964. They must all be taken together, and construed with reference to, and in furtherance of the provisions of, the Civil Code, and not as creating what would be an anomaly in legislation.

We think the plea to the jurisdiction of the court, made by the curator of William Hunt, ought to have been sustained.

Robertson justifies his acts complained of in the plaintiff's petition, as done by him as marshal of the United States, under certain orders and decrees of the

Circuit Court of the United States, for the fifth judicial circuit and district of Louisiana, which he was bound to execute.

DUPUY v. HUNT.

The material facts of the case are stated in the opinion of the court recently delivered in the case of the present plaintiff against John B. Bemiss, ante p. 509. In the present case we have not before us in evidence the whole record of the proceedings of the Circuit Court of the United States. The cause of action against Robertson is fixed in the petition as having taken place on or about the 26th of May, 1842, and consisted in his, Robertson's, wrongfully and illegally taking possession of the slaves, and delivering them to Hunt, and the testimony is confined to the sale of the slaves of that date.

We have before us the petition and order of seizure and sale in the case of Tobias Gibson v. Davis, Curator, of date the 2d Dec. 1841; the bill of William Hunt against the same party, and the service of the subpena on the curator, on the 17th of February, 1842; the order of sale of the 19th of February, 1842, and the return showing the manner in which it was executed; and the final decree rendered in favor of Hunt against the curator. It is therefore obvious, on the principles we have settled in the opinion we gave in Bemiss' case, that the plaintiff, curator of the estate of Claudius Gibson, has no recourse in damages against the officer executing the decree of the Court of the United States sitting in Chancery, under the very imperfect state of the records on which the defence is presented to us.

The judgment in favor of Robertson, appealed from, is therefore affirmed, with costs in both courts; and the suit against Hunt is dismissed, at the costs of the plaintiff,

STURGES v. KENDALL.

The forbearance of a plaintiff by whom an action had been commenced by attachment, in which certain persons were made garnishees, to obtain a judgment against the latter at the same time that judgment was rendered against the defendant, is no waiver of his right to proceed against them at a future day.

Where garnishees are cited to answer interrogatories within a certain time, their neglect to answer is considered to be a confession that they have in their hands property belonging to the debtor to the amount stated in the interrogatories; and this confession authorises a judgment against them without the formality of a default; nor are they entitled to any notice of the plaintiff's intention to render them liable, upon the confession which the law infers from their silence. C. P. 263.

The neglect of garnishees to answer interrogatories can be considered as a confession of having in their hands property of the defendant, only to the amount of the debt mentioned in the interrogatories.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Singleton, for the plaintiff, cited Parmley v. Bradbury, 13 La. 353. 16 La. 525. C. P. 243, 312. Benjamin and Micou, for the appellants. No counsel appeared for the defendant. The judgment of the court was pronounced by

King, J. The plaintiff commenced this action by an attachment, and made the appellants, Follain and Bellocq, parties as garnishees. To the latter interrogatories were propounded, which have not been answered. A judgment was first obtained against the defendant, and after a return of nulla bona on the exe-

Brunges V. Kendall. cution which issued thereon, the plaintiff caused the interrogatories propounded to the garnishees to be taken for confessed; whereupon a judgment was rendered against the latter, from which they have appealed.

The appellants contend that, there is no evidence in the record that the interrogatories were served upon them; that no judgment having been rendered against them when a judgment was taken against the defendant, recourse against them was abandoned; that judgment was rendered against the garnishees without a previous default having been taken against them, or a rule upon them to show cause; that the affidavit for the attachment claims only \$300 to be due by the defendant, whereas a judgment has been rendered against the garnishees for a larger sum.

I. The plaintiff prays that the garnishees be made parties and required to answer interrogatories, which he states are appended to his petition. Annexed to the petition, and apparently upon the same sheet of paper, are two interrogatories addressed to the appellants, at the foot of which is an order that they be answered. There is but one filing of the petition, interrogatories, and order, the whole having been treated by the clerk in this respect as one document. The citation directed to the garnishees, requires them "to answer in writing, under oath, the interrogatories annexed to the petition, of which a copy accompanies the citation," &c. The sheriff's return is, that he served a copy of the petition and citation on Messrs. Follais and Bellocq, &c. We think this evidence establishes, with sufficient clearness, that the interrogatories were considered as forming a part of the petition, and that they were copied and served as a part of it.

II. The forbearance of the plaintiff from taking a judgment against the garnishees, at the time that judgment was rendered against the defendant, was no waiver of his right to proceed at a future day against the former. A judgment is not required by the Code of Practice to be rendered at the same time against the defendant and garnishees, and it is by no means unusual to take separate judgments, at different times, against such parties.

III. The garnishees were cited to answer the interrogatories within ten days from the service. Their neglect to answer is considered as a confession that they had property of the debtor in their hands, to the amount stated in the interrogatories, and this legal confession authorised a judgment to be rendered against them without the formal entry of a default. They were entitled to no notice of the plaintiff's intention to render them liable, upon the confession which the law inferred from their silence. Code of Prac. 263. 13 La. 353.

IV. The affidavit on which the attachment was founded declared only \$300 to be due by the defendant, and the interrogatories propounded to the appellants only enquire of them whether they are indebted to the defendant in that sum. The neglect to answer can only be considered as a confession of an indebtedness to that amount. The judgment against them is for a larger sum with interest, and in that respect is erroneous. The judgment of the District Court is therefore reversed, and ours is in favor of the plaintiff and against the garnishees, Follais and Bollocq, for three hundred dollars; the appellees paying the costs of this appeal.

The many the last the state of the second of

CLEMENTS v. CASSILY et al.

Under the 5th sec. of the stat. of 20 March, 1839, amending art. 243 of the Code of Practice, it is sufficient to authorise an attachment, that the creditor should swear that he verily believes that the debtor resides out of the State; it is not necessary that he should swear positively that he does so.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Perin, for the appellant. Conklin, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The court below, upon a rule taken by the defendants, dismissed the attachment issued in this cause, because the plaintiff, in his affidavit, instead of swearing positively that the defendants resided out of the State, swore that he verily believed so. Such an affidavit would have been defective under the Code of Practice, but we think is good under the amendatory act of 1839 (p. 164), which declares " that the article 243 of the said Code be so amended that, in lieu of the oath prescribed by said article, it shall be sufficient for the creditor to swear to the existence of the debt demanded by him, and that he verily believes that the debtor has left the State permanently, or that he resides out of the State, or conceals himself, so that citation cannot be served on him." Under the Code the affidavit was required to be positive in these three cases; and as they are each enumerated in the amendment, the sufficiency of an affidavit of belief cannot be reasonably restricted to one of the enumerated cases, upon the ground of a distinction which the lawgiver has not thought proper to make, between those facts which may be affirmed with certainty, and those which, under ordinary circumstances, can only be the subject of belief.

The judgment of the court below is therefore reversed, and this cause is remanded for further proceedings according to law; the defendants paying the costs of this appeal.

Succession of McNeil.

A judgment is not conclusive against persons, neither parties, nor privies to it.

Sec. 7 of the stat. of Mississippi of 21 February, 1840, prohibiting any bank in that State from transferring "by endorsement or otherwise, any note, bill receivable, or other evidence of debt," cannot be considered as prohibiting a bank from collecting its dues, by accepting payment of a note due to it, after maturity, from a third person, nor as depriving the latter of the right to be refunded the amount out of the succession of the maker.

A PPEAL from the Court of Probles of Madison, Downes, J. Amonett, for the appellant. Snyder and Shannon, contrd. The judgment of the court was pronounced by

King, J. This is a controversy between two parties, each of whom claims to be entitled to the provata dividend, declared, on a tableau of distribution of the succession of Alexander McNeil, deceased, to be applicable to a note of which the deceased was the maker. It appears from the evidence that McNeil was the maker of a note for \$16,216 66, secured by mortgage, which was endorsed

SUCCESSION OF McNett. by O. B. Cobb, and discounted by the Commercial and Railroad Bank of Vicksburg, for the use of the latter. Erwin, being a creditor of the bank, instituted a suit against it in a court of this State by attachment, in which he made Lowry, the curator of McNeil, a garnishee, and attached in his hands the debt, of which the note in question is the evidence. A judgment was recovered in that action against both the bank and the garnishee for \$6,000, with interest. The curator subsequently presented a tableau of distribution of the funds of McNeil's succession, on which he placed Erwin as a creditor, for the amount of the judgment. Cobb opposed this part of the tableau, alleging that he was the owner of the note in question. Mrs. Cobb, who is separated in property from her husband, subsequently intervened in the proceeding, and claimed for herself the pro rata dividend applicable to this note, averring that it belonged to her. The probate judge sustained her claim, and decreed to her the distributive share of McNeil's succession applicable te the note. From that judgment Erwin has appealed.

The evidence establishes clearly that, after the maturity of the note, it was taken up with funds of Mrs. Cobb's, and for her benefit, by the husband, who acted as her agent in the transaction. But Erwin contends that his attachment was prior to the acquisition of the note by Mrs. Cobb, and that his judgment obtained in that proceeding determined his right as a creditor to be placed on the tableau, and to be paid the amount of his claim, in preference to the intervenor. He also contends that, a statute of Mississippi forbids the banks of that State from assigning their evidences of debt; that the intervenor acquired the note in contravention of this prohibitive law; and that her title to it is consequently void. Mrs. Cobb was not a party to the suit of Erwin against the bank, and the judgment which he obtained in that proceeding had not, as to her, the force of the thing adjudged. Although that judgment stood unreversed at the date of the trial below, it had not the effect of concluding her from contesting Erwin's claims, nor from showing her ownership of the note, and claiming the dividend of McNeil's succession applicable to it.

It has been suggested that, on an appeal to the Supreme Court, the judgment obtained by Erwin was reversed, in consequence of irregularities and defects in the proceedings. The cause had not been finally determined on the appeal, when the judgment in the present controversy was rendered; and the decree of the Supreme Court is not in evidence before us, but is reported in the 12th vol. of Robinson's Reports, p. 227. Erwin consequently acquired no rights under his attachment. His claim rests upon a judgment which has been reversed, and it is difficult to perceive with what object he prosecutes this appeal; for, although we are compelled, in the present state of the record; to reverse the judgment of the inferior court, it must be merely for the purpose of remanding the cause to receive in evidence the decree of the Supreme Court, in the case of Erwin v. The Commercial and Railroad Bank of Vicksburg, which will destroy the foundation on which his claim against McNeil's succession is based.

An isolated section of the statute of Mississippi of 1840 is in evidence, which prohibits the banks of that State from transferring their notes, bills receivable, or other evidences of debt, by endorsement or otherwise. There is nothing, however, in the law before us, which forbids those institutions from collecting their dues; and a prohibition so unreasonable is not to be presumed. In the present instance, the bank surrendered the note to one of the parties to it, who paid its amount in full. As between the bank and that party, we presume that the transaction is valid and sanctioned by the laws of Mississippi. The funds,

however, used in making the payment, belonged to a third person, and to that Succession

person the benefit of the payment must result.

For the reasons assigned the judgment of the Probate Court is reversed, and the cause remanded for the purpose of enabling the opponent, S. Cobb, to offer in evidence the decree of the Supreme Court, in the case of James Erwin v. The Commercial and Railroad Bank of Vicksburg; the appellee paying the cests of this appeal.

McNEIL.

BROUGHTON v. KING.

After a jury has been sworn, a continuance cannot be claimed by the counsel of a party, on the ground of want of time to prepare himself to try the case.

A judicial sale, made at the suit of a mortgage creditor, will not be treated as null for informalities anterior to the order of seizure, except in cases of an actual want of citation, nor for informalities posterior to it not involving the violation of a prohibitory law.

Where a mortgage creditor proceeds by an order of seizure and sale, citation of the debtor is unnecessary:

Before the adoption of the Code of Practice, it was not necessary to take out an execution under an order of seizure. The sheriff served the order itself on the party in possession Code of 1808, b. 3, tit. 19, art. 43.

The provision of the constitution, art. 69, that all process shall be issued in the name of the State, is directory to those charged with the issuing of judicial process. It regulates a mere matter of style; and its non-observance in a judicial sale cannot affect the title of a purchaser.

Judgments rendered in cases of attachment, where the defendant has not been cited and has not appeared, are in rem, and affect only the property attached.

A PPEAL from the District Court of Concordin, Curry, J.

A. N., and A. N. Ogden, for the appellant Broughton. The defendant could not attack Broughton's title, as he claimed under it. Trahan v. McManus, 2 La. 213. Bedford v. Urquhart, 8 La. 234. Grant v. Walden, 6 La. 627. A suit by attachment is a proceeding in rem, authorising only the

sale of the property attached.

Frost, for the appellant Presler, contended that the judgment against Presler, having been rendered without citation or appearance, was null, citing 5 Mart. 465. 1 Ib. N. S. 9. 6 Mart. 726. 8 Ib. N. S. 145. 5 Ib. N. S. 656. 10 La. 338. 19 La. 215. 14 La. 35, 291. 16 La. 487. 2 Nutt & McC. 25. 6 Yerger, 522. 7 Howard, 99, 102, 128. 4 Ib. 401. 20 Pick. 420. 4 Peters, 474. 1 Ib. 340. 5 Howard, 517. 5 Wend. 175. 1 Smedes & Mar. 168. 19 Johns, 739. 6 Wheaton, 128. 8 Cranch, 21. 9 Pick, 259. 5 Rob. 418, 506. 7 Cow. 274. 5 Ib. 524. 1 S. & M. C. R. 620. 6 Rob, 104.

J. Dunlap, for the defendant.

The judgment of the court was pronounced by

Rost, J. The defendant King is in actual possession of a tract of land granted by government to Joshua Presler in 1811, and claims title under a sheriff's sale made in an attachment suit against Edward Broughton, who is alleged to have acquired the title of the grantee, under a judicial sale made at the suit of a mortgage creditor of the said grantee. Presler contends that the judgment and sale which are alleged to have divested him of his title are absolute nullities, and prays to be restored to the possession of the land, and quieted in his title. He also claims the rents and profits of the land. Broughton alleges that he has never been divested of his title, and that Presler has no claim. He prays that

BROUGHTON 6. King, the land be adjudged to him, and that he may recover the rents and profits from the defendant. The defendant denies the allegations of the two other parties; avers that he, and those under whom he claims, have been in open, peaceable, and uninterrupted possession, under a just title, since 1823, and pleads the prescription of ten and twenty years. In case of eviction he claims to be reimbursed the value of his improvements. By agreement of parties, the questions in relation to the improvements, rents and profits, were reserved, and the question of title alone submitted to the decision of the court.

The claims of Presler and of Broughton formed the object of two separate suits, which have since been consolidated. They were tried together before a jury, who found in favor of the defendant, and the two other parties having failed in their attempt to set aside the verdict, have appealed from the judgment rendered thereon. The record contains several bills of exception, which require but a brief notice. The objection made to the juror, Forshey, is not supported by evidence; and the court properly refused to continue the cause after the jury had been sworn. The questions of fact presented by the other bills of exception are not material to the issue, and the questions of law reserved by them are properly before us for our decision on the merits.

In support of the claim of *Prester*, various informalities are alleged, by reason of which it is contended that the order of seizure under which the other parties claim, and the sale which took place under it, are null and void. Under the views expressed by this court in the late case of *Gibson et al.* v. Foster et al., ante p. 503, it is unnecessary to notice particularly the informalities anterior to the order of seizure, except those relating to the want of citation, or such as being posterior to it, do not earry with them the violation of a prohibitory law-

The defendant has shown an order of seizure directed to the sheriff by a court of competent jurisdiction, and the sale made under it at twelve-mouths' credit, on the second exposure. He has also produced the execution and sale under the twelve-months' bond. It is alleged that his title is void, because no writ of execution under the first order of seizure has been produced, and also because that order was given without previous citation to *Presler*.

The law did not then, and does not now, require a citation in such cases. Before the adoption of the Code of Practice, it was not necessary to take out an execution under an order of seizure. The sheriff served the order itself on the party in possession, and proceeded under it. Old Code, p. 462, art. 43.

The constitutional provision that all process shall issue in the name of the State is directory to the functionaries entrusted with the issuing of judicial process. It regulates a more matter of style, and its non-observance in a sale made by the sheriff would not affect the title of the purchaser.

There are no other informalities alleged which can be deemed at all material. It is moreover in evidence that, before the purchase by Broughton, Presler eccupied a house on the land in controversy, that Broughton went on the land at the time he acquired it, and that Presler continued to occupy the house as his tenant, paying him fifty cents a cord for the wood he cut upon the land. This arrangement continued from 1824, till some time in 1827, when the house was destroyed by fire, and Presler declined building another, on the ground that

^{*} The counsel for Broughton, after the jury had been sworn, moved for a continuance, on the ground of want of time, since the filing of the opinion of the Supreme Court in one of the two cases, and their subsequent consolidation, to prepare himself.—References.

Broughton would not compensate him for improvements. If a ratification of BROUGHTON the sale, and a voluntary execution of the order of seizure under] which it was made, were needed to support the title of Broughton, they would be found in those acts of Presler. He is undeniably divested of his title.

Kang.

Among the numerous informalities alleged by Broughton, in avoidance of the title of the defendant, it is shown that in the attachment suit a tract of land situated on Lake Bruin, and containing about eighth hundred arpents, was attached. This land is a different tract from the one sold to satisfy the judgment, and the point is expressly made that judgments rendered in cases of attachment, without the defendant having been personally cited, are purely in rem, and have no legal effect whatever beyond the property attached. This question came before the former Supreme Court in the case of Hill & McGunnegle v. Bowman, 14 La. 445, and it was then held, that proceedings by attachment are not only in rem but also in personam.

The earnest desire not to disturb rules of property established by the decisions of our predecessors, has induced us to retain this case under advisement during an unusual length of time. After mature deliberation, we are unable to concur in that opinion. We do not believe, as it is there stated, that the legislature of Louisiana has considered all persons, whether they were ever in this State or not, as amenable to our courts. Laws authorising judgments in personam to be rendered against absentees, without citation, notice, or appearance, in direct actions naminally instituted against them, are subversive of all ideas of justice and common right. The seizure and sale made under those judgments of any other property but that which may in certain cases have been attached, or in which other persons may have had an interest, are spolintions. We would, unhesitatingly, arrest the execution of judgments of that description rendered elsewhere, and refuse to listen to the argument that foreign laws had taken from us the power, which we hold under our own, to afford adequate protection to our citizens. The rule which in such a case we would deem it our duty to enforce, obtains in other countries, and we cannot presume that the legislature intended a violation of it.

The view taken of the rights and liabilities of absentees in the case of Du puy, Curator, v. Hunt et al. ante p. 562, is decisive of the question under consideration. Judgments rendered in cases of attachment, where the defendant has not been cited and has not appeared, are in rem, and affect only the property attached. This is in accordance with the doctrine laid down on the subject by Judge Story and Chancellor Kent, and, we believe, with the jurisprudence of the other States. It conforms also with the jurisprudence of France on the subject of the saisie-arrêt, from which our attachment law appears to have been, in a great measure, taken. Story's Conflict of Laws, 549. 1 Kent's Com. 262. Clerk's New York Digest, verbis Foreign Laws and Judgments, and the authorities there cited. Code de Procédure of France, Saisie-arret.

The defendant in this case had not been personally cited, and was in court only by the attachment of a tract of land situated on Lake Bruin, which is not even shown to have belonged to him. That land alone could be sold to satisfy the plaintiff's claim. The judgment had no existence beyond it. We have, therefore, come to the conclusion that Edward Broughton has not been lawfully divested of his title, and that, as in relation to the land claimed, he had not been cited and was not in court, the decree homologating the monition cannot

Ring.

avail the defendant. Admitting that he holds under a just title, his possession has not continued during a sufficient length of time to enable him to acquire by prescription.

For the reasons assigned, it is ordered, that the judgment in this case be reversed; that Edward Broughton recover from the defendant the land mentioned in his petition, and that he be forever quieted in his title to said land, against all claims and pretensions of the defendant and of Joshua Presier. It is further ordered, that the case be remanded for further proceedings in relation to the improvements, rents, and profits. The costs in both courts to be paid in equal proportions by Joshua Presier and Edward P. King.

CUTTERS et al. v. BAKER et al.

Consignees, who accept a consignment, are bound to obey the directions of the consignor, made at a time when the property was under his control, as to the appropriation of the proceeds.

Where a factor, by whom merchandise was received with directions to apply its proceeds to the payment of a bill, pays the bill before selling the property, he will be entitled, as factor,

to a privilege on the merchandise, for his reimbursement.

Where a factor, to whom property had been consigned, with directions to apply the proceeds to the payment of certain creditors of the principal, agrees with the latter to apply the proceeds to the payment of their claims, the appropriation cannot be affected by a subsequent attachment by a creditor of the principal; the property or its proceeds being beyond the control of the latter.

Factors have a privilege entitling them to be paid by preference to an attaching creditor, out of the proceeds of goods consigned to them, for any advance made thereon, or for any balance of account accrued anterior to the attachment, though not resulting from advances on the

goods. C. C. 3214: Stat. 17 Feb. 1841.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Fellowes, Johnson & Co. are appellants in this case. The facts are fully stated in the opinion, infra.

Peyton and I, W. Smith, for the plaintiffs. Fraser, for the appellants. J.

Dunlap, for the defendant, Baker. Mott, for Bennett.

The judgment of the court was pronounced by

SLIBELL, J. Cutters and Phelps are the holders of three bills of exchange drawn by Baker on Fellowes, Johnson & Co., on the 27th August, 1845. These bills are not in the usual form, requiring an absolute payment by the drawees, but their tenor is, "on the receipt of funds belonging to me, pay to the order of Cutters & Phelps, within sixty days from date." Cutters & Phelps sent these bills for collection to their agents at New Orleans. In their letter they say: "We will thank you to have them accepted by F. J. & Co., and hold them for payment, and as fast as money is paid on them forward it to us. Mr. Baker says he is sending them a lot of barrels to sell for him, with directions to pay on these drafts as fast as they realise the money; and their acceptance of our drafts is not to bind them—only to pay over as fast as they collect money. We presume they will not object to accepting the drafts on these terms. If they should object and will not accept them, ask them to agree to dispose of the funds of Baker, as they come into their hands, in accordance with the drafts."

CUTTERS

The agent of plaintiffs accordingly presented the drafts to Fellowes. Johnson & Co., who declined to accept, and stated that they had no advice from the drawer, and that he had no authority to draw. A few days after this, F. J. & Co. received a letter from Baker, under date of 29th August, 1845, in which he says: "I have taken the liberty to draw sundry bills on your house, predicated on a shipment of barrels, which will leave Paducah about the 10th or 15th September next. Of course I do not expect you to accept these bills, (without you please to do so,) but merely to say that you are advised that funds will be in your hands to meet them at maturity.

Some days subsequently the agent of the plaintiffs called again with the bills, when F. J. & Co. exhibited to him Baker's letter. There is some discrepancy in the testimony as to the precise purport of what passed between them; but, after a careful consideration of all the testimony, we consider the substance and effect of it to be, that F. J. & Co. promised to hold the proceeds of the barrels that might be shipped in conformity to Baker's letter of advice, applicable towards the payment of all the bills drawn against such contemplated shipments. To the holders of the other bills the same promise was made as to the plaintiffs.

We consider these facts as amounting to an agreement between F.J. & Co. and the holders of these bills, that the proceeds of such barrels as should thereafter come to their hands from Baker, under the letter of advice of 29th August, should be appropriated towards these bills, and that F.J. & Co. could not thereafter appropriate the proceeds of that merchandise to other purposes. But the plaintiffs have no right to hold F.J. & Co. absolutely answerable as acceptors. They have incurred only a qualified liability, that is, for the $pro\ rata$ of the proceeds.

Several shipments of barrels were subsequently received by F. J. & Co., and being received generally they were fairly applicable to the benefit of the bill hold-But there was one shipment of barrels for which they cannot be so charged. In November, 1845, F. J. & Co. received from Baker a letter enclosing receipts of certain parties at Plaquemine and Donaldsonville, for 1045 barrels, placed in their hands by Baker. In this letter Baker directs F. J. & Co. to advertise these lots, and when sold to apply the proceeds first to the payment of a draft held by Story for \$700, which seems to have been based upon those consignments, and afterwards to the bills above mentioned, giving a preference to the plaintiffs' bills. At the time when Baker wrote this letter, these two consignments were under his own control, and the receipts in his own possession. Consequently he had a right to direct the appropriation of their proceeds, and F. J. & Co. in accepting the consignments, were bound to obey his orders. The promise made by F. J. & Co. to the plaintiffs cannot therefore be considered as comprehending that property, F. J. & Co. paid the Story bill, and charged it against the procoods of the other consignments of barrels. This they had no right to do. But having paid the money to Story, they are as factors entitled to a privilege upon the 1045 barrels for their reimbursement, when they shall be sold, which had not been done when this cause was tried in the court below.

Besides the barrels, some small shipments of other merchandise were made by Baker to the defendants. The drafts held by the plaintiffs and the other bill holders standing in the same category, were not based upon the shipments other than of the barrels, and are not covered by the agreement to appropriate proceeds made by F. J. & Co. They had a right to appropriate the proceeds of these other shipments to their account with Baker, for advances made before the levy of attachment by plaintiffs, and Bennett, another creditor.

CUTTERS U. BAKER. Under the view above expressed, the plaintiffs are entitled to receive from F. J. & Co. towards payment of their bills their pro rata of proceeds of shipments of barrels, to wit, \$. If the consignments of 1045 barrels should realise more than enough to reimbures F. J. & Co. what may be uncovered of the \$700 paid to Story, and charges pertaining to those consignments, the plaintiffs will be entitled to the benefit of such surplus.

There is another creditor whose rights remain to be considered. One Bennett, subsequent to the agreement between F. J. & Co. and the bill holders, brought suit by attachment against Baker, and garnisheed F. J. & Co. We consider the rights of the bill holders as superior to those of this attaching creditor. The agreement made between the bill holders and F. J. & Co., in conformity to Baker's letter of advice, anterior to the attachment, placed that merchandise and its proceeds beyond the control of Baker. Bennett could only obtain, by his attachment, a right secondary to the bill holders, and also to the factors' privilege for advances and balance of account accrued anterior to the attachment. See the cases of Urie v. Stevens, 2 Rob. 252. Armor v. Cockburn, 4 Mart. N. S. 667. Babcock v. Malbie, 7 Ib. N. S. 139. Civil Code, art. 3214. Act of 17 February, 1841, p. 21. If we suppose that, after paying the bill holders and the factors, there could be any thing left for Bennett, we would leave the case open to ascertain the balance; but of this there is no probability.

It is therefore decreed, that so much of the judgment of the court below as renders judgments in favor of Cutters & Phelps, William A. Bennett, and Fellowes, Johnson & Co., respectively against the said Baker personally, be affirmed; and that as to the residue of said decree the same be reversed and set aside; and proceeding to render final judgment in this cause, it is decreed that, as to the claim of said Bennett as attaching creditor, that there be judgment in favor of said garnishees, Fellowes, Johnson & Co., with costs of the garnishment; that the said Cutters & Phelps recover from the said Fellowes, Johnson & Co. the sum of \$230 49, with costs of this suit in the court below, reserving to the said Cutters & Phelps their rights, as in the opinion of this court stated, with regard to the surplus, if any there may be, of the proceeds of the 1045 barrels at Plaquemine and Donaldsonville, in the answer of the garnishees mentioned. And it is further decreed that one half of the costs of this appeal be paid by the said Bennett, and the other half by the said Cutters & Phelps.

Succession of Kelly.

A curator of a vacant succession is not a public officer, within the meaning of sec. 14 of the stat. of 10 Feb. 1841; and since the stat. of 28 March, 1840, abolishing imprisonment for debt, a ca. sa. cannot be taken out, after the return of a fs. fa. unsatisfied, against one who has converted to his own use money received by him as curator of a vacant succession.

A PPEAL from the Second District Court of New Orleans, Canon, J. R. M. Carter, for the appellant, contended that the curator of a vacant succession is not a public officer, within the meaning of the stat. of 10 Feb. 1841, s. 14, citing Ex parte Powell, 8 Rob. 95.

J. F. Pepin, contra.

The judgment of the court was pronounced by

SUCCESSION OF KELLY.

King, J. The defendant, Ferral, was appointed the curster of the vacant succession of Kelly, and, upon the rendition of his final account, exhibited a balance in his hands after the payment of the debts. A rule was taken on the defendant, by the attorneys representing the State, to show cause why this balance should not be paid into the State treasury, which rule was made absolute. After a return of "no property found," on two writs of fieri facias, on motion of the counsel representing the State, a writ of capias ad satisfaciendum was ordered to issue. A rule was thereupon taken by the curator to show cause why the writ should not be set aside, on the ground that it was unauthorised by law. This rule was discharged, and the curator has appealed.

The authority relied on to sustain the judgment of the court below is the 14th section of the act of 1841, p. 17, which authorises a capias ad satisfaciendum to issue against sheriffs, or other public officers, for money by them received in their official capacity. In Ex parte Powell, 8 Rob. 95, the late Supreme Court held that an executor was not a public officer within the intendment of that act, and the reasoning by which the court arrived at that conclusion, in the correctness of which we concur, is equally applicable to curators of vacant successions.

It is therefore ordered that the judgment of the District Court be reversed, and that the writ of capius ad satisfaciendum issued against the appellant, P. B. Ferral, be set aside and cancelled; the appellee paying the costs of this appeal.

Succession of Plauche.

....

The acceptance or renunciation of the community by the heirs of the wife, are subject to the rules provided by law for the acceptance or renunciation of successions under the benefit of inventory; and the rights and powers of creditors are the same in both cases. C. C. 2383. They may, in either case, sue the legal representative of the succession, or make opposition to the accounts rendered by him. If they do so, on an exception by the executor or administrator, that the time allowed to the heir for deliberating whether he will accept the succession or community has not expired, the proceedings must be stayed until the expiration of the term, or until the heir has decided. C. C. 1046. Where no such exception is taken, either in writing or in argument, the court will proceed to decide on the rights of the creditors.

The succession of a deceased wife can be made liable only for one half of the community debts.

A PPEAL from the Second District Court of New Orleans, Canon, J. Lewis and Bermudez, for the appellant. Buscail and Grandmont, for the opponents. The judgment of the court was pronounced by

Rost, J. Marie Anne Marchand, wife of J. B. B. Plauché, died, leaving all her property to her two sons by a former marriage. She appointed one of them the executor of her will; the other resides in France, and is represented in the succession by Honoré Doussan, his special attorney in fact. The succession is composed of paraphernal property, and of one-half of the property of the community which existed between the deceased and her last husband. The executor caused an inventory of both to be made in due time, and entered into the possession of the paraphernal property, leaving that of the community in the possession of the husband. A few days after the inventory had been re-

SUCCESSION OF PLAUCHE.

turned into court, the executor filed a provisional account of the claims presented against the succession, some of which were not admitted by him, on the ground that they were community debts for which the husband alone was responsible, that he, the executor, had not taken possession of the property of the community, and that community debts could not be recovered out of the paraphernal estate of the testatrix.

In the petition to which the account is annexed, the executor states his object to be, to ascertain the course to be pursued by him in his future administration of the succession, and to enable its creditors to establish any just claims they may have. The claims rejected were those of the physician and of the nurse, who attended the deceased during her last illness. These two creditors filed eppositions to the account, and those oppositions having been sustained, for the whole amount of the claims, the executor appealed.

The filing of the account by the executor, so short a time after the death of the testatrix, before he and his brother had either accepted or renounced the community, and before the term for deliberating had expired, was a premature proceeding. The fact that the husband continues in possession of the community property, does not, until the heirs renounce, affect their title to one half of it.

The acceptance or renunciation of the community by the heirs of the wife, are subject to the rules provided by law for the acceptance or renunciation of successions under the benefit of inventory; and the rights and powers of creditors are the same in both cases. C. C. art. 2383. They may, in either case, institute suits against the legal representative of the succession, or make opposition to the account he renders. If they do so, on the exception being made by the executor or administrator, that the heir is within the time for deliberating whether he will accept the succession or the community, as the case may be, the proceedings are stayed until the expiration of the term, and until the heir has decided. C. C. art. 1046. This exception has not been taken in this case, either in writing or in argument, and we are bound to proceed, and decide on the rights of the opposing creditors. The amounts claimed by them appear to us high, very high. But the evidence in relation to the value of the services, based upon the revolting nature of the decease, and the faithfulness with which they were rendered, is positive and stands uncontradicted. It satisfied the judge of the court below, and there is nothing in the record which can authorise us to interfere with that portion of the judgment. He erred, however, in allowing the whole amount of these two claims; they are community debts, for one half of which only, the succession of the wife is liable.

It is therefore ordered that the judgment in this case be amended; that the epponent, Honoré Doussan, be placed on the account as a privileged creditor for the sum of \$217 50; and that the opponent, Magdeleine Plauché, be placed on the account as a privileged creditor, for the sum of \$170. It is further ordered, that the judgment so amended be affirmed; the succession paying the costs of the District Court; those of this appeal to be paid in equal shares by the two opponents.

^{*} Lewis and Bermudez, for a re-hearing. Community debts should be paid out of community property. C. C. 2373. The husband of the deceased is in possession of the community property, yet the judgment condeams the succession, and of course the heirs, to pay those debts out of the paraphernal property of the wife, to the same extent as if she had alienated it with the consent in writing of her husband (C. C. 124); a consent which has never existed. The court presumes an acceptance of the community

McMasters v. Dunbar et al.

Where a promissory note is payable, on its face, to the tutor of minors, it is notice that the obligation belongs to the minors, and a holder can acquire, by taking it, no rights adverse to the parties in whose interest the restriction is made.

In an action by the holder of a promissory note, payable to a party as tutor of certain minors, endorsed in blank by the latter, it is incumbent on the plaintiff to establish any matter of account between the tutor and the minors, which may constitute a bone fide ownership of the note in the plaintiff.

Where the under-tutor of a minor intervenes in an action by the holder against the maker of a note, secured by mortgage, payable to the tutor, alleging that the transfer of the note by the tutor was illegal, not having been made for money, nor for any thing which enured to the benefit of the minor, and that, though the minor is still subject to the tutorship, the interest of the tutor, as transferror of the note, are adverse to the minors, no execution will be allowed to issue for the amount due to the minor. Per Curiam: The tutor not being a party to the sait cannot be removed, and he ought not to be permitted to receive the amount; nor ought it to be paid to the under-tutor, who instituted the intervention.

by the heirs, which the law presumes a renunciation in their favor. C. C. arts. 2392, 2383, 2983. The income of the wife received by the husband is intended to help him to support the charges of matrimony. He must alone support them; the wife only helps him, and having done so to the utmost extent of the law she cannot be bound further—not as regards her husband, and still less towards those who may have contracted with the husband for things which he is by law bound to provide her with. C. C. art. 2412. B & S's. D. verbo Contracts of the Wife, E, p. 285, nos. 16, 19. Deslix's Digest, verbo Husband and Wife, p. 234, no. 12.

The judgment deprives the heirs of the deceased of a right which they possess even after having accepted the succession or community—that of discharging themselves from the payment of the debts of the succession or of the community, by abandoning its effects. The heirs and the executor have done every thing necessary to secure that right, and have avoided doing any thing which could have deprived them of it. C. C. arts.

Our Code recognises three sorts of successions, three sorts of heirs, and three sorts of administrators, each of which is treated of separately. There may be a similitude between the laws regulating these separate successions. The powers and duties of testamentary executors are, to a certain extent, similar to those of curators and those of administrators under the 1036th art. of the Civil Code; but the law does not permit the appointment of a testamentary executor to administer a vacant succession, nor the appointment of a curator to administer a testamentary succession; nor would the law permit, except where it so provides, the testamentary executor to seek for his powers and duties among those that are especially established for another sort of administrator, and to substitute such powers to others that are especially established for him, and by which he is to be governed. The court has however committed this error in their reference to the 2383d and 1046th articles of our Code. These articles, 2383 and 1046, referred to by the court, have no application to testamentary successions. A judgment cannot be rendered against a widow or an heir for a debt due by the community or succession, while the effects composing its assets are under the administration of a testamentary executor possessed of seizin. Who ever heard of an action instituted by a creditor against a testamentary executor for a privileged debt to be paid without delay (or any other debt), being stayed, because the beneficiary heir is within the time for deliberating, or until he decides whether he renounces or accepts the succession? The articles of the Code cited in the judgment evidently apply to cases where the wife, or the heirs, retain the effects of the succession or community, or where they are provisionally placed in the hands of an administrator for the purposes of a mere administration. This distinction is rendered the more sensible by a comparison of arts. 1044, 1045, 1046, of the Code, with arts 1663, 1154, 1155 and 1156. As long as the

McMasters Dunbar. A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. McMasters, the transferree, instituted this action against the makers of the following note:

\$3,080 374. Alexandria, La. March 15th, 1841.

On the second day of February, 1843, we jointly and severally (in solido) promise to pay to the order of Carter Beaman, tutor of Mary Eliza Beaman and Carter Beaman, jr., the sum of three thousand and eighty dollars, thirty-seven and a half cents, payable at the office of discount and deposit of the Bank of Louisiana, at Alexandria, with interest thereon, at the rate of ten per cent per annum, after maturity, until paid.

WM. DUNBAR, CHAS. JONES.

(Endorsed) CARTER BEAMAN, PETER CORREY.

For value received I transfer the within to McMasters & Bro. April 3d, 1845.

Peter Correy.

The note was secured by mortgage, and paraphed by the notary. Several payments were credited upon it.

Mary Eliza Beaman, authorised and assisted by her husband, and the undertutor of Carter Beaman, jr., the other minor, intervened, alleging that the note suedion was payable to their tutor and is their property; that any transfer thereof to the plaintiff, or any other person, was illegal and void, because not made on receiving the amount thereof in money, nor in any thing else that has enured to the benefit of the minors; that Mary E. Beaman, since her marriage, is alone entitled to recover one-half of the amount due on the note, and that the other half can only be recovered for the use of Carter Beaman, jr., who is stilla minor under the natural tutorship of the said Carter Beaman, his father, but whose interest as the transferror of said note, is opposed to that of his minor son-They pray for a judgment rejecting plaintiff's claim, and condemning the defendants, in solido, to pay to the positioners the balance due on the note; and that the mortgage be recognised and enforced. The defendants, in answer to the petition and to the intervention, acknowledged their liability for the balance claimed on the note, but averred that, in consequence of the conflicting claims of different parties, they do not know to whom they should pay, and prayed for a decision upon the rights of the claimants. The plaintiff prayed that the intervention might be dismissed.

The note and mortgage were offered in evidence; the signatures of Carter Beaman and Peter Conrey were admitted. It was also admitted, that domand of payment of the note was duly made, and that plaintiff was entitled to any right to the note which McMasters & Brother had. Certain credits were also acknowledged. There was a judgment below in favor of the intervenors against the defendants, for the balance due on the note, from which the plaintiff appealed.

Van Dalson and Grymes, for the appellant. Lewis and Bermudez, for the intervenors. The judgment of the court was pronounced by

EUSTIS, C. J. This note, being on its face payable to the order of a tutor of minors, under the rule settled in the case of *Nicholson v. Chapman*, 1 Annual Reports, 223, we must hold this designation as notice that the obligation belonged to the minors; and that the holder can acquire, by taking it, no rights adverse to the parties in whose interest the restriction is made.

'We concur with the judge of the District Court in the opinion that, any mat- McMastelle ter of account between the tutor and the minors, which would constitute a bond fide ownership of the note in the plaintiff, it was incumbent on him to establish. Nothing of the kind has even been attempted; indeed there is no evidence of the consideration, or circumstances under which the plaintiff became possessed of the note.

A suggestion has been made by one of the defendants, that the portion of the debt belonging to the minor, Carter Beaman, jr., ought not to be paid into the hands of the under-tutor, who has instituted the intervention. In this we concur. The tutor not being a party to this suit, we do not feel ourselves authorised to remove him from office. But, as the matter stands before us, he ought not to be permitted to receive the amount; and, if the allegations of the petition of the intervenors be true, and the representations of their respectable counsel be well founded, the interests of the minor ought to be entrusted to other hands.

The judgment of the District Court is therefore affirmed, with costs. No execution is to issue for the half of the debt due to the minor, Carter Beaman, jr., until the further order of this court.

TAYLOR v. CARLILE.

A note executed by a married woman, secured by mortgage on her property, for the repayment of money lent to her husband, cannot be enforced against her. To recover against the wife on such a contract, it must be shown that the loan enured to her benefit. C. C. 2412.

PPEAL from the First District Court of New Orleans, McHenry, J. Larue and Bryce, for the appellant.

Maurian and Lambert, for the defendant. , A wife cannot bind herself for Maurian and Lambert, for the defendant. A wife cannot bind nerself for her hasband. C. C. 2412. She can, in no event, become his surety; if really a surety, the form of the contract will be disregarded. McMicken v. Smith, 5 Mart. N. S. 431. Hughes v. Harrison, 7 Ib. N. S. 252. Pilié v. Palin, 8 Ib. 693. If sued as principal, the wife may contradict, by parol evidence, her own declarations in an authentic act. Brandegee v. Kerr, 7 Mart. N. S. 64. Gas quet v. Dimitry, 9 La. 590. Firemen's Ins. Co. v. Cross, 4 Rob. 508. Alling v. Egan, 11 Rob. 246. Pascal v. Sauvinet, 1 An. Rep. 428.

The judgment of the court was pronounced by

King, J. The defendant, who is a married woman, executed a promissory note, with the authorisation of her husband, payable to the order of the plaintiff, and to secure its payment gave a mortgage on a slave owned by her in her separate right. The note was not paid at its maturity, and the plaintiff obtained an order for the seizure and sale of the slave, the execution of which the defendant enjoined, on the ground that the note and mortgage were given for a debt due by her husband, for which she was in no wise bound, which was not contracted for her benefit, and which did not turn to her advantage. The injunction was perpetuated in the court below, and the plaintiff has appealed.

The evidence establishes satisfactorily, that the debt for which the defendant obligated herself was contracted by her husband;* the money went into his

^{*} The note was executed for money lent by the plaintiff to the husband. R.

TAYLOR O. CARLILE.

hands; and the plaintiff has failed to show that it enured to the wife's use. The contract of the defendant is one which she is prohibited by law from entering into, and it cannot be enforced against her. Civil Code, art. 2412. Pascal y. Sauvinet, 1 Annual Rep. 429.

Judgment afirmed.

CLARK et al. v. PRESTON, Executor.

Where a testator, after making various dispositions in a will in which he evidently intended to dispose of his whole property, declares as follows: "I give the rest and residue of my estate to my brother, and the legal heirs at law of my deceased wife, in equal proportions; this residue, if any shall remain after the payment of debts and legacies, will consist in notes due me at New Orleans, the joint property of the estate of myself and my late wife"—the words "this residue, &c. will consist in notes due me at New Orleans, &c.", being mere words of description, will not be considered as limiting the generality of the phrase "rest and residue of my estate" to notes due to the testator at New Orleans.

Where the language of a testament leaves the meaning of the testator doubtful, acts done by him after its execution, may be taken into consideration, as explanatory of his intentions. C. C. 1708.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Peyton, and I. W. Smith, for the plaintiffs, cited Jackson v. Sill, 11 Johns, 217. Mann v. Mann, 14 Ib. 11. Doe v. Roe, 1 Wendell, 541.

Preston, appellant, pro se, cited C. C. 1710. Lartigue v. Duhamel, 4 Mart, N. S. 664. Thrall v. Thrall, 7 La. 230. Sarce v. Dunoyer, 11 La. 223.

The judgment of the court was pronounced by

SLIDELL, J. In the year 1830, James Brown, the testator, sold to Humphreys, his co-proprietor, an interest of one-sixth in a certain plantation and slaves in Louisiana, for the sum of \$18,000, payable by an appropriation of onesixth of the sugar crop yearly, during four years; the debt however, if not thus satisfied, to become at all events due in four years from the day of sale. Brown and his wife were in community at the time of the sale, She died soon after. Her one-half interest in this debt passed to her legatees, and Brown remained the owner of the other half as surviving partner in community. The testator made his will, in 1832. At that time this debt was outstanding. A portion of it was subsequently paid by Humphreys, during Brown's lifetime; the residue was collected after his death, from the heirs of Humphreys; and a portion of this residue is now claimed from the executor, by the plaintiffs, as legatees of John Brown, who contend that James Brown's interest in this debt passed, by his will, to John Brown, as residuary legatee; while, on the contrary, the executor, Preston, contends that the fund belongs either to the plaintiffs in connection with certain other legatees under James Brown's will, or to his heirs generally. . .

The clause in the will of James Brown, which is the main subject of this controversy, is in these words: "I give the rest and residue of my estate to my brother John Brown, and the legal heirs at law of my deceased wife, in equal proportions; this residue, if any shall remain after payment payment of debts and legacies, will consist in notes due me at New Orleans, the joint property of the estate of myself and my late wife." This clause is the last clause of bequest in the will. The will commences by directing the dispositions of

CLARK V. PRESTON.

his wife's will to be respected as to her half in the plantation and slaves, and in a house in New Orleans; it then directs that the other half of said possessions in Louisiana, that is to say the plantation, with its appurtenances in slaves and utensils, &c., should be sold by his executors, or worked in partnership with the co-proprietor, Humphreys, and the amount of sales or of annual proceeds divided as follows: one-half to his brother John Brown, and the two children of his brother Samuel Brown; the remaining half equally between his sister Mary, and the children of his sister Elizabeth, and those of his brother Preston Brown; "or, in other words, that I may be considered as having died intestate, except as to the preference given to the children of my brother Samuel, and to my brother John." The next clause gives to a neice certain jewels. The next, to another neice, \$1,000. The next, the like amount to a sister-in-law and her daughter. The next, the like amount to another neice; and then follows the residuary bequest quoted. The testator concludes with the following declaration: "The cholera has rendered this disposition of my property urgent; and I adjure my heirs not to go at law about my estate, as whatever may be found after my death has been the fruit of my own industry. My wish has ever been kindness and justice to all my relatives and connections."

It is our duty to ascertain the intention of the testator in this clause; and, in doing so, we must compare it with other parts of the will, and so interpret it, if possible, that the whole may harmonise and have effect. The first impression created on the mind by the perusal of this will is, that the testator intended to dispose of his whole property; that it should cover every thing which he might leave behind him. This results not only from the general frame of the will, and from the large and comprehensive expressions of the following specific legacies—"I give the rest and residue of my estate to my brother John Brown, and the legal heirs at law of my deceased wife, in equal proportions"—but also from the concluding expression, in which he affectionately entreats his heirs not to disturb the execution of his wishes—"whatever may be found after my death has been the fruit of my own industry." These words clearly indicate that, he intended by his will to dispose of all that he should leave behind him.

But it is said that the concluding expressions of the contested clause limit the generality of the antecedent, and restrict this residuary legacy to "notes due at New Orleans," and that, as the *Humphreys*' debt never existed in the form of a note or notes, it does not therefore fall within the bounty of the testator. This interpretation is at war with that intention to dispose of all that the testator should leave at his death, which, as we have said, is plainly deducible from the rest of the will. Are these expressions then susceptible of any other interpretation, which will harmonise with the rest of the will? If they are, we are bound to adopt it.

The language is "will consist in notes due at New Orleans." The words are not in the present, but the future. They may be considered as indicative of his expectation that his assets will ultimately assume that form. That such may have been his expectation is in accordance with the written instructions subsequently given to his agent at New Orleans, Erwin, in which he directs Erwin to make investments there of moneys that may come into his hands either in bank stock or safe notes. These subsequent acts of the testator, as explanatory of his will, we are authorised to consider by article 1708 of the Civil Code.

But because the testator entertained the expectation that his assets would, at a future time, assume the form of notes, it would be unreasonable to say that

CLARE O. PRESTON.

his bounty to his brother, named as the legatee of the rest and residue of his estate, was intended to be contingent on the mere form in which his assets should exist at the time of his death. The transmutation of his assets into notes would require time, and would depend upon the contingency of meeting with satisfactory securities of that nature. But the testator cannot be supposed, from the terms of his will, to have looked forward with certainty to the possibility of doing so. He was, as the will shows, impressed with a sense, not only of the general uncertainty of life, but of an unusual danger. A postilence which had spread terror and destruction throughout the country, was prevailing. It was a disease which destroyed suddenly. The testator saw himself surrounded by its devastation. The next week, or the next day, might find him a victim, and under such circumstances he applies himself to the making of his will, with a manifest desire to dispose of all "the fruits of his industry which may be found after his death." Now the testator cannot be supposed to have been ignorant of, or to have forgotten, this large debt of \$18,000. But if death should overtake him speedily, this large debt could not be realised so as to accomplish his expectation of one day investing its proceeds in notes. Yet if the interpretation claimed by the defendant be the true one, the disposition of a very important item of "the rest and residue" of the testator's estate would have been left contingent and uncertain.

If, instead of regarding the language of the testator as expressive of an expectation that the residue of his estate would, at a future day, be found in the form of notes, we treat the words "notes due at New Orleans" as an enumeration, we would not be justified in considering the general and highly comprehensive words, "rest and residue of my estate," as restrained by the subsequent enumeration. This case is a stronger one in favor of the residuary legates, than some that are to be found in the books. Thus where a man gave the remainder of his estate, viz, his Bank stock, India stock, South-Sea stock, and South-Sea annuities, to his son, and appointed him sole executor, it was held that the words following the "viz" were added by way of enumeration, or description, only of the chief particulars whereof his estate consisted, and did not restrain the word "estate" to those particulars. See Ward on Legacies (214), and the cases there cited.

Looking even to the expressions "notes due me at New Orleans," npart from the antecedent words, we are not prepared to say that they should be so rigorously construed as not to comprehend the *Humphreys*' debt. That debt was evidenced by a written promise to pay, embodied in the written act of sale.

It is said that by this interpretation of the will, John Brown is largely preferred to the other relatives, for all of whom the testator professed an affectionate regard, and a desire to do them justice. The preference created by the clause in question does not stand alone in this will. A preference was also given to him in an antecedent clause, which distributes the proceeds of specific property. The testator was the rightful judge of what was just in the distribution of his property; for, as he declared in his earsest and solemn appeal to them not to go to law about his estate, it was the fruit of his own industry. It is also worthy of remark that, with a single exception, John Brown was the nearest relative named in the will.

The argument is unsound, which the defendant derives from the expressions in an antecedent clause—"in other words that I may be considered as having died intestate, except as to the preference given," &c. These expressions

clearly relate to the specific property there disposed of; and the interpretation claimed by the defendant would be utterly inconsistent with all the subsequent dispositions, both specific and residuary.

CLARK V. PRESTOR.

It is contended that the debt in question was covered by the antecedent clause in the will, which disposes of the plantation and slaves. In support of this argument it is urged, that this price of the one-sixth sold to Humphreys, was part of the capital of the partnership, which, at the date of that sale, and by the same act, was formed between Brown and Humphreys. We do not so regard it. It was a matter distinct from the partnership. Although the debt was to be paid by the yearly appropriation of one-sixth of the nett proceeds of the crops, yet these annual payments were expressly stipulated, "to be made out of one-half part of the nett proceeds of the said plantation which will belong to the said Humphreys." The partnership was declared to exist between Brown and Humphreys, as equal owners of the plantation and slaves. If the partnership had made no profits whatever, Humphreys was bound absolutely, and without reference to the state of the partnership account, to pay the \$18,000 at the end of four years.

The decree of the court below in sustaining the claim of the plaintiffs has, we believe, fulfilled the intention of the testator.

Judgment affirmed.

DOAT v. MALTBY.

A new trial will not be granted on the affidavit of counsel of his ignorance of facts which were known to the party whom he represented before the commencement of the suit, but which were not communicated by him to his attorney, in consequence of the absence of the elient from the State at the time of trial. Per Curiam: It was the business of the client to give proper information and instruction to his counsel.

To entitle a party to a new trial, on the ground of the discovery of important evidence since the trial, it must be shown that it could not have been obtained by due diligence before. C.P. 560.

A PPEAL from the District Court of the First District, Buchanan, J. Augustin, for the plaintiff. Haynes, for the defendant. Durant, for the appellant. The judgment of the court was pronounced by

SERPELL, J. The only ground upon which the appellant asks the reversal of the judgment and this remanding of this cause is, that the application for a new trial, upon the ground of newly discovered evidence, should have been granted. A portion of the evidence stated in the affidavit for a new trial, involves facts within the knowledge of the party at or before the inception of the snit. The absence of the party from the State at the time of the trial, and the alleged ignorance on the part of his counsel of these facts, and of the names of the witnesses, afford no ground for relief. It was his business to have given the proper information and instructions to his counsel, before his departure. As to the rest of the evidence, the affidavit is defective, on the score of diligence. C. P. art. 560.

Judgment affirmed.

CAVELIER et al. v. Moss.

Where the declarations of a witness are the only evidence of his having been interested, and those declarations establish the release of that interest, they must be taken together as proving his competency.

Where, in an action of revendication instituted by a former possessor to recover a slave, both parties are in good faith, and claim under titles which they believe to be just, but neither has possessed under his title long enough to perfect it by prescription, their condition being equal the defendant cannot be evicted by a title not superior to his own.

A PPEAL from the Parish Court of New Orleans, Maurian J. Blacke, for the plaintiffs. W. H. Hunt, for the defendant. Prentiss and Finney, for the appellants. The judgment of the court was pronounced by

Rost, J. This is the action of revendication, based upon a just title not perfected by prescription, named in the roman law, Actio Publiciana.*

The plaintiffs purchased and took possession of a slave in the State of Mississippi, in 1838. They held him on their plantation in Louisiana till the year 1844, when he ran away, and, having found him in the possession of the defendant, they instituted the present action against him. The defendant pleaded a purchase from *Porterfield*, in Mississippi, in December, 1844; and also that his vendor had a good title. There was judgment against him, and he appealed.

The testimony of several witnesses, taken under commission, and offered by the defendant in support of his possession and title, was excepted to by the plaintiffs, and rejected by the court. It has come up with the record, and a perusal of it has satisfied us that it should have been admitted. Those witnesses were called upon by the defendant to testify against the interest they might have in the event of the suit, and did so testify. If they had not, their interest is only shown by their declarations, and those declarations establish their release; their evidence must be taken together. 1 Greenleaf on Evidence, nos. 95, 398, 422.

The evidence shows that the slave in controversy was in the possession of Sparks in 1834, and that he sold him to Elliott, in 1836; Elliott sold to Fox; Fox to Gray, Gray to Knox, in 1837, and Knox to Porterfield, in 1844. It is also shown that, in 1837, the slave ran away from Knox, who advertised him, and offered a reward for him; and that, in 1844, he was apprehended in Missinsippi, and delivered by the jailor to Knox, who paid the reward, and sold him to Porterfield, under whom the defendant claims.

The plaintiffs have not justified the pessession of their vendor, by showing a title in him under which they could prescribe. The defendant has equally failed to justify the possession of the original vendor, Sparks. Both parties are in good faith, and claim under titles which they believe to be just. Neither has possessed long enough under his title to perfect it by prescription. They are

The counsel for the plaintiffs, in an application for a rehearing, contended that the Publiciana in rem actio is inapplicable to the case of a fugitive slave. Here actio in his que usucapi nou possunt, puta furtivis, vel in servo fugitivo, locum non habet. Dig. lib. 6, tit. 2, l. 9, § 5. The action Rei vindicatio applies to such a case. The Actio Publiciana is unknown to our laws. The action before the court is simply a petitory action, or action of revendication, as it is termed by art. 43 of the Code of Practice.

[†] The judgment below was against the defendant; but in his favor against his warrantors, and the latter appealed. The answer of the defendant alleges that the purchase was made from Porterfield, in New Orleans. R.

of equal condition, and the defendant cannot be evicted by a title not superior to his own. "L'ancien possesseur de bonne foi n'est pas pareillement reçu à revendiquer la chose dont il a perdu la possession, contre un possesseur qui, sans en être propriétaire, la posséderait en vertu d'un juste titre. Car les deux partis étant dans ce cas d'égale condition, le possesseur actuel doit aveir la préférence. In pari causa, potier causa possessoris." Pothier, Droit de Propriété, no. 294.

CAVELIER OF MOSS.

It is therefore ordered, that the judgment in this case, as it affects the defendant and his warranter, be reversed; and that there be judgment against the plaintiffs, and is favor of the defendant and of the warranter, with costs in both courts.

WEBB, Under-tutor, v. THE UNION BANK OF LOUISIANA.

It is no objection to the validity of a mortgage executed by a married woman, under the 25th sec. of the stat. of 2 April, 1832, incorporating the Union Bank, to secure a loan made to her husband, that her rights were not explained to her, out of the presence of her husband, by the notary before whom the mortgage was executed. Per Curiam: The law requires that married women should be made acquainted with their rights, when about to renounce them; but the bank does not claim under a renunciation by the wife, but under a direct obligation, which she had capacity to contract.

A PPEAL from the District Court of the First District, Buchanan, J. Sheaf, for the appellant. Halsey, and Denis; for the defendents. The judgment of the court was prenounced by

Rost, J.* The plaintiff, as under-totor of the minor children of the late Agnes Hoggat and of John M. Morris, her husband, seeks to annul an act of mortgage, granted by her, jointly with her husband, upon certain slaves which were her separate property, to secure the payment of a loan made by the Union Bank to her and her husband, in the course of dealing authorised by the charter of that institution and in the usual form. The bank filed a general denial; but first excepted to the action, on the ground that it could not be maintained by the under-tutor, because the interest of the minors is not in this instance in opposition to that of their father and tutor. The court below, without noticing the exception, gave judgment on the merits in favor of the defendants, and the plaintiff appealed.

We are utterly unable to discover the object of this suit, and what end beneficial to the minors can be attained by it. If the act of mortgage was annulled, the bond in solido, to secure the payment of which it was given, would still remain, and bind all the property of the wife. Leaving the principal obligation in full force, and attempting to avoid that which is merely accessory to it, is a fancy proceeding in which minors should not be involved. But there is no pretext for the action itself. The power of attorney given by the deceased to Craveford, authorised him to execute all the acts of mortgage and obligation that might be necessary or expedient for securing a loan to her husband, and in her name to sign all and singular the instruments that might be required by the board of said bank, in order to bind the constituent in solido with her said husband.

^{*} Eusrus, C. J., being interested, did not sit in this case.

WEAD. UNION BANK. The act of mortgage in controversy was one of the instruments required by the board of the bank, and its execution by the attorney in fact was strictly within the scope of his authority.

The bank had nothing to do with the application of the fund borrowed; and the ground that the rights of Mrs. Morris were not explained to her on that occasion by the notary, cut of the presence of her husband, is untenable. The 25th section of the charter of the bank removes the disability of married women, and enables them to bind themselves and their property. The law requires that married women should be made acquainted with their rights by the notary, when they are about to renounce those rights. The bank does not claim under a renunciation of the wife; but upon a direct obligation which she had capacity to contract.

Besides these reasons, Mrs. Morris obtained in her life time a separation of property from her husband, caused the property mortgaged to be seld under her judgment, bought it, and held it, at the time of her death, subject to the bank's mortgage. It is doubtful whether the under-tutor had capacity to maintain the suit, but the case is se clear for the defendants that we have thought it best to decide it.

Judgment affirmed.

LEDOUX et al. v. Cooper et al.

Decision in Ledoux v. Anderson, ante p. 559, affirmed.

Where the fact of the purchase of certain property by the plaintiff appears to have been conceded throughout the proceedings, and the answer of a witness to an interrogatory propounded by the defendant positively establishes it, the evidence of title will be sufficient against the defendant in a case where the question of title is merely incidental.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Wharton, for the appellants.

Rawle, for the defendants. Plaintiffs have failed to prove the most important fact in the cause. They have not proved that they did buy the land. There is no evidence but the sheriff's deed. The parol evidence only shows that there was a sheriff's sale—rem ipsam. Without authority, the sale of a sheriff is nothing; and there is no proof of a transfer of title, unless there appears, if it exist, a judgment or order of court, a writ of execution, and the sheriff's returnupon it; they give a title without a deed, but the deed is of no use without them. It "adds nothing." C. P. 695. See cases of Dufour v. Camfranc, 11 Mart. 611. McDonogh v. Gravin, 9 La. 542. Reeves v. Towles, 10 La. 286. Thompson v. Rogers, 4 La. 12. Donaldson v. Rouzan, 8 Mart. N. S. 172-Same v. Winter, 8 Ib. N. S. 179.

The judgment of the court was pronounced by

Rost, J. This case does not differ in principle from the case of Ledoux et al., and erson et al., lately determined, ante p. 558. It involves a claim for the proceeds of the cotton shipped by J. A. Cotton to the defendants, from the plantation of the plaintiffs in West Feliciana, under the circumstances mentioned in the former case. The defendants resist the claim on the following grounds: That before the 3d August, 1844, Joseph A. Cotton, as executor of his father, and for himself, was indebted to them in the sum of \$7,804 43, for moneys paid and advanced to him, for supplies furnished to his plantation, and expenses paid by them for said plantation, on account of Cotton and

his father, at their special instance and request; that, in September, 1844, they received from the said *Cotton* eighty-three bales of cotton, upon which they have a privilege for the balance due them, and for their supplies and advances; that said cotton was made, grown, and saved, by the slaves and laborers of said *J. A. Cotton*. There was a judgment in their favor in the first instance, and the plaintiffs appealed.

In the case already cited, we held that Cotton could be considered in no other light than as agent of the plaintiffs, in preparing the crop for market and shipping it; the cotton and the land upon which it grew, having become the property of the plaintiffs by virtue of their purchase, on the 3d of August, 1844; and their subsequent agreement with Joseph A. Cotton, if any took place, not having been executed by him.

The point is made in this case, that there is no evidence of the purchase in the record, save the sheriff's deed, which is alleged not to be sufficient. This is not a petitory action, and the question of title is merely incidental. The fact of the purchase appears to have been conceded throughout the proceedings; and the answer of the witness, Sterling, to a question propounded by the defendants themselves, positively establishes it.

The only claim which the defendants have on the proceeds of the cotton sold by them, arises from the privilege given them by the act of 1841, for supplies furnished to the plantation during the year 1844. The mainer in which their account is made out does not enable us to ascertain the extent of their claim; and as this appears to be a hard case for them, we will give them an opportunity to adduce further evidence in relation to it.

The judgment is therefore reversed, and the case remanded for further preceedings, in conformity with the opinion of the court; the defendants and appellees paying the costs of this appeal.

VAN HORN v. TAYLOR et al.

The owners of a steamer will not be liable for the value of goods shipped under a bill of lading containing the exception of "unavoidable accidents and dangers of the river," and lost in consequence of a collision with another boat, where there was no fault or carelessness on the part of those who had charge of the steamer on which the goods were shipped, and it was not in their power to prevent the collision. Such a loss is the result of an unavoidable accident, or danger of the river, within the meaning of the bill of lading.

Where goods, atored on the deck of a steamer, to the knowledge of the shipper, who was a passenger, and without objection on his part, are lost everboard, in consequence of a collision with another boat, occurring without any fault on the part of those in charge of the steamer on which they were shipped, the shipper cannot recover their value from the owners of the steamer on which they were shipped, on the ground that they were lost from having been improperly stowed on deck, instead of in the hold.

A PPEAL from the Parish Court of New Orleans, Maurian, J. The defendants appealed from a judgment in favor of the plaintiff.

T. A. Clarke, for the plaintiff. The exception in the bill of lading is of "unavoidable accidents and daugers of the river." The adjective "unavoidable" qualifies the word "dangers," as well as "accidents," and has invariably been interpreted in this connection, to mean such overpowering force as is produced by auperhuman agency, and which human effort could not prevent. If, then,

VAR HORE

the cause of the accident was the mismanagement of the Emperor, it was not the result of vis major. This interpretation of the clause in bills of lading for transportation upon the western waters, has been adopted in two cases by the courts of Tennessee, viz.: Gordon v. Buchanan, 5 Yerg. Rep. 71, and Turney v. Wilson, 7 Yerg. Rep. 340. "If goods are injured by the wanton or careless collision of boats, the carrier is liable to the shipper, and must seek his remedy from the aggressor." Wright's Ohio Rep. 193. Whatever may be the doctrine in relation to marine collisions—whether, as relates to the mutua lrights of freighter and carrier, the carrier is responsible or not, where the bill of lading contains the exception "daugers of the sea," and the collision was not the result of his negligence—we contend that principles of public policy require in river navigation that the carrier should be held more strictly responsible. The reasoning in the cases of Trent Nav. Co. v. Wood, 3 Esp., 127, and Forward v. Pittard, 1 Term. 27, here applies.

C. M. Randall, for the appellants. The tobacco shipped on the defendants' steamer was well stowed. Abbot on Shipping, new ed. p. 423, note 2. 4 La. 211. Collisions are dangers of the river, within the exception of the bill of lading; and where they occur without fault on the part of those in charge of one of the vessels, they are, as to the owners of that vessel, "unavoidable accidents," for which they cannot be made liable. C. C. 2725. 3 Stewart and Porter, 176. The case cited from Wright's Ohio Reports, 193, is not law. It is a

solitary case, unsupported by reason or principle.

The judgment of the court was pronounced by

SLIDBLL, J. This is an action by a shipper, to recover from the owners of the steamer George Collier the value of certain goods shipped under a bill of lading containing the exception of "unavoidable accidents and dangers of the river." The defence is, that the goods were forced overboard in a collision with another steamer, which collision was caused by the fault of the other steamer. This cause has been already before the Supreme Court, and was remanded for a new trial. See 7 Robinson, 201. It was then said by the court, and in that opinion we concur, "that if there was no fault or carelessness on the part of those who had charge of the George Collier, and it was out of their power to have prevented the collision, we can see no good reason why it should not be considered as an unavoidable accident, and as one of the dangers of the river within the meaning of the bill of lading."

We have carefully examined the testimony in this cause, and while, on the one hand, we discover gross negligence, and something approaching even to wanton and malicious conduct, on the part of those in charge of the other boat, we find nothing in the evidence which would justify us in attributing the collision in any degree to the fault or negligence of the defendants' officers or crew. The obligation of the shipowner is a stringent one; and the interests of commerce, and the safety of human life, require that we should enforce rigidly the performance of their duty by the officers of vessels, for whom the owners are responsible. They are bound to constant vigilance, and if a case presents itself in which there is even slight fault, we should hold the owners answerable to the shipper. In the present case no fault whatever is attributable to the defendants' officers and crew.

It is said that the plaintiff's goods were improperly stowed on deck; that the deck load only was thrown overboard by the collision, the carge in the hold not being injured. The goods were thus laden with the knowledge and implied approbation of the plaintiff. He was a passenger on board the steamer, and does not appear to have made any objection to the goods being thus carried, though the collision occurred several days after the steamer commenced her younge. Moreover, it appears by testimony, that merchandise of that sort* is

[?] The merchandise shipped was tobacco in hogsheads. R

often carried on deck, and that underwriters do not charge a higher premium on such merchanduse, carried in that way, it being however considered the duty of the master to protect it from the weather. VAN HORS

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment for the defendants, with costs in both courts.

FORGAY v. LAMBETH.

The non-joinder of all the obligors in an action on an obligation alloged in the petition to be joint, can only be taken advantage of by exception in limine litis. The exception is avaived by an answer to the marits.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Watts and Spring, for the plaintiff. W. M. Randolph, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. Jacobs and Lambeth were joint owners of certain lots of ground in New Orleans. The municipality gave an order requiring them to be paved. Jacobs, with the authorisation of Lambeth, made a contract for himself and Lambeth, with Forgay, for this paving. The contract was fulfilled by Forgay. Jacobs paid his half to Forgay, who gave Jacobs a full discharge, and then brought this action against Lambeth, to recover his half of the price of the work. The defendant pleaded the general issue. He also pleaded specially that he had become bound to sell and convey the property alleged to have been paved, before the pavement thereof, to James Donaldson, and that if the same was paved, it was for the benefit of Donaldson, and not of respondent.

Upon these issues the parties went to trial. Witnesses offered by the plaintiff proved the contract for paving. From this testimony it clearly appeared that the liability of Jacobs and Lambeth was that of joint obligors; also, that Jacobs had paid his half, and had been fully discharged by Forgay. Upon proof of the contract, the defendant filed what he terms a peremptory exception, in which he suggested that it appears from the testimony of the witness, Jacobs, that he was jointly bound with the defendant upon the contract made with plaintiff, and moved the court to dismiss the suit. The court disregarded the exception, and refused the motion to dismiss. In this, we think, the court did not err.

What would have been the duty of the court if the joint liability had been presented for the first time by the evidence, is a question which it is unnecessary to decide. The averments of the petition sufficiently charge a joint obligation, and if the defendant decired to avail himself of the rule prescribed in art. 2062 of the Code, which requires all the joint obligors to be made parties, even although one of the joint obligors has discharged his part of the obligation, he should have excepted in limine litis to the non-joinder; and he has waived the exception by answering to the merits. The court has examined the cases cited cited by counsel, but does not consider them pertinent. In the case of The Mayor v. Ripley, 5 La. 122, the suit was brought against all the makers of a joint note. Before the case came to trial, the plaintiff discontinued as to three of the defendants. At the trial the remaining defendants moved a dismissal of the suit, which was granted by the court below, and sustained on appeal. In

FORGAY LAMBETH. Thompson v. Christian, 3 Rob. 26, the suit had been brought against all the defendants. The court below, for a supposed want of jurisdiction on the ground of domicil in another parish, dismissed the cause as to one; but on appeal it was held that, as the debtors were joint obligors, the plaintiff should have appealed from the judgment dismissing the action as to the co-obligor, and have kept him before the court till final judgment. In Duggan v. De Lizardi, 5 Rob. 226, all the co-obligors had been made defendants, and there was judgment against each for his proportion. Five of the defendants appealed, and the other defendants were not cited as appellees. There was a motion by the plaintiff to dismiss the appeal, on the ground that the action was against joint obligors, and that all the defendants in the court below were not made parties to this appeal. The motion was sustained, and the appeal dismissed. In none of these cases was there an implied waiver of the exception.

The testimony of Jacobs was excepted to, on the ground of interest. It was properly admitted. He had no interest in favor of Forgay, the party calling him. He had paid Forgay, and had been fully discharged. How the interest of the witness could be promoted by the the recovery of Forgay, against Lambeth, we are unable to perceive. It is said that, as co-obligor, he was liable in solido for costs, although he had discharged his part of the obligation. C. C. art. 2082. He would have been so liable, if he had been sued; but he was not made a party defendant, and Lambeth, as we have seen, had, by his pleading, waived any objection on that score.

The liability of the defendant is fully proved. The case does not appear to us to rest upon the testimony of a single witness. The corroborating circumstances are abundant.

When the contract was made a sale to Donaldson was in contemplation, but not executed nor recorded. Lambeth was the apparent owner. The contract was for a fair and reasonable price; it was made by Jacobs, Lambeth's co-proprietor, with his authorisation and approval. The credit was given to them. If Donaldson has had the benefit of the work, that may give rise to a question between him and Lambeth, but does not soncern Forgay.

Judgment affirmed,

COPLEY v. BENTON, Executor, et al.

the same and the second of the same of

Where the words of a receipt leave its meaning doubtful, the testimony of witnesses is admissible to explain it.

A PPEAL from the District Court of Carroll, Mayo, J. S. W. Downs, for the appellant, contended that the parol evidence to explain the receipt was inadmissible, citing 5 Mart. N. S. 251. C. C. 2256.

Short and Drew, for the defendants. The judgment of the court was pro-

Kins, J. The plaintiff claims in this action \$512 50, for his fee as an attorney, and for costs paid, in a suit instituted by *Martha A. Barton*, as the executrix of her husband. There was a judgment for \$4 75 rendered in the court below in favor of the plaintiff, from which he has appealed.

COPLEY 0. BENTON.

The defence mainly relied on is, that the sum claimed in this suit was inclued in a receipt given on a general settlement of all accounts, made between the plaintiff and W. M. Benton. The language of a part of that receipt left the meaning of the instrument doubtful, and a witness was called to explain the intention of the parties. The introduction of this testimony was opposed by the plaintiff, but the grounds of objection are not stated in the bill of exceptions. It was clearly admissible to explain the receipt. 8 Mart. N. S. 542, and authorities there cited. The testimony of this witness appears to have satisfied the district judge that the sums now claimed were included in the settlement and receipt, and we are not prepared, on this question of fact, to dissent from the conclusion at which he arrived. The witness is uncontradicted; his veracity is not impeached; and the judge below, who heard him testify, seems to have based his judgment upon his testimony.

Judgment affirmed.

McNamara et al. v. Janvis et al.

The failure of any of the obligors named in an instrument to sign it, authorises the others to retract; but they must do so seasonably, before the contract takes effect.

Where in an action by creditors against the sureties in an administrator's bond, defendants plead that they have been discharged by the gross negligence of plaintiffs, it is an administration of their limbility unless negligence be shown, and a waiver of any defects of form in the execution of the bond.

A PPEAL from the Second District Court of New Orleans, Canon, J. Psyton and I. W. Smith, for the plaintiffs. Winthrop, for the appellant, cited Wells v. Dill, 1 Mart. N. S. 593. Pothier, Obilg. no. 11. 4 Cranch, 219. The judgment of the court was pronounced by

Rost, J. The plaintiffs, being creditors of the late John Dwyer, were placed as such, for the dividends coming to them, on the tableau of distribution filed by the administrator of his succession. The tableau was duly homologated, and the administrator having failed to pay over the dividends, writs of fi. fa. were issued against him, and returned by the sheriff—no property found. This action was instituted against the sureties on the administrator's bond, for the amount of the unpaid dividends. The defendant, Jarvis, filed a general demial; admitted his signature to the bond, but resisted the claim of the plaintiffs, on the ground that he was discharged from all liability, in consequence of their gross negligence and inattention in enforcing their claims against the administrator. He further alleged that, if not so discharged, Mary, and Sally Dwyer, two of the plaintiffs, had received on account the sum of \$400, for which credit should be given. There was judgment, in solido, against him and another of the defendants, and he appealed.

The allegations in the answer of the appellant are not sustained by proof; but his counsel asks the reversal of the judgment, on a point not put at issue. He alleges that the name of *Goodrich*, one of the sureties named in the body of the bond, was signed without authority by his attorney in fact, *Thomas*; and that the name of *Stetson* was substituted for that of *Andrews*, who did not sign the bond, although his name is also inserted in the body of it.

McNamana 9. Janvin Had this plea been made in the answer, we are not prepared to say that, after the appellant had suffered the contract in which he entered to be executed without opposition and rights to be acquired by third persons under it, he could avail himself of that informality. We admit the doctrine, contended for by the appellant, that the failure of any of the obligors named in the instrument to sign it, gives the others the right to retract. But we apprehend that it is incumbent upon them to do so seasonably, and before the contract takes effect. The opinion of Judge Marshall, refied on by the appellant, clearly lays down the distinction. The question in that case was, whether the instrument was delivered absolutely, or merely as an escrow. On the evidence adduced, the court considered that a jury might well have found the issue in favor of the defendants, and gave judgment on the demurrer accordingly. But if it had been clearly shown that the instrument had been delivered absolutely, the judgment must have been otherwise. 4 Cranch, 219.

But this plea appears to us inconsistent with the answer, and cannot be entertained. The allegation that the sureties were discharged in consequence of the gross negligence of the plaintiffs, necessarily admits the liability of the defendants, if negligence is not shown. This defence is a waiver of all defects of form, and the appellant must abide by the issue he has deliberately made.

Judgment affirmed.

DREW v. ROBERTSON.

Ohe who endorses a note to which he was not a party, is presumed to bind himself as surety.

A PPEAE from the Fifth District Court of New Orleans, Buchanan, J. J. Dunlap, for the appellant. Benjumin and Micou, for the defendant. The judgment of the court was pronounced by

Kino, J. This suit is instituted to recover the amount of two promissory notes, drawn by Felix Bosworth, physble to the order of the defendant, and endorsed by the latter. Upon each the name of the plaintiff appears as second endorser. The plaintiff alleges that he endorsed the notes at the request of the defendant, as the guaranter of the latter, for the purpose of facilitating their negotiation, and that he has since been compelled to pay them. The defence set up is, that the plaintiff gave the notes to the defendant in payment of a debt, and endorsed them as a guaranter of the maker. There was a judgment in the court below in favor of the defendant, and the plaintiff has appealed.

It appears from the evidence, that the plaintiff purchased a quantity of merchandise from the defendant, for which he stipulated to give to the latter in payment notes and other demands against third persons. In pursuance of this agreement he caused two notes to be executed by Felix Bostootth, who was his debtor, payable to the order of the defendant, and delivered them to the latter. Whether or not they have the endorsements of the plaintiff at the time of their delivery, does not appear. The defendant, however, subsequently gave them in payment to Turner & Woodruff, and at that time the name of the plaintiff figured on the back of each, as second endorser.

The plaintiff does not pretend that he intended to incur the liability of a setcond endorser, and it is clear from the evidence and the nature of the transaction, that such was not his intention. It devolved upon him then to show that the intention of the parties and character of the endorsement were those alleged in his petition, otherwise he is presumed, by the settled jurisprudence of the State, to have bound himself as surety. No such proof has been made. 1 Ann. Rep. 249, 274. This legal presumption is strengthened, in the present instance, by the fact that the notes were given in payment of a debt due by the plaintiff to the defendant, and that while they were in the possession of the latter, they bere the endorsement of the plaintiff.

Judgment affirmed.

DREW W. BOBERTSON.

Muir, Syndic, c. HENRY et al.

The validity of a sheriff's sale cannot be tested by a rule, taken by the purchaser on the plaintiff in execution, to show cause why the adjudication should not be set saide.

A debtor in whose possession property is seized to satisfy his vendor's mortgage, who, after notice of the proceedings, appears at the sale and purchases the property, cannot afterwards complain of any irregularities in the proceedings, nor can they affect the title to the property in his hands.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J.

Limore and W. W. King, for the plaintiffs. A rule is not the proper remedy to set aside a sheriff's sale; the remedy is by an action against the possessor of the property. Where the debtor is himself the purchaser he cannot bring suit. He possesses by a good title, because he is in no danger of eviction. The informalities in the sheriff's sale, if any, were cured by the debtor's appearance and purchase of the property. 1 An. R. 11. C. C. arts. 1810, 1811, 1812. 1 Story's Equity, p. 365 and note.

Holland, for the appellants.

The judgment of the court was pronounced by

KING, J. The defendant became the purchaser at a syndic's sale of a house' and let, together with seventy shares of the capital stock of the Citizens' Bank, for which the property was mortgaged. A part of the price was paid in cash, and, to secure the notes given for the residue, a mortgage was retained by the syndic. The notes not having been paid at their maturity, the syndic obtained an order for the seizure and sale of the hypothecated property, in virtue of which the sheriff seized the house and lot, and, after the usual advertisements, offered them for sale, but there was no adjudication, for the want of bidders; they were not readvertised for sale at twelve-months, but, after the lapse of ashort time, a second seizure was made of the mortgaged property, together with the seventy shares of stock, all of which were offered for sale for cash, but failing to bring two-thirds of their appraised value, they were not adjudicated, They were readvertised for sale, at twelve-months' credit, and adjudicated to the defendant, Henry, who promised to furnish his bond for the price, with Jonathan Davis as his surety. Subsequently, however, he declined giving his bond, and took a rule on the syndic to show cause why the adjudication should not be set uside, on the ground that the sheriff had no authority to make the seizure and sale. This rule was discharged. The plaintiff then took a rule on the defendant and Davis, to shew cause why they should not execute their twelve-months' bond for the price of the adjudication, and this rule was made absolute. From the judgments rendered on these rules the defendants have appealed.

MUIR O. HENRY.

There is no error, in our opinion, in the judgment appealed from. We are not prepared to recognise the defendants' right to test the validity of the sheriff's sale on a rule. Admitting, however, for the purposes of the present investigation, that the proper remedy was resorted to, the appellants have not presented a case which entitles them to the relief for which they ask. No specific cause of nullity is alleged. The averment is, in general terms, that the sheriff was without authority, but wherein his authority was defective is not stated. The officer appears to have been acting in virtue of a writ legally issued, under a judgment rendered by a competent tribunal, and unappealed from. If there were irregularities, however, the defendant Henry cannot complain of them, nor can they affect the title to the property in his hands. He was the debtor, and the property was seized in his possession to satisfy the vendor's mortgage. He had notice of the proceedings, and with a knowledge of the sheriff's acts became the purchaser. No other party complains of having sustained injury by reason of irregularities in the proceedings; and the appellant Henry, by appearing at the sale, bidding, 'and' becoming the purchaser, waived and cured all defects, if any existed.

The evidence shows that Davis promised to become the surety of the defendant on a twelve-months' bond, in the event of the latter's becoming the purchaser of the property. Davis has not objected to the propriety of the proceedings against him by rule.

Judgment affirmed.

AMIS V. THE MERCHANTS INSURANCE COMPANY.

In the absence of evidence to the contrary, it will be presumed that payment was made by the party bound, and not by another.

The fact that a party was erroneously condemned by the court of the first instance to pay half the costs of the action, will not authorise a reversal of the judgment on appeal, where no application was made to the court below to correct the error.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Pepper, Stockton, and Steele, for the appellant. L. Peiree, for the defendants. The judgment of the court was pronounced by

Rost, J.* The only question presented by the appellant, Amis, for our consideration is, whether a sum of \$2,500 received by the defendants, was paid by the appellant for the accommodation of Theophilus Freeman, their debtor, or by Freeman himself. The judge of the court below being of opinion that the evidence did not satisfactorily show its payment to have been made by the plaintiff, gave the defendants the benefit of his doubts, and dismissed the claim.

A careful perusal of the evidence has satisfied us of the correctness of the judgment. The plaintiff did not substantiate his allegations, and the legal presumption is that the payment was made by the party bound.

The appellant further complains that, he was adjudged to pay half of the costs in the court below, although he partially succeeded. He should have applied to that court to correct the error, if it be one; and as he neglected to do so, it is not a sufficient ground for the reversal of the judgment. Grailhe v. Hown, 1 Annual Rep. 140.

^{*} SLIDELL, J. did not sit in this case, having been of counsel.

The appellees have asked that the judgment be amended in their favor, in relation to the other matters passed upon by the court below; but we are satisfied, it has done justice between the parties.

AMIS

W.

MERCHANTS
INSURANCE
COMPANT.

Judgment affirmed.

Succession of GIROD.

The compensation due to a parish judge for the sale of property belonging to a succession though opened in another parish, is that fixed by sec. 5 of the stat. of 28 March, 1813. He is not entitled to the commission allowed to ordinary auctioneers on sales made by them.

A PPEAL from the Second District Court of New Orleans, Canon, J. Bodin, for the appellant. Duvigneaud, for the executors, contra. The judgment of the court was pronounced by

Rost, J. The appellant, being at the time parish judge of the parish of Assumption, was directed by the Court of Probates of this city, to advertise and sell the property belonging to the succession of the late Nicholas Girod, situated within that parish. He made the sale, and was placed on the account rendered by the executors for the fees allowed in such cases by the 5th section of the act establishing an explicit fee bill, approved March 28th, 1813. Bul. & Curry's Dig. 439.

The appellant opposed the account, on the ground that the succession, not having been opened in his parish, he did not make the sale by virtue of his office, and was entitled to the commission allowed by law to ordinary auctioneers. His opposition was dismissed, and he appealed. The law relied on by the appellees provides that, in all sales of property belonging to an estate, parish judges shall be authorised to charge and receive one per cent on all sums not exceeding \$5000, and half of one per centon all sums exceeding that amount, and no more. The counsel for the appellant states that the only difficulty is to ascertain whether this provision refers and applies exclusively to property of successions opened before the judge himself, or to the property of any succession whatever.

We are unable to perceive any difficulty in the matter. The law-giver was well aware that the property of successions is often situated in different parishes, and has made ample provision for its administration in such cases. He has, among other things, provided that a uniform commission shall be paid for the judicial sale of it, without reference to its locality. The regulation is in every respect a proper one. The letter of the law which establishes it is clear and free from all ambiguity; and the attempt to disregard it, for the purpose of discovering aliunde the mens legislatoris, would, in a case like this, be a pretent indeed. C. C. art. 13.

Judgment affirmed.

DAVID v. FERRAND.

A debter of one declared a bankrupt under the act of Congress of 19 Aug. 1841, when proceeded against by an individual creditor of the bankrupt for the purpose of obtaining, separately, satisfaction of his claim may set up in defence the exclusive right of the assignee of the bankrupt to recover the debt, and the pendency of a suit instituted by the latter for that purpose.

A PPEAL from the Second District Court of New Orleans, Canon, J. Da-vid, appellant, pro se. L. Janin, for the defendant. The judgment of the court was pronounced by

King, J. After Louis Ferrand had been declared a bankrupt, the plaintiff, as curator of M. A. Hugwin, instituted a suit against him, and recovered a judgment for a sum of money. Under the execution which issued upon this judgment, the plaintiff caused to be seized, in the hands of François Auguste, rents which had accrued upon certain property in St. Philip street, of which Auguste claims to be the owner. The plaintiff also presented to the district judge a petition, in which he averred that Auguste had received rents to an amount sufficient to satisfy his judgment with interest and costs, from the property in question, which property this court declared in the case of Bernard v. Auguste, 1 An. R. 69, to belong to neither of the parties to that controversy, but to the creditors of Louis Ferrand, and that, as a creditor of Ferrand. these regts were subject to seizure, in satisfaction of his claims. He concluded with a prayer that Auguste should be required to answer under oath certain interrogatories appended to his petition, the object of which was to ascertain the amount of rents received. To this petition Auguste excepted, and averred that, from the plaintiff's own allegations, if true, the assignee of the bankrupt alone had the right to recover the property and rents, and that the assignee had instituted a suit against him for that purpose, which was then pending in the District Court of the United States. He also took a rule on the plaintiff to show cause why seizures of rents, made in the hands of his tenants, should not be set aside. The exceptions were austained, and the rule made absolute in the court below; and the plaintiff has appealed.

We think there is no error in the judgment appealed from. If the property upon which the ronts accrued belongs, as is alleged, to Ferrand's creditors, it can only be claimed by the assignee of the bankrupt, for the benefit of all the creditors. Individual creditors cannot be permitted to enforce their claims separately upon it, the effect of which would be to defeat the ends of the bankrupt law, one of the purposes of which is to distribute the proceeds of the bankrupt's estate generally among the creditors, with such privileges and preferences as are established by the act. It was competent to Auguste to make this defence, as a writ was actually pending against him to recover the property in question.

Judgment affirmed.

HOFFMEYER, Assignee, v. WHITE.

A new trial will not be granted on the affidavit of a party that, a person whose testimony was important in the cause, but who had not been summoned because he had declared that he was interested, had, since the trial, informed the applicant that he had become a competent witness. Held, that the interest of the witness was a question upon which the opinion of the court should have been had, and that a new trial should not be granted.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Mott, for the appellant. Edwards and Hays, for the defendant. The judgment of the court was pronounced by

Rost, J. Judgment having been rendered in favor of the defendant in this case, the plaintiff moved for a new trial, and supported his motion by an affidavit, stating that, since the trial, he had discovered testimony important to the cause, which he could not, with due diligence, have discovered before, which testimony, says the affidavit, is that of H. Griffon, Esq., who will testify, "that the pretended payment was not made to Barrett & Lepage, and that the entry in their books was an error; deponent applied to said Griffon before the trial for his testimony, and he was then informed by said Griffon that he could not testify, as he was interested; but deponent avers that the said Griffon has, since the trial, on the 19th day of December, 1846, informed deponent that he has no interest in the suit, and that he has become a competent witness, and will testify to the facts above set forth." The new trial was refused, and the plaintiff appealed.

We cannot interfere with this judgment. The evidence mentioned in the affidavit was not discovered after its rendition. It was known to the plaintiff long before, but he did not call on the witness to testify, because the latter had told him that he could not do so on the ground of interest. This was a question upon which the opinion of the court ought to have been had on the trial, and the omission of the plaintiff in that respect cannot be made by him the ground of a new trial.

We have no means of ascertaining how the supposed interest of the witness has ceased; but we are satisfied that applications of this kind should, as a general rule, he discouraged, on account of the great inducement which the granting of them would give to false swearing and perjury.

Judgment affirmed.

CREAR v. Sowles.

Acts of transfer of immovables, whether passed before a notary or not, have effect against third persons only from the time of their registry in accordance with the stat. of 20 March-1827. The stat. of 26 January, 1838, making it the duty of notaries in New Orleans to cause to be registered in the conveyance office all acts passed before them, which by law ought to be so registered, does not exempt the party to whom the immovable is transferred from the duty of seeing that it is so registered; that statute may give him recourse against the notary, but does not affect his rights as against third persons.

CREAR U. SOWLES.

A PPEAL from the Fifth District of New Orleans, Buchanan, J.

A Elwyn, for the appellants, cited stats. of 20 March, 1827, and 26 January, 1838. McManus v. Jewett, 6 La. 530. Planters Bank v. Allard, 8 Mart. N. S. 136. Hagan v. Williams, 2 La. 122. Doubrere v. Grillier, 2 Mart. N.

5. 171. Grenier, Hypothèques, 1 part. ch. 1, sec. 2, § 2.

T. J. Lacy and Preston, for the defendant.

The judgment of the court was pronounced by

Rost, J. On the 11th of April, 1845, the plaintiff purchased by notarial act from Michael Glassgow, a house and lot situated in this city. The sale was not registered in the office of the register of conveyances till the 5th of July of that year. On the 2d of July, three days before the registry, the defendant, being a creditor of Glassgow, caused the house and lot to be attached as his property, and, after obtaining judgment against him, had them advertised to be sold. The plaintiff enjoined the sale, alleging the foregoing facts, and farther that his act of sale was not registered before, through the neglect of the notary, who had promised to attend to the registry, and had received the fees to be paid to the register.

The defendant took a rule upon the plaintiff to show cause why the injunction should not be dissolved, on the following grounds: 1. The petition sets forth no good and sufficient cause why the writ should have issued. 2. The facts disclosed by the petition clearly show that, the defendant's lien by attachment is prior in point of time, and has preference to his pretended deed of conveyance. The court, after a hearing, dissolved the injunction with ten per cent interest on the amount enjoined, and fifty dollars as damages.

The plaintiff moved for a new trial, and supported his motion by an affidavit, alleging new matters. But the court adhered to its decision, and judgment was rendered accordingly, that the injunction be dissolved, and that the plaintiff and his surety pay, in solido, the interest and damages. The plaintiff and his surety have appealed,

The appellee exclusively relies upon the provision of the registry act of 1827, that acts of transfer of immovables not registered agreeably to law, whether they are passed before a notary public or otherwise, shall have no effect against third persons, but from the day of their being registered. For the appellants, it is contended that, in the case of Hagan v. Williams et al., which involved the question at issue, the former Supreme Court intimated that a case might be made out, in which a vendee, situated as the plaintiff now is, would be entitled to relief, and that this is such a case. 2 La. 122.

We are unable to come to that conclusion. In this case, as in that, the purchaser has failed to account satisfactorily for the delay in making the registry. The act of 1838, requiring the notary to make it, did not dispense him from seeing that it was made. It probably gives him a recourse against the notary, but it does not affect the rights of an attaching creditor. Registry laws ought not to be so interpreted, as to enable third persons to commit frauds upon bond fide purchasers. But fraud is not alleged in this case. The fact of knowledge of the transfer by the defendant is not even put at issue, and is only mentioned in the affidavit made to obtain a new trial. If it had been, knowledge by itself is not a badge of fraud. The defendant may well have believed, as alleged in his answer, that the sale was simulated, and, if it was, he was justified in treating it as a nullity.

Judgment affirmed.

LEE v. HIS CREDITORS.

The extreme term for the duration of privileges for work done, or materials furnished, for the construction of a steamer, is sixty days, where the boat has been for that length of time engaged in making trips between this port and those of other States.

Privileges on steamers or other vessels established by the laws of other States, unless expressly recognised by our laws, will not be enforced here. Per Curiam: The framers of our Code did not intend to confine their legislation on the subject of the privileges on steamers or other vessels to such as are owned in this State; they laid down general rules as to the distribution of the proceeds of such vessels, without regard to their origin, or the place of their owners' residence.

A nation within whose territory personal property is found, has as entire jurisdiction over it while there, as it has over immovable property. Its exercise, for all purposes, is a question of policy.

Privileges established by the laws of another State for work or labor furnished for the construction of a steamer form no part of the contract itself, and cannot follow the property into this State, when no such privilege exists here.

In the distribution of insolvent estates, no distinction is recognised among creditors dependent on the place of origin of the debts. The distribution is made as of the proceeds of a common pledge, according to the order of privileges and mortgages established by the Civil Code.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J.
The facts of this case are stated in the opinion of the court.

Wray and Hoffman, for the appellant. The main question in this case is—Shall the liens granted under a foreign law be enforced by the courts of Louisiana, in an insolvent proceeding, to the prejudice of liens acquired under our laws, and to the injury of ordinary creditors? The court a quá considered that the lien under the law of Kentucky, was part of the contract: that the place of the contract was Kentucky; and that it was bound to give the same effect to the contract as if the suit was to be tried in Kentucky.

1st. We contend that New Orleans was the place of contract. The drafts are all payable in New Orleans. The contract was to be performed here, and the parties evidently had in view the laws of Louisiana, in reference to the execution of it. Contraxisse unusquisque in eo loco intelligitur, in quo ut solveret se obligavit. Dig. lib. 21, tit. 2, l. 6. Story on Conf. of Laws, § 233, 270. Prentiss v. Savage, 13 Mass 23. 2 Kent's Com. 459.

2d. Should Kentucky be considered the locus contractus, still its laws can have

2d. Should Kentucky be considered the locus contractus, still its laws can have no extra-territorial force and effect. Remedies are to be governed by the lex fori, not by the lex loci.

3d. The principle that the lex loci as to privileges is to govern, does not hold where there are domestic liens to be enforced. Story on Conf. of Laws, § 323; and Chief Justice Marshall, in Harrison v. Sterry et al. 5 Cranch 289, says: "The law of a place where a contract is made is generally speaking the law of the contract; i. e. it is the law by which the contract is expounded. But the right of priority forms no part of the contract. It is extrinsic, and rather a personal privilege dependent on the law of the place where the property lies, and where the court sits which is to decide the case." See Huberus, de Con. Leg. tom 2, lib. 1, tit. 3, § 2. Idem. tom 2, lib. 1, tit. 3, § 11. "It is also requisite," says Fonblanque, "to give a binding force to a contract entered into in another country, that it does not violate the rights of persons not parties to it. To this qualification of the rule may be referred those cases in which courts of justice refuse to enforce contracts entered into abroad, which, though there valid, either violate some moral duty, or are inconsistent with a positive right accrued to a third person under the law of the country in which such inconsistent claim is sought to be made available." Fonblanque's Equity, 444. Also the case of Smith v. Union Bank, 5 Peters, 518.

LEE ... CREDITORS.

4th. The court a qud, considering itself bound by the comity of nations, upholds these foreign liens. But the comity of nations becomes inoperative, when the lex loci and the lex fori, as to conflicting rights acquired under each, come in direct collision. Kent's Com. 2 vol. 461. Story on Confl. of Laws, § 327. Saul v. His Creditors, 5 Mart. N. S. 596. By the law of Louisiana privileges on steamboats and vessels are extinguished in sixty days from their creation, if the vessel perform her usual voyage. C. C. 3204, 3211, 3212. 10 La. 75. Under our law the opponents can claim as ordinary creditors only.

5th. No nation is bound to recognise or enforce any contracts which work positive injury or inconvenience to its citizens, or those chiming under its laws. LeBreton v. Nouchet, 3 Mart. 68. Oliver v. Townes, 2 Ibid. N. S. 93. Privileges are only allowed when expressly granted by law. C. C. 3152. 17 La. 443. 18 La. 73. Under art. 3204, furnishers of materials and workmen employed in the construction, &c. have a privilege, if the vessel has never made a voyage; and of course no privilage if she has made a voyage. Terry v. Terry, 10 La. 75. Grant v. Fial, 17 La. 158. Under the law, and its judicial interpretation in this State, there can be no privilege on ships and vessels after the lapse of sixty days, and yet this court is called on to recognise a privilege under circumstances in which the law of the State declares that no privilege shall exist. The injury to commerce which the recognition of these foreign liens would cause is manifest. The purchase and sale of ships and vessels would be at

once arrested. Oliver v. Townes, 2 Mart. N. S. 93.

6th. The liens sought to be enforced, are extinguished by prescription. C. C. 3244, § 4. Prescription is part of the remedy, and is governed by the lex fori. C. P. art. 13. Under art. 3204, § 8, builders have a privilege if the vessel has never made a voyage, which is lost if she has made a voyage in the name of a purchaser. Art. 3210. A voyage is a departure from one port and arrival at another, or the being out sixty days. Art. 3211. It is wholly inconsistent with these provisions of law, that the creditor can retain his privilege, if he give a credit, as was done in this case, of 3, 6, or 12 months. The term of sixty days is now settled to be the limit of the privilege on steamboats navigating to distances which do not come within the meaning of the term voyage. This is the judicial interpretation of the law, and leans in favor of creditors. See

Terry v. Terry, 16 La. 6. Shirley v. Fabrique, 15 La. 140.

Mott, contra, cited Whiston v. Stodder, 8 Mart. 95, 133. Sabatier v. Creditors, 6 Mart. N. S. 585. Ohio Insurance Co. v. Edmondson, 5 La. 298. Sto-

ry, Confl. Laws, § 401, et seq.

The judgment of the court was presounced by

Eustis, C. J. This case was determined in the District Court, after a very elaborate examination of the subject involved in it on the part of the district judge, who has given us the benefit of his views in an able and well prepared written opinion. The decision of the district judge was given in favor of certain claims for work done and materials furnished in building the steamer Old Hickory, in Kentucky, in preference and adversely to an asserted privilege of the vendor. The party representing this privilege has appealed, and the case has been argued at bar principally with respect to the relative rank of the privileges claimed by each.

By a law of the State of Kentucky, workmen and material-men have a lien or privilege on the boat, which may be enforced at any time within twelve months, even against a purchaser without notice; and steamers, indebted to that class of creditors, coming within that commonwealth, are subject to the lien or privilege. The district judge considered all the parties before him as non-residents, and the enquiry was not embarrassed with the distinction between the rights of domestic and foreign creditors.

It is contended by the counsel who argued the case for *Handy*, representing the vendor's privilege, who is the appellant, that in a *concurso* or litigation of all the creditors of an insolvent, opened in this State, a privilege existing under the law of another State, cannot be recognised or enforced by our courts. It is

LEE

rather singular that this question has never been determined by the Supreme Court of this State, and we are not aware of its ever having been presented to the consideration of the court of the last resort, although in the courts of the first instance scarcely a month passes in the business season without the seizure or sale of a vessel or steamer, and the judicial distribution of the proceeds among the conflicting claims of creditors.

We deem it first necessary to ascertain what privileges the appelless, Gloser and others, would have under our laws, supposing their contracts to have been made, their work done, and materials furnished the bonf, in the State of Louisiana. The steamer made her first trip from Louisville, in December, 1845. From her arrival in New Orleans, until she was attached and surrendered, in May, 1846, she was engaged in the Nashville trade. She had been making voyages during five months, before the appelless attempted to enforce their privilege.

We consider that the extreme term for the duration of privileges on steamers, when engaged in making voyages between this port and those of other States, is sixty days. The subject was first brought to the consideration of the Supreme Court, in 1836. Vide Terry v. Terry, 10 La. 79. In the case of The Fulton Company v. Wright & Harris, decided in the year, 1837, the judge of the late first judicial District Court, thus expressed himself on this subject:

"I have on various occasions expressed my difficulties on the subject of administering the law relative to privileges on vessels. The articles of our Code on this matter are taken from the French Code of Commerce, and some of them cannot be applied, for they contain expressions which refer to a system not known with us. The article 192, nos. 6 and 7, refers to a system of registering claims against vessels with the clerk of the tribunal of commerce, within ten days after the departure of the vessel; and other articles of that Code are framed with a view to that registry, viz: those describing the voyage, &c. The very language of these last articles we have adopted, while the system of the registry of claims, which makes them reasonable and practicable, is unknown to us. I consider that the term voyage does not apply to boats on rivers, lakes, &c. Either then there is no privilege, or it must receive a reasonable limitation. I have adopted the period of sixty days, by analogy to art. 3212, as the period within which these claims must be asserted, where there are conflicts of rights."

A motion was made for a new trial, on which this question was again considered, and we believe since that case it has been held to be settled, with the general concurrence of the bar. This interpretation received the sanction of the Supreme Court in Shirley v. Fabrique, 15 La. 140. We therefore conclude that, under our law the appellees had no privilege on the proceeds of the steamer at the time of the attachment.

Being aware that our courts had frequently had this subject before them, we directed an examination to be made of the cases decided by the late Commercial Court of New Orleans, distributing the proceeds of steamers among the different privileged creditors.

In the case of Berthoud v. Wm. T. Gray and Steamer Caledonia, no. 6807 of the suits of that court, Judge Watts, who decided the case of The Fulton Company v. Wright & Harris, after an elaborate review of his whole course of decisions on the subject of privileges during a period of twelve years from the

LEE .

time he had presided in the District and Commercial Courts, touching on the question of privileges given by the laws of other States, says:

"Another principle which I have found it neccessary to adopt is, that privilege is governed by the law of the forum, and not of the place where the debt was contracted. In the distribution of the proceeds of a steamboat which came from Pittsburg, claims for privilege, the duration of which was one year under the laws of Pennsylvania, Ohio, Kentucky, Tennessee, Mississippi, and Louisiana, were presented. Such a system was manifestly impracticable, and the rule was adopted of regulating privileges by the law of the forum. It has, however, produced inconveniences, for a steamboat, sold to pay her debts under a decree of the courts of Louisiana, has been taken from the purchaser at St. Louis under the claim of privileges given by the laws of Missouri, and re-sold to enforce the privileges.

"It is presumed, however, that more mature reflection will demonstrate the impractibility of permitting the laws of lien or privilege to follow moveables into a new jurisdiction. That lien or privilege is part of the remedy seems clear, when we consider the purpose for which they are given. They are the means of enforcing a right, which right is always the payment of a sum of money; and a privilege or lien is the means of compelling the payment, and is analogous to a seizure or execution. We do not respect mortgages given in other States, when they are claimed on negroes brought into Louisiana. A party who claims a privilege on a moveable, must not permit that moveable to leave the jurisdiction of the State or country which confers the privilege. The utter impractibility of paying any attention to the laws of lien or privilege of other States on vessels or other moveables, is a complete answer to any claim of right founded on the laws conferring such privileges or liens.

"I consider that my opinion on this subject is entitled to some authority, as a long administration of justice in the courts of the first instance enables me to comprehend the bearing of these kinds of rules in practical affairs of this nature."

Judge Buchanan, who succeeded Judge Watts on the bench of the late First District Court, states the practice to have been uniformly to the same effect.

Without being required to assent to the principle adopted by Judge Watts, as to liens and privileges in all cases apportaining exclusively to the remedy and as such regulated by the law of the forum alone, it must be admitted that the views given by him as to the impractibility of the opposite system are sound, and that his exposition of the law and the practice of our courts under it in relation to privileges on ships and vessels, is in accordance with the textual provisions of our Code.

Privilege can be claimed only for those debts to which it is expressly granted in this Code. C. C. art. 3152. This article has always received the construction from our courts which its terms import, and no privilege by implication, or other than that created by positive enactment, has been recognised. Grant v. Fial, 17 La. 158. Hoffman v. Laurans, 18 La. 72. First Municipality v. Hall, ante p. 549.

Art. 3202 provides that the following debts are privileged on the price of ships or other vessels, in the order in which they are placed: they are eleven in number, and the material-men, seamen, and others are provided for in their order, and provision is made in subsequent articles for the lose and extinguishment of privileges. We are not aware of a single case in which any privilege has been

recognised in the distribution of the proceeds of a vessel, other than those mentioned in the Code.

LEE v. CREDITORS

The policy of our system, which confines privileges to those expressly created by law, is very obvious to those who have had the means of observing the abuses to which its extension would necessarily lead. It would be impossible to prevent collusion between the owner of a vessel and creditors whom he might wish to prefer, or who would hold up and keep unsatisfied their secret privileges, to be enforced as his interests required, to the detriment of bond fide creditors. Even under our system, restricted as it is, this abuse prevails to a certain extent, and imposes on our courts the duty of rigid scrutiny of all claims which carry with them privileges on the proceeds of a vessel under judicial authority.

We think that the framers of our Code, in establishing privileges on ships and vessels, did not intend to confine the operation of their legislation to those belonging to this port, or owned in this State; but laid down general rules in relation to the distribution of their proceeds, without regard to their origin or the place of their owner's residence. The existence of privileges on vessels under the law of other States was a fact before them, and none of any kind are allowed except those expressly recognised and enumerated in the Code.

That a failure to acknowledge, or enforce, liens or privileges on moveables created by foreign laws, cannot be considered as derogating from the comity which prevails among States in relation to the effect to be given to foreign laws, is obvious. A nation within whose territory personal property is found, has as entire jurisdiction over it while there as it has over immovable property. Its exercise for all purposes is a question of policy, and may be co-extensive with its authority over the latter. Civil Code, art. 9. Story Conflict of Laws, § 550. Penny v. Christmas, 7 Rob. 499. Harper v. Stanbrough, ante p. 377. We therefore conclude, that the claims of Glover and others are not privileged.

The judge of the District Court from whose judgment this appeal is taken, decided in favor of the privileges claimed by Glover and others, on the ground that the privilege, attaching by the law of the place of the contract, became a part of the contract, which ought to be maintained and carried out in its integrity, and that to deprive the party of the privilege was virtually to impair the obligation of the contract. The right of a creditor to enforce a privilege created by a foreign law on a moveable within this State as part of the original contract, is the astagonist theory to that which considers the privilege as exclusively appertaining to the remedy. We do not feel ourselves called upon to adopt either in the present case, as our own legislation has placed the moveable exclusively under the operation of our own laws, which the sovereign power has the same right to do as it has to determine what property shall, and what shall not, be subject to the payment of debts under execution.

Whoever has taken the trouble to examine the opinions of writers of acknowledged authority on this vexed question of conflicting laws, will be struck with the difficulties which every phase of it presents, and the almost necessity of remedying the evil by positive legislation.

The learned judge has referred to several authorities in support of his opinion, which he considers as recognising the doctrine that the privilege, forming part of the contract itself by the law of the country where it is made, fellowed the property into one where by law no such privilege existed. The case

CREDITORS.

of Whiston et al. v. Stodden & Hewil's Syndics, 8 Mart. 134, was determined in 1820, and consequently without reference to the effect of our Code of 1825.

The opinion in the case of Sabatier et al. v. Their Creditors, 6 Mart. N. S. 589, we do not understand as relating to a right created under a foreign law; and as we have seen in the practice of our courts since, the case of the Ohio Insurance Company v. Edmonson, 5 La. 296, decided in 1832, has never been considered as determining the question under consideration. Indeed, so far as authority is considered in relation to the conflict of laws in similar cases, and the comity which is to be observed in relation to the right of priority of payment created by the law of the place where the contract is made, the decisions of the highest tribunal in the Union are directly and positively against its recognition. Harrison v. Sterry, 5 Creach, 298. Smith, Administrator, v. The Union Bank, &c., 5 Peters, 523.

In the distribution of insolvent estates under our laws, we are not aware of any distinction that is recognised among creditors, dependent on the place of the origin of the debts. The distribution is made according to the order of privileges and mortgages established in the Code, as of the proceeds of a common pledge.

It has been urged in argument that the sale was made for the purpose of defeating the rights of Glover et al., the appellees, on the steamer, and that it was in that respect fraudulent, and that the appellants can have no claim under the sale. That objection is obviated by our decision as to the existence of the privilege asserted by Glover et al. In regard to the bond fides of the sale itself, for the price of which Handy claims a privilege, we find nothing in the evidence which would authorise us in disallowing it.

The judgment appealed from must therefore be reversed, and a privilege allowed to *Handy* of the vendor on the proceeds of the one-half of the steamer *Old Hickory*, for the sum of \$7,750; the costs of the appeal to be paid by the appealers.

THE STATE v. RUSSELL.

A formal averment in an indictment that it was found by the authority of the State, is not essential to its validity. It is a sufficient compliance with the 69th art. of the constitution, that the prosecution appear to be conducted in the name of the State.

A PPEAL from the First District Court of New Orleans, McHenry, J. The indictment on which this prosecution was founded commences as follows:

- " The State of Louisiana,
- " First Judicial District, ss.
- "Parish of Orleans, First District Court of New Orleans: The grand-jurors of the State of Louisiana, duly empannelled and sworn in and for the body of the parish of Orleans, upon their oath present, that one Edward Russell," &c. It concludes: "contrary to the form of the statute of the State of Louisiana in such case made and provided, and against the peace and dignity of the same."

Elmore, Attorney General, for the State, contended that the indictment was framed as required by the constitution, citing State v. Anthony, 1 McCord, 285.

Allen v. Commonwealth, 2 Bibb. 210. Wharton's Am. Crim. Law, pp. 64, 65, 103, 104. 5 Pike, 445. 1 Walker Miss. Rep. 392.

Larue and Bryce, for the appellant, cited the Const. arts, 69, 117. Journal of Convention of 1845, pp. 297, 331, 348.

The judgment of the court was pronounced by

King, J. The defendant, Edward Russell, was convicted of manshaughter upon an indictment charging him with murder, and he moved for an arrest of judgment on two grounds: 1st. That the indictment does not aver, with sufficient certainty, that the deceased died of the mortal blows charged to have been given by the accused. 2dly. That the indictment does not purport in its margin, or in the body, to be carried on "in the name and by the authority of the State of Louisiana," and does not conclude "against the peace and dignity of the same." This motion was overruled and sentence pronounced, and the accused has appealed.

The clause of the indictment in which it is contended that the first of the alleged errors exists, is in the following words, viz: "of which mortal strokes, blows, wounds and bruises, given as aforesaid, the said Margaret Russell, then and there did suffer and languish, and languishing did live, and on the seventeenth day of said month of June, in the year of our Lord one thousand eight hundred and forty-six, in the parish of Orleans aforesaid, of said mostal wounds did die." It is contended that there is a period at the word live, and that what follows, beginning with the words, "and on the seventeenth," &c., is a separate sentence, disconnected from the preceding averments of the mortal blows dealt, and that there is consequently no averment that the deceased died of the mortal wounds alleged to to have been given by the accused.

An inspection of the original instrument has satisfied us that the sentence is anbroken by a period, and that the objection is based upon peculiarities of the hand-writing of the framer of the indictment. The point used at the word line, resembles somewhat a period, but by comparing it with the punctuation of the remainder of the instrument, it is evident that a comma is the point used. That it was not the intention of the framer to use a full stop is further apparent, from the fact that the point used is not followed by a capital letter, and that the sense of the sentence, and its grammatical construction, require that it be unbroken by a period.

The second ground we deem to be equally untenable. The expressions, which it is contended should be used in the indictment, occur in the constitutions of several States of the Union, and the point now presented has been so frequently decided in those States that it can scarcely be considered an open question. It has been repeatedly held to be a sufficient compliance with the constitutional requisition, that the prosecution should appear to be conducted in the name of the State, and that a formal averment that it was found by the authority of the State, was not escential to the validity of the indictment. 5 Howard's Miss. Rep. 36. State v. Johnson, Walker's Miss. Rep. 392. Allen v. Commonwellh, 2 Bibb's Rep. 210. 1 McCord, 285.

In the case of *The State* v. Calvin Moore (8 Rob. 518), decided by the late Court of Errors and Appeals in Criminal Cases, these words were neither directly nor impliedly held to be essential to the validity of an indictment. The language of the instrument was merely quoted, from which it appeared that it

STATE V.

BTATE V.
RUSSELL.

contained the expressions which the defendant intended were required by the constitution, and consequently that the objection urged was without foundation; but there was no intimation of an opinion that their absence would have been fatal.

Judgment affirmed.

CHIGE v. LANDREAUX.

After an adjedication at a probate sale made to effect a partition among heirs, it was discovered that the property sold was encumbered by a special mortgage in favor of a bank; and a part of the price was deposited by the purchaser in the hands of a third person, to be paid to the heirs upon their exhibiting proof of the erasure of the mortgage. On the production of a declaration, made by the administrator of the succession before a notary in the form of an authentic act, that he released the mortgage in favor of the bank, the recorder of mortgages cancelled the mortgage, and the heirs were thereby enabled to withdraw the amount on deposit. The bank having enforced its mortgage, the purchaser sucd the heirs for its amount; and having made, on execution, but a part, proceeded against the recorder. Held, that the latter was responsible to the purchaser for the balance not recovered from the heirs.

By a special provision in the stat. of 7 April, 1824, sec. 31, incorporating the bank of Louisiana, the right of the bank as a mortgagee to seize and sell the mortgaged property, is, in cases of mortgages executed under that act, unaffected by the death of the mortgagor.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Soulé, for the plaintiff. Legardeur, for the appellant, cited 20 Duranton, Nos. 193, 194. Went v. Morgan, 3 La. 311. Sacerdotte v. Duralde, 1 La. 484. Williamson v. Creditors, 5 Mart. 620. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff purchased certain real estate in New Orleans, at a probate sale, ordered for the purpose of effecting a partition among the heirs of Pigneguy. Upon preparation of the act of sale, it was found that the property was encumbered with a special mortgage in favor of the Bank of Louisiana, executed in their life time by the deceased persons in the matter of whose successions the sale was made. The plaintiff accordingly refused to pay the purchase money absolutely; but caused a sufficient amount of it to be retained and deposited in bank, to protect him against the mortgage. The money was to remain in deposit till the bank should be satisfied, and to be delivered to the heirs of Pigneguy, only upon their exhibiting proof that the mortgage had been raised. This mortgage the recorder of mortgages cancelled, upon no other authority than that of a declaration, made before a notary in the form of an authentic act, by Marsoudet, the administrator of the succession, that, by virtue of his authority as administrator, he released and cancelled the mortgage in favor of the bank. The heirs were thus enabled to withdraw the money deposited, without the plaintiff's knowledge or consent. Subsequently the bank seized the property to satisfy its mortgage; the plaintiff gave the recorder of mortgages notice of these proceedings; and, after an unsuccessful resistance, was compelled to pay the bank. The plaintiff then sued the heirs of Pigneguy, but obtained in execution of his judgment a partial satisfaction only, and now claims the residue of what he has thus lost from the defendant, Landreaux.

o.

. It is urged, on the part of the defendant, that there was no breach of his official duty. That he cancelled the mortgage upon the production at his office of a duly certified copy of a notarial act, which he had no right, or at least was not bound, to pronounce null and of no effect. Upon this point the defendant cites the authority of Duranton, Droit Français, vol. 20, p. 303. It appears that in France, an instruction "de la regie" had been given, in conformity with the opinion of "le grand juge, ministre de la justice," that the recorders of mortgages were not to occupy themselves with questions of law, which may arise as to the radiation of mortgages; and that their responsibility should not be compromited by radiations assented to by authentic act, or in virtue of a judgment certified to them. Without investigating the applicability of the doctrine of Duranton to our system, or whether it correctly explains the jurisprudence of France, it suffices to say that it applies only, even according to that author, to the case of an assent by the mortgagee himself, exhibited by an authentic act; in which case it would seem, according to that author, not to be the duty of the recorder to inquire into the capacity of the mortgagee. In the present case, the authentic act, upon which the recorder has cancelled the mortgage, emanates not from the mortgagee, but from the representative of the succession of the mortgagor. The proposition is monstrous that the mere exhibition of an authentic act, not executed by the mortgagee or some one authorized to represent him, should authorize the recorder to extinguish the mortgagee's rights.

This brings us to the second proposition of the defendant, that the administrator of the succession, by virtue of his office, has authority to cancel mortgages created by the deceased. If the proposition, in its general sense, be conceded, still the case of the bank's mortgage falls under special legislation. By the 31st section of the charter of the Bank of Louisiana it was declared that, "on all mortgages executed under this act, the president, directors, and company of the bank shall have the right to seize the property mortgaged, in whatever hands it may be, in the same manner, and with the same facilities, that it could be seized in the hands of the mortgagor, notwithstanding any sale or change of the title or possession thereof, by descent or otherwise." By the 35th section of the charter, the bank, as mortgagee, was exempted from the effects of surrender by insolvent mortgagors, it being declared that, in such cases, the mortgaged property should not pass. This legislation was intended to favor the bank, and to protect its securities from being dilapidated, like those held by individuals, by the notoriously wasteful and extravagant administration of syndics and administrators, and the unreasonable charges which, under pretence of priviliges, were levied at the expense of mortgage creditors. Whether the interest of the State in this institution, or a disposition to encourage banking operations, was the motive of the legislator, it is unnecessary to inquire; the legislative will is clearly expressed, and, under it, the administrator was incapable of cancelling the mortgage virtute officii. That incapacity resulted from a statute which the recorder was bound to know and notice.

The exemption in question has been the subject of judicial interpretation, and has been recognized in the case of Williams v. Bank of Louisiana, 17 La. 382, and in the case of Bertoliv. The Citizens' Bank, 1 Annual R. p. 119. It is also adverted to in the case of the Gas Bank v. Webb, ante p. 526. It is not protended that the bank was in any wise a party to the proceedings in the Court of Probates, or ever, directly or indirectly, assented to what the administrator has done. It was an entire stranger to all these matters.

STATE V.

contained the expressions which the defendant intended were required by the constitution, and consequently that the objection urged was without foundation; but there was no intimation of an opinion that their absence would have been fatal.

Judgment affirmed.

CHIGE C. LANDREAUX.

After an adjedication at a probate sale made to effect a partition among beirs, it was discovered that the property sold was encumbered by a special mortgage in favor of a bank; and a part of the price was deposited by the purchaser in the hands of a third person, to be paid to the beirs upon their exhibiting proof of the crasure of the mortgage. On the production of a declaration, made by the administrator of the succession before a motary in the form of an authentic act, that he released the mortgage in favor of the bank, the recorder of mortgages cancelled the mortgage, and the heirs were thereby enabled to withdraw the amount on deposit. The bank having enforced its mortgage, the purchaser sucd the heirs for its amount; and having made, on execution, but a part, proceeded against the recorder. Held, that the latter was responsible to the purchaser for the balance not recovered from the beirs.

By a special provision in the stat. of 7 April, 1824, sec. 31, incorporating the bank of Louisiana, the right of the bank as a mortgagee to seize and sell the mortgaged property, is, in cases of mortgages executed under that act, unaffected by the death of the mortgager.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Soulé, for the plaintiff. Legardeur, for the appellant, eited 20 Duranton, Nos. 193, 194. Went v. Morgan, 3 La. 311. Sacerdotte v. Duralde, 1 La. 484. Williamson v. Creditors, 5 Mart. 620. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff purchased certain real estate in New Orleans, at a probate sale, ordered for the purpose of effecting a partition among the heirs of Pigneguy. Upon preparation of the act of sale, it was found that the property was encumbered with a special mortgage in favor of the Bank of Louisiana, executed in their life time by the deceased persons in the matter of whose successions the sale was made. The plaintiff accordingly refused to pay the purchase money absolutely; but caused a sufficient amount of it to be retained and deposited in bank, to protect him against the mortgage. The money was to remain in deposit till the bank should be satisfied, and to be delivered to the heirs of Pigneguy, only upon their exhibiting proof that the mortgage had been raised. This mortgage the recorder of mortgages cancelled, upon no other authority than that of a declaration, made before a notary in the form of an authentic act, by Marsoudet, the administrator of the succession, that, by virtue of his authority as administrator, he released and cancelled the mortgage in favor of the bank. The heirs were thus enabled to withdraw the money deposited, without the plaintiff's knowledge or consent. Subsequently the bank seized the property to satisfy its mortgage; the plaintiff gave the recorder of mortgages notice of these proceedings; and, after an unsuccessful resistance, was compelled to pay the bank. The plaintiff then sued the heirs of Pigneguy, but obtained in execution of his judgment a partial satisfaction only, and now claims the residue of what he has thus lost from the defendant, Landreaux.

It is urged, on the part of the defendant, that there was no breach of his official duty. That he cancelled the mortgage upon the production at his office of LANDREAUX. a duly certified copy of a notarial act, which he had no right, or at least was not bound, to pronounce null and of no effect. Upon this point the defendant cites the authority of Duranton, Droit Français, vol. 20, p. 303. It appears that in France, an instruction "de la regie" had been given, in conformity with the opinion of " le grand juge, ministre de la justice," that the recorders of mortgages were not to occupy themselves with questions of law, which may arise as to the radiation of mortgages; and that their responsibility should not be compromited by radiations assented to by authentic act, or in virtue of a judgment certified to them. Without investigating the applicability of the doctrine of Duranton to our system, or whether it correctly explains the jurisprudence of France, it suffices to say that it applies only, even according to that author, to the case of an assent by the mortgagee himself, exhibited by an authentic act; in which case it would seem, according to that author, not to be the duty of the recorder to inquire into the capacity of the mortgagee. In the present case, the authentic act, upon which the recorder has cancelled the mortgage, emanates not from the mortgagee, but from the representative of the succession of the mortgagor. The proposition is monstrous that the mere exhibition of an authentic act, not executed by the mortgagee or some one authorized to represent him, should authorize the recorder to extinguish the mortgagee's rights.

This brings us to the second proposition of the defendant, that the administrator of the succession, by virtue of his office, has authority to cancel mortgages created by the deceased. If the proposition, in its general sense, be conceded, still the case of the bank's mortgage falls under special legislation. By the 31st section of the charter of the Bank of Louisiana it was declared that, "on all mortgages executed under this act, the president, directors, and company of the bank shall have the right to seize the property mortgaged, in whatever hands it may be, in the same manner, and with the same facilities, that it could be seized in the hands of the mortgagor, notwithstanding any sale or change of the title or possession thereof, by descent or otherwise." By the 35th section of the charter, the bank, as mortgagee, was exempted from the effects of surrender by insolvent mortgagors, it being declared that, in such cases, the mortgaged property should not pass. This legislation was intended to favor the bank, and to protect its securities from being dilapidated, like those held by individuals, by the notoriously wasteful and extravagant administration of syndics and administrators, and the unreasonable charges which, under pretence of priviliges, were levied at the expense of mortgage creditors. Whether the interest of the State in this institution, or a disposition to encourage banking operations, was the motive of the legislator, it is unnecessary to inquire; the legislative will is clearly expressed, and, under it, the administrator was incapable of cancelling the mortgage virtute officii. That incapacity resulted from a statute which the recorder was bound to know and notice.

The exemption in question has been the subject of judicial interpretation, and has been recognized in the case of Williams v. Bank of Louisiana, 17 La. 382, and in the case of Bertoliv. The Citizens' Bank, 1 Annual R. p. 119. It is also adverted to in the case of the Gas Bank v. Webb, ante p. 526. It is not pretended that the bank was in any wise a party to the proceedings in the Court of Probates, or ever, directly or indirectly, assented to what the administrator has done. It was an entire stranger to all these matters.

CHICK.

The unauthorized radiation and certificate granted by the defendant, has enabled the administrator and heirs to abstract the fund deposited; and his good faith, which is unquestioned, cannot protect him.

The argument that an administrator has a right to control and receive the funds of a succession, seems to us irrelevant. The funds deposited did not belong to the succession absolutely. It belonged to both parties, under the terms of the contract; to the plaintiff, for the purpose of his protection against the bank's mortgage; to the heirs, when that mortgage should be released. The condition was that the money was to remain in deposit, and to be delivered to the heirs of Pigneguy, only upon their exhibiting proof that the mortgage had been raised. That proof the defendant unlawfully furnished, and the immediate loss must fall upon him, leaving him his recourse upon those whose misconduct has led him into error, and the heirs who have been benefited by the unlawful receipt of the fund.

Judgment affirmed.

JARTROUX v. DUPEIRE.

The registry of a judgment which decrees "that defendants do return the notes and money already paid by the plaintiff, and that they pay the costs," will not entitle the plaintiff to a mortgage as against third persons, so far as relates to the notes and money. The inscription can produce no effect, the judgment containing no statement of the amount in money for which it was rendered, nor any description of the notes. But it will have effect as a mortgage, for the costs.

PPEAL, by the plaintiff, from a judgment of the Parish Court of New Orleans, Maurian, J.

Bonford, for the appellant. Article 3289 of our Code gives to a recorded judgment the effect of a mortgage. Its language is general. Whether the judgment direct that a thing shall be given, or something be done or omitted, or a sum of money be paid, it seems equally to be the intention of the legislature to preserve the judgment creditor's right, by the security of a general mortgage upon the debtor's property. Whence did the court below derive the restricted application of art. 3289, to such judgments only as express in their body a fixed sum of money? Not from any provision of our law further than the application to judgments of art. 3277, which in its terms is confined to conventional mortgages; but from the french hypothecary system, under which it has been held by some authors, that in order to render valid the inscription of a judicial mortgage, a valuation of the debt nears be previously made by the judgment creditor. We hope to show conclusively, first, that the french system of inscription has not only, in this respect, not been adopted, but has been actually repudiated by the framers of our Code; and secondly, that under the french system, all judgments, of whatever character they may be, whether for sums of money determinate or indeterminate, or for the doing of or refraining from any act, have, when recorded, the force and effect of mortgages, and that no valuation is required to be made by the judgment creditor in order to give them an hypothecary character.

There is one peculiarity in the french system of inscription, for anything similar to which we look in vain in our own. It is that by which the mortgage creditor is obliged to present to the recording officer, with his title, a bordereau, containing certain points in relation to the mortgage and the parties thereto, which are specifically detailed in the 2148th writele of the Code Napoléon. Among these, the creditor is enjoined to set out the value of his claim. This value he is permitted to estimate, and the inscription is good up to the amount of his estimation. The debtor is protected from over estimation by the action which the law gives him in such case against the creditor, for a reduction of the estimation. Even conventional mortgages, which with us are required to con-

tain in the act creating them the mention of a sum certain, are subject in France JARTHOUX to this system of bordereaux. Thus, where a conventional mortgage is given under art. 2132 of the Napoléon Code, for a conditional obligation, or one of indeterminate value, the creditor is entitled to inscription by complying with the requisites of art. 2148. Such a system does not prevail with us. That our legislators did not intend to engraft it upon our law is evident from a comparison of art. 3277 of our Code with the corresponding article of the french Code, no. 2132. Our article contains the simple enunciation that no conventional mortgage shall be valid, unless the exact sum for which it was given be declared in the act. The french article in addition, contains the clause of which we have just spoken, entitling the creditor to inscribe with an estima-tion. Why was this portion omitted in our article? For the palpable reason that the french system of inscription with the aid of bordereaux, was not designed to be put in force here.

Thus art. 2148 of the french Code, which contains nearly all its legislation upon this subject, is entirely omitted in our Code. If in France positive legislation was necessary to make it incumbent upon the creditor to attach a fixed and definite value to his judgment, such legislation is equally as necessary here to force the judgment creditor into the same position. As our Code now stands, there is a positive provision requiring all conventional mortgages to contain a declaration of the avect supplies they are given. declaration of the exact sum for which they are given. It is silent as to legal and judicial mortgages. And yet this silence of our Code, this designed omission to incorporate the french system of inscription into our own, is not, it is contended, to be taken as proof that those provisions have not the force of law here, but, on the contrary, is evidence that they exist here by analogy and in-

ference, because they exist in France by positive legislation.

But is it true that, in France, such judgments only can have the force of mortgages as condemn to the payment of a sum certain, or such as the owner has caused to be inscribed with the bordereaux mentioned in art. 2148. Troplong, Tarrible, Grenier, Persil, Dalloz, all the french authors agree, that any judgment which condems the party cast to the performance of an obligation, of whatsoever character it may be, produces a mortgage. See the authorities in Troplong, Des Privilèges et Hypothèques, vol. 1, p. 266, § 438. Grenier, Persil, Dalloz, and the Court of Cassation decide that even the judgment which condemns the defendant to render an account, produces a judicial mortgage. Grenier, 1, 20, 105. nier t. 1, no. 195. Persil, Questions, p. 83. Dalloz, vo. Hypothèque no. 2. Cass. 21 Août, 1810. 4 Août, 1825. Lyons, 11 Août, 1809. Is it matter then of doubt that a definite judgment, such as the one on which this action was instituted, would in France be susceptible of becoming by inscription, a judicial mortgage? But it is averred that, although such a judgment contains all the requisites to form a mortgage by inscription, yet when the creditor in France seeks to make it available as an hypothecary claim, he must comply with art-2148, and estimate, in the bordereau, the value of the debt. Grenier, it is true, supports this view. It is far however from being the opinion of more recent commentators; and the contrary view may be said to be now firmly established by repeated decisions of the highest Tribunals. Troplong, Des Privileges et Hypothèques, vol. 2, § 681, declares that it is altogether unnecessary to put a valuation on the judgment claim in order to give effect to the inscription. In this view he is supported by Duranten, vol. 20, no. 117, by three decisions of Courts Royal, and one of the Court of Cassation; one of the decisions being as late as the year 1839. See Cass. 4 Août, 1825. Paris, 16 Mars, 1822. Rouen, 19 Février, 1828. Limoges, 5 Décembre, 1839. This last case will be found in the Journal du Palais for 1840, p. 539. In the case decided by the Court of Cassation, the holder of the judgment declared that he could not place any fixed value upon his claim, but that it was of considerable value, and it was held that this judgment, which condemned the defendant to render an account, was entitled by its inscription to rank as a mortgage. Whether therefore, the french rule of inscription is considered to be in force in Louisiaua, or not, the court below decided erroneously, because, under either system, no valuation is necessary to give an hypothecary effect to the judgment when recorded.

Morel, on the same side.

C. Janin and Grymes, for the defendant.

Eyma, for the recorder of mortgages, called in warranty, cited C. C. 3277.

JARTROUX 9. DUPEIRE. Code Nap. 2132. Grenier, Hypothèques, v. 1, p. 264. Dict. Gen. du Droit Civil, v. 4, p. 96, no. 68, verbo Hypothèque; p. 215, verbo Inscription. 1 Pothier, 264.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiff claims to be an hypothecary creditor, upon property formerly owned by Debergue, and now in the possession of the defendant, by virtue of a judgment obtained and recorded against Debergue, before the rights of the defendant were acquired. In the suit of Jartroux v. Debergue and others, the plaintiff obtained a verdict of the jury in these words: "The jury find a verdict in favor of the plaintiff for the refunding of such sums of money as the plaintiff has paid, and returning of the notes given by him; or, in default thereof, for the amount of the same, and damages to the amount of \$1,500." Upon this loose and uncertain verdict, a judgment was entered in the following terms: "The court being satisfied with the legality of said verdict, it is decreed that judgment be entered according to said verdict, in favor of the plaintiff, and against the defendants, for the sum of \$1,500, as damages; that said defendants do return the notes and money already paid by the plaintiff, and that the defendants pay the costs."

So far as the sum of \$1,500 damages is concerned, it may be left out of view. That part of the judgment was remitted by Jartroux. Of the costs we will speak hereafter. The residue of the judgment will be at present considered. We do not think it necessary to decide the point urged by counsel, that the judgment in question was, even between the parties to it, void for uncertainty. We confine ourselves to the question of inscription, as affecting third persons.

This judgment was recorded in the terms above stated. The inscription was consequently uncertain, and did not inform the public what amount of money was decreed to be paid, and what notes were to be restored to the plaintiff. We deem it to be our duty, under the fair interpretation and intendment of our registry laws, to held this inscription invalid, because it does not exhibit any definite pecuniary amount, nor any description of the notes to be returned. This essential information should be patent upon the public records of the mortgage office. The creditor cannot be permitted to inscribe a loose and obscure notice, and leave third persons to ferret out elsewhere the extent of the antecedent encumbrance claimed by him. If he desires to obtain by inscription the security of a judicial mortgage, let him ask and obtain his judgment from the court in a distinct and intelligible form. If a contrary practice were tolerated, confusion, mistakes, and injustice, would be the inevitable result.

As to so much, therefore, of this judgment, as decrees that "the defendants return the notes and money already paid," we consider it as not having acquired, by the inscription, the force of a judicial mortgage; and in this respect the hypothecary action must fail. As regards the costs given by the judgment in question, we consider the plaintiff entitled to be recognized as a mortgage creditor. In the sheriff's sale to Dupcire, these costs are stated at the sum of \$232, and the purchaser was allowed to retain so much of the price to satisfy that incumbrance. In this respect, therefore, the judgment of the court below must be corrected.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the said François Jartroux be recognised as a mortgage creditor, for the sum of \$232, with interest from the 8th day of June, 1843, and costs of this suit in both courts, upon the following described real

estate, to wit: 1st. A certain lot of ground situated in faubourg Marigny, in JANTROUX Elysian Fields street, measuring fifty one feet front on said street, between Casacalvo and Moreau streets, by one hundred and forty-five and a half feet deep; said lot is designated by the number ninety-three, on the plan of said faubourg; together with all the buildings on said premises, without any exception or reserve whatever. 2d. Another certain lot of ground designated by the number ninetytwo, on the plan of said faubourg Marigny, situated in said faubourg, and measuring fifty-one feet front, more or less, on Marigny street, between Casacalvo and Moreau streets, by one hundred and forty-five feet six inches deep, more or less, bounded on the side towards Casacalvo street by property belonging to M. Ulm, and on the side towards Moreau street by that of John L. Thielen, together with the buildings thereon; and that the same be sold to pay and satisfy to the said Jartroux, the sum, interest, and costs aforesaid.

THE THIRD MUNICIPALITY OF NEW ORLEANS v. THE URSU-LINE NUNS.

.The 6th sec. of the stat. of 28 March, 1813, amending the act of 17 February, 1805, incorpo rating the city of New Orleans, by the words "incorporated suburbs," meant those suburbs which were urban at the time of the incorporation in 1805, and was intended to apply ex" clusively to such rural estates as had become urban since that time, or might thereafter be .come so. It refers exclusively to property laid out into streets, and is not repugnant to sec 6 of the stat. of 1805. The 5th sec. of the stat. of 16 March, 1830, declaring what shall be considered as the "non-incorporated faubourgs" of the city, refers to the same suburbs as

The territory of the city of New Orleans was composed, at the time of its incorporation, of urban and rural property, the latter being by far the most extensive-

Property within the incorporated limits of the city of New Orleans, not laid out into streets, is subject to taxation for all municipal purposes, except the maintenance of lights, of the city-watch, and for watering and cleaning the streets. Such property is not comprehended in the provision of sec. 1 of the stat. of 28 March, 1813.

The discretion vested in the Mayor and City Council of New Orleans by sec. 6 of the stat. of 17 February, 1805, does not authorise them to exempt any portion of the territory of the city from taxation. The ordinance of the Third Municipality, approved 2d April, 1845 exempting certain portions of the territory of that municipality from taxation, is consequently null.

Municipal councils, or other functionaries of government, cannot renounce the powers vested in them by the constitution and laws. An ordinance of a municipality which makes even a partial surrender of political power is null.

PPEAL from the First District Court of New Orleans, Preston, J. A Grailhe, for the plaintiffs. Dufour and Grymes, for the appellants. opinion of the majority of the court was pronounced by

ROST, J. The issue in this case involves the legality of a city tax, imposed upon real estate situated within a district of the city not laid out into streets, and on the slaves employed thereon. The court below was adverse to the pretensions of the defendants to be exempted from taxation, but considered that the plaintiffs had debarred themselves of the right of collecting the land tax, and gave judgment for the tax on the slaves only. From this judgment they have appealed, and the appellees ask that it be amended in their favor.

THIRD
MUNICIPALITY
O.
URSULINE
NUMS.

There is no doubt of the legality of the tax upon the slaves, and we have come to the conclusion that the land of the defendants has only been partially exempted from taxation. A misapprehension of facts by the Supreme Court in the case of Laferranderie v. The Mayor et al., 3 Ln. 246, has alone obscured the meaning of laws otherwise clear and free from all ambiguity.

At the time of the incorporation of this city, in 1805, its population was small, and its territory much larger than it is now. It extended some twenty-five or thirty miles along the bank of the river, and, with the exception of the square of the old city and the front of the Second Municipality, was almost exclusively composed of rural estates and waste lands. It is necessary for the purposes of this enquiry to keep that fact in view. The territory of the city of New Orleans, like that of ancient Rome, was composed of urban and rural property, the latter greatly predominating in extent.

A proviso in the 6th section of the act of incorporation, made a distinction between these two kinds of property, and provided that the rural portion of it, although subject to all other taxes, should not be made to contribute for the maintenance of lights, of the city watch, nor for watering and cleansing the streets. This proviso, having exclusive reference to property not laid out into streets, is in no manner affected by the provisions of the act of 1813. It is a part of the history of the country that, between 1805 and 1813, the rural estates adjoining the urban portion of the city were laid out into streets. That fact came before us during this term, in relation to the Gravier plantation. The act of 1813, in providing for suburbs laid out into streets outside of the city and incorporated suburbs, meant by incorporated suburbs, those that were urban at the time of the incorporation in 1805, and was intended to apply exclusively to such rural estates as either had become mban since that time, or might thereafter become so. It refers exclusively to property laid out into streets, and is therefore not sepugnant to the provise of the 6th section of the act of 1805. The act of 1830 evidently refers to the same suburbs as that of 1813. Whatever be the meaning of the words equal support and privileges, made use of in the latter act, the defendants do not come within its provisions. Their property has not been hid out into streets, and is a proper subject of taxation for all municipal burthens except for the maintenance of lights, of the city watch, and for watering and cleansing the streets. In the case of Laferranderie, already cited, the court, in our opinion, erred in applying the act of 1813 to a district of the city not faid out into streets.

The right secured to the owners of rural estates to be partially exempted from taxation, has been left inchoate, and cannot be enforced by courts of justice to its full extent. Instead of providing that the taxes on urban and rural property should be levied, kept, and distributed separately, so as to enable the judiciary to control the application of them to the uses for which they were intended, it gave the city council power to raise taxes on all the real and personal estate within the limits of the city, in such manner as to them might seem proper.

It is urged that the intention of the legislature was not, to give the city government the power to impose any taxes but such as were necessary to supply deficiencies in the other revenue of the city, and it is perhaps to be regretted that courts of justice have not so understood it from the beginning; but if they had, that limitation would not, as we conceive, affect this case. Within the limits of the power, whatever it be, the mode of imposing and collecting the

NUMB.

tax. provided it be uniform, rests within the discretion of the city council. But they must exercise that discretion so as to make a distinction between rural and MUNICIPALIT urban property; and it is evident that, if the admission in the record that the property has been duly assessed, means, as we suppose, that it is assessed in the same manner as urban property, it is taxed too much, and the defendants are entitled to a diminution of the amount claimed.

The court below exempted the defendants from the payment of the land tax for the year 1845, on the following grounds:

1st. That the municipality had the right to exempt a portion of its territory from taxation, because the act of 1805 provided that the taxes should be imposed in such a manner as to them might seem proper, and that it had exercised that right in passing the ordinance of the 2d of April, 1845.

2d. That the assessment rolls on which the tax claimed was laid, being subsequent in date to that ordinance, could not, so far as made with a view to taxation, embrace property which stood at the time exempt from it; that this ordinance was not repealed, and the ordinance imposing the tax revived, till the 29th December, 1845; that the revived ordinance must be considered as operating prospectively and not retrospectively, and that, having been revived only two days before the end of the year, the municipality could not enforce the payment of the tax for that year.

To the examination of those grounds we will now address ourselves.

I. We do not understand the discretion vested in the mayor and city council, by the 6th section of the act of 1805, as going to the extent supposed by the court below. If it did, all the burthens of the corporation might be imposed on any number, however small, of its inhabitants. It is a principle which lies at the foundation of our government, and a textual provision of our constitution, that taxation must be equal; and although perfect equality may not be attainable, an ordinance that exempts from it a large portion of the property of the municipality, is such an open violation of the rule as courts of justice cannot sanction. That ordinance is moreover a partial surrender of political power, and as such, an absolute nullity. Functionaries of government cannot renounce the powers yested in them by the constitution and laws.

The rule that a law can have no retrospective operation is, as usual with metaphysical formulæ, false in the majority of instances. If a law could never affect the consequences of facts accomplished before its passage, or give to those facts new consequences, laws could only be passed for the use of posterity. As every new enactment must, if enforced from the time of its promulgation, modify to a certain extent some of the consequences, more or less remote, of anterior facts. When a new law is enacted, the presumption is that it is better than the old, and that it is intended to remedy some existing mischief. It is therefore the duty of courts of justice to apply to all cases occurring after its promulgation, unless its application should impoir the obligation of a contract, or endanger the peace and good order of society, by destroying strong and well founded expectations, formed under pre-existing laws. Valette on Proudhon, 1 Droits des Personnes, 21 et seq.

In this case there is no contract, and the defendants could not have a strong and well founded expectation of enjoying the protection of municipal government without bearing any of its burthens. The ordinance complained of requires from them a contribution which all the owners of real estate in the Third Municipality have paid; and had a deduction been made under the proviso of The the 6th section of the act of 1805, we would amend the judgment as prayed Musicipality for by the plaintiffs. As the case stands, we will affirm the judgment for the Tax upon the slaves, and render a judgment of non-suit for the remainder of the claim; reserving to the plaintiffs the right to collect the land tax for the year 1845, upon making an equitable abatement from the amount assessed, in accordance with the letter and spirit of that provise.

It is therefore ordered that the judgment in this case be amended, so as to reserve the rights of the plaintiffs to recover the tax on the land of the defendandants for the year 1845, upon previously making a deduction on the amount assessed, as contemplated by the provise of the 6th section of the act of 1805-incorporating the city of New Orleans. It is further ordered that the judgment as amended be affirmed, with costs in both courts.

EUSTIS, C. J. I have considered with great care the legislation relating to the subject of this suit. The confusion in which it is involved by the language of the several enactments is such, that any one definite conclusion is liable to objections and is far from being satisfactory. I have not been able fully to concur in the view taken of it by Judge Rost, and will proceed at once to state what I understand to be the sense of the law, as to the right of the municipality to exact the tax sued for.

I. The 6th section of the act of 1805, relates to lands within the limits of the city not laid out into streets, and they are exempt from certain city charges, viz: from taxes for the maintenance of lights, of the city-watch, and for watering and cleaning the streets. Except for these objects, I find no restriction as to the right to tax these lands in common with other real property within the limits of the city. I do not think this section has ever been repealed; and for those objects I do not think the parts of the city not laid out into streets can lawfully be taxed. In this case, the tax sued for cannot be abated for that reason, inasmuch as there is nothing in the pleadings or evidence which even suggests the amount to be abated.

The mode in which the city taxes have been levied and the accounts kept, render the ascertainment of the precise sum expended for those objects for each year difficult, if not impossible; but the municipal authorities can easily cause to be made such a reasonable abatement or diminution of the tax on real property in parts of the city not laid out into streets, as will cover the contribution for those objects, which they are not permitted to exact.

II. The first section of the act of 1813 relates to the suburbs laid out into streets, and, on the hypothesis assumed by the defendants, that the part of the municipality in which their property is situated is not laid out into streets, the provisions of this section do not apply to their case. In relation to the construction of this section, I concur in the opinion given by the judge of the District Court in the very able opinion he has given in this case. It is impossible to give effect to it, consistently with any recognised rules of municipal administration, without considering it, as the judge has considered it, as directory to the municipal authority, and involving an administrative matter, and not a case for the intervention of the judicial power. See case of First Municipality v Pease et al., ante p. 538.

III. It is urged by the counsel for the defendants that the act of 1830 conclusively establishes the exemption of this suburban property from taxation. My impression is otherwise, and considering the section relied upon—the fifth—in reference to the act of which it forms a part, and giving to its expressions their

evident intendment, it cannot be held to be an exposition of a limitation of the power of the municipal authority, but it is merely an assertion of the fact of its non-exercise as to unincorporated faubourgs.

THIRD MUSICIPALITY 6. Unsulism

A recent act of the legislature of May 4, 1847, has removed the difficulties resulting from the condition of the legislation on the subject of taxation by the municipal government of New Orleans, so far as the future is concerned. The collection of the arrears of taxes on this description of property, I think, ought to be subject to the abatement I have stated.

FREEMAN v. STACY.

A sale under a ft. fa. issued on a judgment the amount of which exceeded three hundred dollars, made after the promalgation of the stat. of 8 Feb. 1842, and before the stat. of 6 April, 1843, in a parish in which a newspaper was published at the time, and not advertised therein, will be annulled. Art. 669 of the Code of Practice, and the amending act of 28 Feb. 1828, were revived by the stat. of 8 Feb. 1842, repealing that of 8 March, 1841.

The fact that the discontinuance of a newspaper rendered it impossible to publish the advertisement of a judicial sale therein as often as required by art. 669 of the Code of Practice, will not excuse the omission to publish such advertisement before the discontinuance of the paper.

A PPEAL from the District Court of Concordia, Curry, J. The plaintiff A appealed from a verdict and judgment rendered in favor of the defendant. T. P. Farrar and Thomas, for the appellant. Stacy and Sparrow, for the defendant. The opinion of the majority of the court was pronounced by

SLIDELL, J. This is a contest concerning the title to a slave between the plaintiff and Reynolds, the lesser of Stacy. The circumstances under which Reynolds acquired title are stated in the case of Farrar v. Stacy, ante p. 210. Pending the attachment suit of which we have there spoken, and before judgment therein, Spencer, the defendant in attachment, executed an act of sale of the slave in favor of Freeman, in consideration, as therein stated, of the sum of five hundred dollars paid to him by Freeman. The act stated that the slave was one of those attached in the suit of Briggs, Lacoste & Co. v. Spencer. This act was duly recorded on the day of its date. It is contended by the defendant that this was the purchase of a litigious right. The circumstances under which the sale was really made were, that Spencer was the debtor of Freeman, and conveyed the slave to him on account of his indebtedness.

We see nothing illegal in this. It was a dation en paiement to a bond fide creditor, of property subject to encumbrance. Even if Spencer's title be considered a litigious right, which is not clear, this would subject Freeman to no equity in favor of Reynolds, it having been, in the words of the Code, "transferred to a creditor as a payment of a debt due to him." Arts. 2624, 2622. We have stated in the case of Farrar v. Stacy, that the judgment in the attachment suit of Briggs, Lacoste & Co., upon the execution of which judgment the slave was sold, was reversed upon a devolutive appeal. The encumbrance, therefore, of the attachment being extinct, the contest between these parties turns solely upon the validity of the judicial sale, under which Reynolds claims title. This sale Freeman alleges to be invalid, by reason of the non-observance of the legal formality of advertisement.

The sale was made in the month of August, 1842, the seizure under fieri

PREEMAN O. STACK: facias having been made on the 2d July, 1842. Under the then existing laws it was necessary that this sale, being in the case of a judgment for an amount ever three hundred dollars, should be advertised in a newspaper, if there was one published in the parish. The defendant, however, insists that this formality was dispensed with, by the statute of February 8th, 1842.

The Civil Code, art. 3522, and the Code of Practice, art. 669, required a newspaper advertisement. By the act of 1828, this general requisition was modified, and it was enacted, that when the judgment on which the execution issues is under \$300, it shall be unnecessary to advertise in a public newspaper. In 1841 the law was again changed, the requisition again became general, and it was made "the duty of the sheriff in any parish of the State in which a newspaper is published, to publish all his advertisements for sales in said paper," &c., and "all laws, or parts of laws, inconsistent therewith" were repealed. In 1842, another act was passed, by which it was declared, "that the act entitled an act relative to sheriffs' sales, approved 8th March, 1841, be and is hereby repealed, and that all acts relative to advertising at sheriffs' sales in force at the time of the passage of the said act be, and the same are hereby revived." The result of this complicated legislation, so well calculated to create confusion and mistakes, nevertheless undoubtedly was, that a newspaper advertisement should be made when one was published in the parish, and when the amount of the judgment exceeded three hundred dollars. Such also was the opinion of our predecessors on this very point. See Exparte Groves, 12 Rob. 131.

The return of the fieri facias exhibits an advertisement by posting only; and a witness states that the property was not advertised in the newspaper published in the parish at the time when the seizure was made, and for some time subsequently. The first day for advertising was the 6th July, 1842, and the sale took place on the 6th August, 1842; the newspaper was regularly published every week during the year 1842, down to the 16th July, 1842. The advertisement might have been published during a portion of the time; and the subsequent impossibility does not excuse the previous omission.

Spencer, under the state of facts to which we have referred in the case of Farrar v. Stacy, has precluded himself from any objection to this sale; but his acts subsequent to the recorded conveyance to Freeman cannot affect the latter without his assent, which is in no way shown. He stands before us as a bond fide purchaser of property subject to a prior incumbrance. His title could not be divested at the suit of the privileged creditor, except by a sale conducted in conformity to law. No such sale has been made; and the incumbrance created by the attachment has in the mean while become extinct. So that the unencumbered legal title is now in the plaintiff, who must have judgment accordingly.

Upon the claim for the value of the slave's labor, we consider the plaintiff entitled, under the evidence, to recover, at the rate of \$75 a year, from judicial demand, until the slave be restored to his possession.

It is therefore decreed that the judgment of the court below be reversed, and that the slave Frank, in the petition described, be restored by the said Reynolds to the said plaintiff as the lawful owner thereof; and that the said plaintiff further recover from the said Reynolds, as wages for the said slave, at the rate of seventy-five dollars per year, from the 2d day of December, 1842, until delivery of said slave be made to the said plaintiff; the said Reynolds paying the costs of suit in both courts.

Eusris, C. J., dissented.

LOUCKS v. THE UNION BANK OF LOUISIANA.

Where a sheriff's dood for property sold at a judicial sale, after enumerating several special mortgages, racites that the property was sold "subject to the mortgages specified," the recital willadd nothing to the consequences which the law attaches to the adjudication made by the sheriff, nor to the obligations of the purchaser. Per Curiam: A sale under execution may be made for a sum fixed, and for the additional amount of previous mortgages; but, unless such appear distinctly to be the terms upon which the property was offered, the purchaser will not be presumed to have given more than the sum bid by him.

The fact that the sum for which preperty was adjudicated at a judicial sale, is less than the amount of previous special mortgages, will not prevent a sale, where the previous mortgages are in favor of the judgment creditor. C. P. 683, 684. Where the owner of such previous encumbrances appears at the sale and assents to the adjudication, no other party can complain of the insufficiency of the price.

The consent of a mortgagee to give a preference over his mortgage to one executed in favor of a third person, does not amount to a cancelling of the mortgage of the former. It is a more agreement that such third person, for the amount of his mortgage, shall take the place of the mortgagee who consents to the postponement.

A PPEAL from the District Court of East Baton Rouge, Burk, J. Elam, for the appellants. A. Denis, for the defendants. The opinion of the court was pronounced by

Kino, J.* In 1816. Francis D. Newcomb was confirmed in the tutorship of his minor children, the issue of his first marriage, of whom the plaintiff, Mary W. Newcomb, was one. The estate of the minors, of which he acquired the administration in virtue of the tutorship, was ascertained and fixed by a decree of the Probate Court. Previous to his confirmation he purchased at the probate sale of Guy Duplantier's succession, a plantation, with two hundred and twenty-five shares of the capital stock of the Union Bank of Louisiana, secured by a mortgage on the property purchased. The plantation and stock were subject to a further mortgage in favor of the bank to secure the sam of \$10,725, the residue of a stock loan made to Duplantier. The adjudication to Newcomb was for the price of \$14,950; and, by the terms of the sale he assumed these mortgages, and the payment of the stock loan. For the residue of the price, \$4,825, a mortgage was retained in favor of the succession. In 1839, Newcomb obtained a loan from the Union Bank, and, to secure its repayment, mortgaged this plantation, and pledged the two hundred and twenty-five shares of stock. The widow of Guy Duplantier intervened in the act, as administratrix of her husband's succession, and tutrix of her minor children, and postponed the mortgage retained in favor of the estate, giving precedence and priority over it to that granted by Newcomb to the bank, to secure the loan on that day made to him. In 1846, the Union Bank obtained an order for the seizure and sale of the plantation and two hundred and twenty-five shares of stock, under the mortgage granted in 1839, to secure the loan made to Newcomb, in virtue of which the property seized was adjudicated to the bank, at the second exposure, for \$7,670, and two twelve-months' bonds, amounting collectively to that sum, were given by the purchaser. In the sheriff's deed the special mortgages with which the property was encumbered are recited, in the order of

^{*} Eurris, C. J., being interested, did-not sit in this case.

LOUCES UNION BARE. their dates. The two first were to secure the stock. These, it is conceded on both sides, may be left out of view, the stock being at a premium. The third was a mortgage in favor of the Union Bank to secure the payment of \$7,825, to which sum the stock loan had been reduced; and the fourth, the mortgage under which the seizure and sale were made. The sheriff proceeds in his deed to say: "and having frequently cried said property to the highest bidder, the Union Bank of Louisiana, by her agent, Arthur Denis, Esq., became the purchaser for the price of \$7,670, on the terms and conditions above mentioned, and subject to the mortgages above specified."

Immediately after executory proceedings were commenced by the bank, the plaintiff, Mary W. Newcomb, instituted this suit, the object of which was to regulate the effects of the seizure. After stating the foundation of her claim, she averred that the mortgage granted to secure the original stock loan was the only mortgage entitled to preference over that existing in her favor; that the effect of the act of 1839, in which Mrs. Duplantier intervened, was to raise the ven dor's mortgage retained by the estate which she administered, whereupon that in favor of the minor children of Newcomb instantly attached, and acquired precedence over all other mortgages upon the land. She prayed that the proceeds of the sale should be applied in satisfaction of her demand, after paying the bank the sum remaining due upon the original stock loan. The under-tutor and tutor of the plaintiff's minor co-heirs also intervened in the proceedings, adopting the allegations of the plaintiff's petition, and uniting in a similar prayer. There was a judgment for the defendants in the court below, and the plaintiff and intervenors have appealed.

A number of serious questions have been presented in the pleadings, and in the printed arguments submitted by counsel, but the most important to the decision of the cause is, to determine the true amount for which the property was adjudicated to the bank at the sheriff's sale. The plaintiff contends that, having been sold subject to the previous mortgage in favor of the bank for \$7,875, that sum is to be added to the defendants' bid, and that the price of adjudication was thus \$15,546, instead of \$7,670.

When a mortgage or privilege exists on the property offered for sale un de execution, the sheriff is required to give notice that the property is sold subject to all privileges and hypothecations with which it may be burthened, and the purchaser is required to pay to the sheriff only the excess of the price over the privileges and special mortgages. Art. 679. The recital then by the sheriff in his doed, that the property was sold, "subject to the mortgages specified." added nothing to the consequences which the law attaches to adjudications made by sheriffs, nor to the obligations which it imposed upon the purchaser. If the clause had been omitted altogether, the law would have supplied it, and the obligations and rights of the purchaser would still have remained the same. A sale under execution may no doubt be made for a sum fixed, and for the additional amount of previous mortgages; but unless such appears distinctly to be the terms upon which the property was offered, the purchaser will not be presumed to have given more than the precise sum bid. There is no statement in the sheriff's deed that the adjudication was for a sum over and above the special mortgages, nor does the return refer to any other price than the sums for which the twelve-months' bonds were given. In the case of Rowly v. Rowly, 19 La. 576, relied on by the appellants, the property was adjudicated subject to the payment of the mortgages specified. The court held, under the

evidence in that case, that a certain special mortgage had been assumed by the purchaser, and that its amount was to be added to the price bid. In the present instance, we find no terms used in the sheriff's deed or return, which indicate that the property was offered upon any other conditions than those required by law, and which are usual at sheriff's sales; nor is any fact disclosed by the ovidence tending to the conclusion that the purchaser would be required to assume, or that he did assume, the mortgage, in addition to the sum bid. See case of Bulfour v. Chew, 4 Mart. N. S. pp. 154 and 162 to 165. We consider that the adjudication was for a fixed sum, and that the purchaser is bound for man dispersion of nothing beyond the sum bid.

It is next urged that, if the amount of the first mortgage be not added to the bid, then the sum for which the property was adjudicated falls short of the previous special encumbrances, and that there was no sale. This does not follow as a necessary consequence, when the previous special mortgage exists in favor of the judgment creditor. An adjudication for a sum less than the amount of the privileges and previous special mortgages is only prohibited, when those encumbrances are owned by other persons than the judgment creditor. C. P. arts. 683, 684. This provision of law is established in the interest and for the protection of the claims entitled to these preferences, and when the judgment creditor is himself the owner of the previous incumbrances, as is the case in the present instance, and appears at the sale and assents to the adjudication, no other party can complain of the insufficiency of the price. The evidence shows that, although there appeared by the mortgage certificate to be a special mortgage inscribed in favor of the bank for \$7,875, the debt had been reduced by payments, and that there actually remained due, at the date of the sale, only \$5,062 50. There was thus in reality an excess of price over the amount of the previous mortgage.

We conclude that the sale is valid. It remains to determine how the procoeds are to be applied. As regards the precedence to which the mortgage for the original stock-loan is entitled, there is no contest. This claim, with interest up to the date of the sale, is to be first paid. After its extinction there still remains a surplus. This residue, it is urged, should be applied to the claim of the plaintiff and intervenors, whose mortgage, it is contended, attached and acquired precedence over the second mortgage granted by Newcomb to the bank, in consequence of the postponement made by Mrs. Duplantier. This claim is based upon the hypothesis that Mrs. Duplantier released her mortgage, an assumption that is not supported by the terms of the act. Mrs. Duplantier did not cancel her mortgage, but merely gave precedence and priority to that of the bank. The mortgage in favor of Duplantier's succession has never ceased for a moment to be in full force, but the advantages of its rank, as far as relates to the parties to the present controversy, enure to the bank. The validity of that act cannot be contested by the plaintiff. The only parties by whom it could be questioned are not before the court. The surplus of the price after paying the original stock-loan is less than the amount of the postponed mortgage, and the entire sums must be applied to the second mortgage of the defendants.

The conclusions at which we have arrived upon these points, render it unnecessary to consider others which have been urged by the counsel on both Judgment affirmed.

LITTLEJOHN et al. v. WILCOX et al.

Where one by whom an attachment had been sued out abandons the case, under circumstances which show that in instituting the suit he was not acting in good faith, the defendant may recover from him, in an action on the attachment bond, fees of counsel paid to defend the attachment.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. T. A. Clarke, for the appellants, cited 3 La. 103, 391. 2 Rob. 318. 9 Rob. 91. Josephs, for the defendants. The judgment of the court was pronounced by

Rost, J.* This is an action brought by the plaintiffs, upon an attachment bond, executed by the defendants as principal and surety. They claim \$380 82, as damages sustained in consequence of the attachment. The court below gave judgment in their favor for \$95, and they appealed.

It appears that, in 1842, Jacob Wilcox instituted a suit against the plaintiffs in the State of Tennessee, upon a bill of exchange, and that this suit was finally decided in favor of the defendants by the Supreme Court of that State. In 1845, Jacob Wilcox instituted in this city a suit by attachment against the plaintiffs on the same bill of exchange, and gave the bond upon which this action is based. After the attachment, he often told one of the garnishees, that he did not wish to interfere in the business of Littlejohn, but that he wanted to try the question. He did not, however, try the question. When the case came on for trial neither he nor his counsel attended, and his petition was dismissed.

Suitors who try experiments, without hope of success, and who do not prosecute them, must take the consequences. They cannot be considered in good faith, and the rule of damages applicable to them is peculiar. We think the sum allowed by the court below for the loss on the cotton, not sufficiently proved; but we are also of opinion that, under the facts of the case, the fees paid by the plaintiffs to their counsel to defend the attachment should have been allowed. The judgment must be amended accordingly.

The objections made by the defendant's counsel to the introduction of the evidence of Wright, Connolly, and Durant, were properly overruled. It went to the effect, not to the admissibility of the testimony.

It is therefore ordered that the judgment in this case be amended, and that the plaintiffs recover from the defendants in solido, the sum of \$175.75, with costs in both courts.

ARSENE v. PIGNEGUY.

A slave voluntarily taken by her owner to a country in which slavery is prohibited, and there kept in his service for two years, will be thereby emancipated. The fact of the master's not having acquired a domicil in the country to which the slave was removed, will not prevent her emancipation. Per Curiam: The personal condition of those thrown on foreign coasts by shipwreck, or taking refuge from pirates, or driven by some overwhelming

^{*}SLIDBLL, J., having been of counsel, did not sit in this case,

necessity, or perhaps those passing through a foreign territory on a lawful journey, may remain unchanged; but this is the extent to which an immunity from the foreign law can be maintained under the law of nations.

ARSENE v.
Pigneguy.

One who succeeds in establishing her right to freedom against a person by whom she is held in slavery, will be entitled to recover wages from judicial demand.

A PPEAL from the First District Court of New Orleans, McHeary, J. David, for the plaintiff. Roselius, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff claims her freedom on the ground that, being the slave of the defendant, L. A. Pinéguy, she was taken from New Orleans, the domicil of her master, to France, where she remained in the service of his family for the space of two years, in 1836, 1837, and 1838, and afterwards returned to New Orleans.

In the cases which we have had before us of slaves claiming their freedom by reason of having been taken to places where the condition of slavery did not exist, the owners had acquired a domicil in those places, and there was no question as to the operation and effect of the laws there upon the status, or personal condition, of the parties. See Josephine v. Poultney, 1 Annual Rep. 329. Eugenie v. Préval et al., ante 180. It is contended that this case does not come within the principle of those cases, inasmuch as the defendant acquired no domicil in France, as his absence from Louisiana was but temporary, where his property remained and his business continued, and he never lost his original residence.

We consider that the jurisprudence of this State has settled this question, which has been more than once the subject of discussion. We cannot expect that foreign nations will consent to the suspension of the operation of their fundamental laws, as to persons voluntarily sojourning within their jurisdiction for such a length of time. As to those thrown on foreign coasts by shipwreck, taking refuge from pirates, driven by some overwhelming necessity, or parhaps those passing through a foreign territory on a lawful journey, their personal condition may remain unchanged; but this is the extent to which an immunity from the effect of the foreign law could be maintained under the laws of nations. Marie Louise v. Marot, 9 La. 474. Priscilla v. Smith, 13 La. 444. Story, Conflict of Laws, § 96 et seq. 2 Kent's Com. p. 458, s. 39. We have met with no case in which a contrary doctrine is held. The case of the United . States v. The Garonne, is supposed to support it; but an examination of it will satisfy any one, that the decision in that case does not reach that under consideration. Vide 11 Peters, 73. In the case of the slave Grace, 2 Haggard's Rep. 94, she had not been taken out of the realm, but from one of the islands to England, within the same imperial jurisdiction.

The plaintiff became free by remaining two years in France, and her former master ceased to have authority or dominion over her.

We think the plaintiff is entitled to wages from the judicial demand.

The judgment of the District Court releasing the plaintiff from the dominion of the defendant is therefore affirmed; and it is further ordered, that the plaintiff recover from the defendant, L. A. Pignéguy, the sum of \$8 per month from the 5th of November, 1846, with costs in both courts.

McLevaine et al. v. Franklin.

In an action to render a defendant liable for goods sold to a partnership of which it is alleged that he was a member, another partner is incompetent as a witness for the plaintiff, to

prove the partnership. The witness is interested to charge the defendant.

Where interrogatories to be propounded to a witness under a commission are submitted to the opposite party, and the latter propounds no cross-interrogatories, but writes at the foot of the plaintiff's interrogatories "legal objections reserved," the reservation will authorise an objection afterwards to the admissibility of the evidence on the ground of interest in the witness.

PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Stockton and Steele, for the appellants, contended that any objection to the witness examined under commission, on the ground of interest, should have been made when the interrogatories were in the hands of the party for the purbeen made when the interrogatories were in the hands of the party for the purpose of preparing his cross-interrogatories, citing 3 Rob. 275; 11 Rob. 467.

Stewart, for the defendant. In no case can a partner prove a partnership.

Even if allowed to prove a debt due by the firm, he cannot prove that others composed the partnership. It would be a clear case of interest. The partnership must be established aliunde. Phillips on Evid. Com. & Hill's notes, vol. 3, pp. 1520, 1521. Ib. vol. 2, pp. 111, 172, 173. Greenleaf Ev. § 177, 356.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs allege that the defendant was a member of the commercial firm of Franklin & Routh, and as such liable to them, in solido, for the price of certain merchandise sold in Kentucky to the partnership, acting by Routh on its account. At the trial of the cause the testimony of Routh was offered in evidence, to prove the sale of the merchandise to Routh, in Routh's name, the existence of the partnership, that the purchase was made for the use of the partnership, and that the partnership received and used the goods. The defendant excepted to the competency of Routh to prove the partnership; and the court below rejected so much of the testimony as went to prove the existence of the partnership. Without the testimony of Routh there is no evidence of the existence of the partnership. A judgment of non-suit was

We think the court below did not err in austaining the exception. It was the interest of the witness to charge the defendant in this suit, by testifying in favor of the party calling him. The point is one which has been much discussed, but the weight of authority is against the competency. See the cases of Marquand v. Webb, 16 Johnson, 89. Columbian Manufac. Co. v. Dutch, 13 Pick. 128. Purviance v. Dryden, 3 Sug. & Rawle, 402. 2, De Saussure, 43. The doctrine is not peculiar to american courts, but is supported by the english authorities.

It is said by the plaintiffs that the defendant had lost the right of excepting at the trial to the testimony of Routh, because he did not make the specific objection when the interrogatories were served upon him, preparatory to the execution of the commission. The defendant declined propounding crossinterrogatories, writing at the foot of plaintiff's interrogatories "legal objections reserved." We deem this reservation sufficient to authorise the specific exception at the trial. Such, we believe, has been the general understanding of the bar; and we are not aware of any provision in the Code of Practice, nor of any authority, to the contrary. Judgment affirmed.

^{*} Everus, C. J., did not sit in this case, having been of counsel.

AUGUSTE v. TRUDEAU.

A great-grandmother cannot be tutrix of her great-grandchild. Women, except the mother and grandmother, are excluded from the tutorship.

A PPEAL from the District Court of Jefferson, Clarke, J. Hubert and Grailke, for the appellant. Conrad and Dugué, for the defendant. The judgment of the court was pronounced by

Rost, J. This purports to be an action instituted to annul a judgment appointing the great-grandmother of a minor her tutrix, on the ground that women, except the mother and grandmother, are excluded from the tutorship by art. 322 of the Civil Code.

There is no doubt of the exclusion. But as the judgment sought to be annulled was not introduced in evidence, the court below had nothing to act upon. It is not found in the record; we know neither its contents nor its date, and can make no order in relation to it. We would reverse the judgment and dismiss the petition, but for the possibility that the interests of the minor might be prejudiced by such a course.

It is therefore ordered, that the judgment in this case be reversed, and the case remanded for further preceedings; the defendant and appellee paying the costs of this appeal-

BROWN v. HUGHES et al.

A partnership to carry on the business of ship carpenters, is an ordinary partnership; and the members are liable jointly only, and not in solido.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Peyton and I. W. Smith, for the plaintiff. Hornor, for the appellants. The judgment of the court was pronounced by

King, J. The defendants have appealed from a judgment rendered against them on an open account. They contend that the district judge erred in rendering a judgment in solido against them, their liability being only joint; and in refusing to issue an attachment to enforce the appearance of Stockton, one of the defendants, who was summoned as a witness in the cause.

The defendants were associated together as ship carpenters; this was an ordinary partnership, and their liability was joint. A judgment in solido is prayed for in the petition. The decree does not, in express terms, condemn the defendants in solido, but, construed with reference to the pleadings, may be considered and enforced as a joint and several judgment. Heath et al. v. Howell & Johnson, 15 La. 139. In this respect the judgment must be amended.

The judge did not, in our opinion, err in refusing the attachment to enforce the appearance of Stockton, one of the defendants, as a witness. He was clearly incompetent to testify. Assuming the facts stated in the bill of exceptions to be true, that the partnership between the defendants had been dissolved previous to the trial of the cause, and that Hughes had assumed all the obligations

Brown V. Hugues of the partnership, and granted a full discharge and release to Stockton, still this contract, to which the plaintiff was no party, did not impair his recourse against Stockton. Stockton continued to be a joint debtor of the plaintiff, and a real party defendant in the cause; as such he could not be called as a witness by his co-defendant. We think that the sum awarded to the plaintiff by the court below is fully supported by the testimony.

The judgment of the district judge is therefore so amended, as to render the defendants liable jointly and not in solido, for the payment of the same; the ap-

and the management of the second of the sections.

Louds in the party that the control of

pellee paying the costs of this appeal.

successful to highly a behaviored

Carlo Carlo Land Agent

THOMPSON v. PACKWOOD.

ied god for at with retire to be more and the free from the form in the first

A factor cannot be deprived of his commissions by the wilful act of his principal. The execution of a contract of agency, the obligations of which are mutual, cannot be placed entirely at the option of the principal.

In an action by a factor against his principal for compensation, evidence is admissible on the part of plaintiff to establish a custom among merchants alleged in the petition. Per Curium: As a fact, it was competent to plaintiff to establish the custom; its effect, is a different matter. It may well be supposed that the parties contracted with reference to the usual course of the business, which was the subject of their agreement.

It is within the discretion of the judge who tries a case, to determine whether the trial shall be delayed until a bill of exceptions can be drawn up and signed. Per Curism: All that the party who excepts has a right to require on the trial is, that the point reserved, or decision excepted to, be reduced to writing by the court, and that a bill of exceptions may be drawn up and signed afterwards. C. P. 488, 489.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Benjamin and Micou, for the plaintiff. A. Hennen, for the appellant. The judgment of the court was pronounced by

Eustis, C. J. The plaintiff, a merchant in New Orleans, had been the factor of the defendant and his son, owners of a large sugar plantation in the parish of Plaquemines, had made advances, furnished supplies, and disposed of the crop. On the defendant's becoming the sole owner, he continued the plaintiff in his agency, in the spring of 1846; and, on leaving Louisiana during the summer, entrusted him with the general superintendence of his plantation, which implied responsible and important duties on the part of the agent, which appear to have been performed in a proper manner. It appears that, on the return of the defendant, in October following, the plaintiff was in advance for the sum of \$2,900; the defendant took his business from him, and this suit is for a commission of 2½ per cent on the crop made on the plantation, which the plaintiff would have been outified to had the agency not been terminated by the defendant.

We agree in the opinion of the district judge who tried this case, that the testimony and letters of the defendant establish a contract, which excludes the conclusion that the plaintiff's compensation for his labor and trouble was to be limited to a commission of 2½ per cent on his advances, and which was, according to the true intent and meaning of the parties, a continuance of the agency which had previously existed, for which the plaintiff was to be paid by the commission on the sale of the crop, according to the usual course of business as proved by the testimony of several witnesses.

It would be manifestly unjust to deprive a factor of his commission by the wilful act of the principal, and to place entirely at his option the execution of a contract the obligations of which are mutual. Russell on Factors, 164. On the merits there is no defence whatever. There are several bills of exceptions which will be noticed.

THOMPSON,

1. There is one to the exclusion of certain evidence offered by the defendant. We think the evidence was inadmissible under the pleadings, and that the judge did not err in excluding it.

2. The defendant took a bill of exceptions to the testimony of witnesses proving the custom among merchants, as stated in the petition, on the ground that said custom was illegal. The only portion of the evidence on this subject which has any bearing in this case is, that which establishes the custom of the trade between the planter and factor. This, as a fact, it was competent for the plaintiff to establish; as to its effect as a custom, it is a different question, not necessary for us to determine. It may well be supposed that the parties contracted, with reference to the usual course of the business which was the subject of their agreement.

3. A third bill of exceptions was taken to the opinion and course of proceeding of the district judge, who refused to delay the trial of the cause for the purpose of having a bill of exceptions taken by the counsel for the defendant drawn up and signed. The judge desired the counsel to note the exception, and informed him that the court would do the same; and that the bill of exceptions might be extended afterwards.

There must be a power somewhere to control the proceedings in the trial of a cause. The practice is so well understood, and so generally acquiesced in, that questions of this kind are rarely raised. If the trial of a cause is to be delayed until every bill of exceptions is formally written out and signed by the judge, it is obvious that it may be protracted to an unreasonable length. In trials by jury this would be a must serious impediment in the administration of justice, and, in the hands of an unscrupulous litigant, the means of defeating it. We think matters of this kind are necessarily within the discretion of the judge who tries the cause, and that all the party excepting to the epinion of the court has a right to require on the trial of a cause is, that the point reserved, or decision excepted to, be reduced to writing by the court, and that the bill of exceptions may be drawn up and signed afterwards. Code of Practice, arts. 488, 489. Tidd's Practice, 788. Dean v. Gridley. 10 Wendell's Rep. 254. We think that the judge did not err in refusing to delay the trial and sign the bill of exceptions, as requested by the counsel for the defendant.

Judgment affirmed.

PAHNVITZ U. FASSMAN.

The granting of new trials rests in the discretion of the courts of the first instance; and the Supreme Court will not attempt to control it but in very clear cases.

Where an application for a new trial rests on the ground of newly discovered evidence, the party must make his vigilance apparent; if it be left in doubt, his application must fail.

PARHVITZ.

that the judgment below was correct, and the new trial properly refused, citing 18 La. 535. 1 Rob. 93. Graham on New Trials, 473, 485. The judgment of the court was pronounced by

Rost, J. This is an action of redhibition. The plaintiff seeks to annul the sale of a female slave made to him by the defendant, on the ground that the said slave was addicted to running away before he purchased her. The defendant pleaded the general issue, and called his vendor in warranty. Many witnesses were examined on both sides, in relation to the redhibitory vice alleged; and the plaintiff has appealed from the judgment rendered against him on the evidence. The case turns exclusively upon a question of fact, and the evidence in the record fully justifies the conclusion to which the judge came.

The appellant's counsel has called our attention to a motion made by him for a new trial, and supported by the affidavit of his client, "that since the trial of the cause, and even since judgment was rendered, he had discovered important evidence which he could not obtain before, although he had used every effort and diligence in his power." Two of the witnesses mentioned in the affidavit reside in the city of New Orleans, and the other in the adjoining city of Lafayette.

The judge of the court below, considering it strange that the plaintiff should have discovered all this additional evidence within three days after the judgment, and that all his efforts and diligence should not have enabled him to discover it in the fourteen months which elapsed from the institution of the suit until the trial of it, was of opinion that proper diligence had not been used, and refused the new trial.

The granting of new trials rests within the discretion of the judge of the first instance, and the Supreme Court has not been in the habit of controlling that discretion in any but very clear cases. When the application rests on the ground of newly discovered evidence, "the party must make his vigilance apparent, for if it is left even doubtful that he knew of the evidence, or that he might, but for negligence, have known and produced it, he cannot succeed in his application. Graham on New Trials, 473. Bonnet v. Legras, 1. Rob. 93. 18 La. 535. The vigilance of the appellant in this case is more than doubtful, and we cannot interfere.

BACH v. SLIDEED.

Where, after a judgment ordering one of the parties to convey to the other one-third of the land which may be found to be contained within the limits of a confirmed land claim; the parties sign an agreement stipulating "that a survey shall be made by B., so as to cat off from the upper portion of the land the one-third thereof which, on the survey, may be found to be contained within the limits of the confirmed claim, &c., which survey, without further formality, shall serve as the basis of the conveyance which the defendant has been adjudged to make to the plaintiff," the parties will not be considered as having bound themselves to abide by any survey which B. might make, though it it should be erroneous.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. R. N., and A. N. Ogden, for the appellant. T. A. Clarke, for the defendant. The judgment of the court was prenounced by

King, J.* After the decree lately rendered by this court in this case (1 An. Rep. 375.) was returned to the lower court for execution, the parties entered into the following agreement:

BACH 9. SLIDELL.

"It is agreed that a survey shall be made by Benjamin Buisson, so as to cut off from the upper portion of the land patented to defendant the one-third thereof, which, on the survey may be found to be contained within the limits of the claim numbered 38, as confirmed to P.A. Delachaise, George Legendre, Seaman and James H. Field, John M. Bach, John Lewis Drouet, the heirs of John Muchon, and Jerome Toledano, by act of Congress, July 6th, 1842, which survey, without further formality, shall serve as the basis of the conveyance which the defendant has been adjudged to make to the plaintiff, by the decree of the Supreme Court in the above mentioned case.

(Signed)

" JOHN M. BACH,

" JOHN SLIDELL"

Buisson, the surveyor selected by the parties, proceeded to make a survey, and return a plat exhibiting the result of his operations, in which he represented the portion of the confirmed claim No. 38, included in the entry of the defendant, to be sixty-seven arpents. The plaintiff objected to this survey as being erroneous, and the parties being unable to agree upon the quantity and boundaries of the land to be divided between them, the plaintiff took a rule upon the defendant to show cause why the survey made by the United States should not be taken as the basis of the conveyance to be made by Slidell, or a new survey be made under the order of the court, for the purpose of ascertaining the quantity and fixing the limits of the land to be conveyed. To this rule the defendant answered that, by the agreement between himself and Bach, a survey had been made, which was definitive between the parties, and that, in conformity therewith, he had tendered a conveyance to Bach. After the alleged error had been discovered, an order was entered up in the court below, on the motion of Bach, taxing, as costs to be paid by the defendant, \$50, for the services of Buisson, in making the survey and plan. The judge below considered that the survey had been made according to the actual possession of the proprietors of the confirmed claim, and that Bach had precluded himself from contesting its correctness by his application to tax the costs of the survey to the defendant, and discharged the rule. From this judgment the plaintiff has appealed.

The defendant contends that by the agreement, the survey of Buisson was to be final and conclusive upon the parties, and form the basis of the transfer, without further formality. We find nothing in the terms of the agreement which made it imperative upon the parties to abide by any survey that Buisson might make, although it should be erroneous. Such an interpretation cannot be given to the expressions "which survey, without further formality, shall serve as the basis of the conveyance, &c." The formalities referred to, and which were to be dispensed with, we understand to be those which, in the absence of an agreement, the parties would have been compelled to observe, before the survey could have been effective between them, such as an application to the court for an order to issue to the parish surveyor, the returning of the survey when completed into court, and its approval by the judge after notice to the parties. The language of the contract does not, in our opinion, authorise the conclusion, that the parties were to be precluded from correcting the operations of the surveyor,

^{*} SLIDELL, J., recused himself, on account of relationship to one of the parties.

BACH ...

in the event of their being erroneous. The case of Talcott v. McKibben, 2 Mart. 298, does not support the position assumed by thedefendant's counsel. There the parties agreed to submit their matters of difference to five persons, whose report was to be made the judgment of the court. The court held that the parties had selected their own judges, and refused to alter the report.

Nor do we think that the motion of the plaintiff to tax his adversary with the costs of the survey alleged to be erroneous, can be considered, under the evidence, an affirmance of that survey. It is shown that, immediately upon its being discovered that the quantity of land to be conveyed was less than the plaintiff supposed himself to be entitled to, he objected to the survey, and has ever since steadily persisted in asserting it to be incorrect.

We think it is conclusively established that the survey is erroneous. An extract from the township map shows the quantity of land to be divided, according to the United States survey, to be 103 8-100 acres. The plat annexed to the application for confirmation represents the quantity to be 92 arpents and a fraction, and the survey of Buisson makes it 62 arpents. It is manifest that there must be error in some of the measurements. Buisson, in his testimony states, that his survey was made without reference to the titles, and that, from information since obtained, he is satisfied that it is incorrect. His only guide appears to have been the enclosures of Mrs. Delachaise, which he had not previously ascertained to be in accordance with the lines of the confirmed claim. We also think that the survey of Zimpel, of which the plat accompanying the application for confirmation is a copy, is incorrect. But we are not informed by this witness, nor by other testimony in the record, what are the true boundaries or quantity of the land in controversy. It was the duty of the parish surveyor to have ascertained the upper and lower boundaries of the confirmed claim, No. 38, and to have extended the side lines, which converge, until they met, or were intersected by the lines of a superior title. In ascertaining the true boundaries of the tract, if they were not admitted, he should have had recourse to the titles. C. C. arts. 839, 841. No one of the plats before us is sufficiently free from objection to enable us to adopt it as the basis of the transfer to be made by the defendant, with the prospect of doing justice between the parties.

It is therefore ordered that the judgment of the District Court be reversed, and that the cause be remanded, with instructions to the district judge to direct a survey of the land in controversy to be made according to law, for the purpose of ascertaining the quantity, and fixing the limits, of the portion to be conveyed by the defendant to the plaintiff, under the decree heretofore rendered in this cause by this court; the appellee paying the costs of this appeal,

GIBSON V. SELBY.

A judge is not incompetent to grant an order of appeal in consequence of being a party to the case. A recusation could alone render him incompetent.

Where a judge is unwilling to act on an application for an appeal from a judgment rendered against him personally, he should recuse himself; and the recusation should be in writing, to enable the judge of an adjoining district to act in his place.

The inability or omission of a party to furnish a bond and fulfil the condition precedent upon which a suspensive appeal was granted, will not preclude him from applying within the

year for a devolutive appeal, on the ground of his having abandoned a previous appeal. The jurisdiction of the Supreme Court attaches only when the bond is filed.

Consent of parties cannot dispense with the necessity of an order allowing an appeal. Per Curiam: The jurisdiction of the appellate court attaches only after a judicial order, divesting, when its terms are complied with, the jurisdiction of the inferior tribunal.

RULE on the Judge of the District Court of Carroll, in the Tenth Judicial District, to show cause why a mandamus should not be issued, commanding him to allow a devolutive appeal to the plaintiff, in an action against the judge individually. Bonford for the rule. Thomas, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff applied to this court for a rule upon the Hon. Lewis Selby, judge of the Tenth District Court in and for the parish of Carroll, to show cause why a peremptory mandamus should not issue, commanding him to grant an order for a devolutive appeal. The plaintiff accompanied his application with affidavits showing that both he and his counsel had presented a petition of appeal to the judge, who refused to grant the order of appeal, or to recuse himself by a written recusation. The judge was, in his individual capacity, the defendant in the suit in which the appeal was prayed for. The judgment had been rendered by his predecessor in office. It also appeared by a certificate of the Hon. Thomas H. Farrar, judge of the Ninth Judicial District, that the petition of appeal had been presented to him, and that he refused to grant the appeal, unless the case were referred to him in writing by the judge of the Tenth District. Upon the above application this court granted the rule to show cause, and the judge of the Tenth District has answered in writing.

The first ground taken in reply by the judge is, that "he is a party defendant in the judgment from which Gibson claims to exercise the right of appeal, and that, as such, he is incompetent to make any order in the case, except one recusing himself, should such recusation be necessary to the exercise of any legal right therein by the plaintiff. No such recusation was required of him, to enable the plaintiff, if entitled thereto, to obtain an order of appeal from a neighboring judge. An appeal would have been granted in the case of right, and as a matter of course, by a neighboring judge, on the presentation to him of a petition alleging that the presiding judge was a party defendant therein, without an order of recusation by him."

The judge was not absolutely incompetent to grant the order of appeal, by reason of the fact that he was a party to the judgment from which an appeal was desired. A recusation was necessary to render him incompetent. recusation could be made by the plaintiff, or it could be made by the judge proprio motu. See Code of Practice, articles 337, 340. The plaintiff dld not recuse the judge. On the contrary, he requested him to act and grant the order. He was willing, and desired, that the judge should act. If the judge was unwilling to act, his course was clear; he should have recused himselfthe alternative presented by the plaintiff, and have declared so officially and in writing. This recusation would have enabled the judge of the adjoining district to act. In its absence the latter judge could not act; he was without jurisdiction, nor could be undertake to declare the judge of the Tenth District incompetent, for, as we have seen, the incompetency was not absolute; it could flow only from a recusation; and until recusation judicially certified, the capacity and jurisdiction of the judge of the Tenth District over the cause was not divested.

GIBSON O. SELBY-

The next ground taken in the answer of the district judge is that, the plaintiff is not entitled to an order of appeal, because the judgment in this cause was rendered on the 13th April, 1846; that on the 18th of that month the predecessor of the defendant granted, on motion in open court, under the act of 1843, an order for a auspensive appeal, returnable in January, 1847, which appeal the plaintiff, not having filed the transcript, is to be considered as having abandoned; and that, under article 587 of the Code of Practice, he is not entitled to a new order for an appeal in devolutive form. It is true, as argued by the defendant in rule, that the motion for an appeal is to be considered, under the act of 1843, as operating a citation; but it is to be observed that, in this case, no appeal bond was filed. The filing of a bond was a condition precedent without which the appeal was inchoate only, and the case therefore does not come within the rule of abandonment, as expressed in the 594th art. of the Code of Practice. The inability, or the omission, of the plaintiff, to furnish a bend and fulfil the condition precedent upon which a suspensive appeal was granted, did not preclude the party from applying within the year for a devolutive appeal. The jurisdiction of this court attaches only when the bond is filed. See 7 La. 448. 1 Rob. 527. 10 Rob. 152. See also 3 Rob. 78.

The third ground presented by the answer is, that the defendant in the rule offered to the parties, as he alleges, "to waive an order of appeal on the transcript of the record, if they would present to him a correct one, which they declined doing." This offer must be considered as made by the defendant in his individual, and not in his official, character. Assuming such offer to have been made, the plaintiff was not bound to accept it. Such an agreement, if made, would not have been binding. The jurisdiction of the appellate court attaches only by a judicial order divesting, where its condition is complied with, the jurisdiction of the inferior tribunal, and cannot be given by consent of parties.

It is therefore ordered that a peremptory mandamus issue, commanding the Hon. Lewis Selby, judge of the Tenth Judicial District, to grant and sign an order for a devolutive appeal, as applied for by the plaintiff.

Succession of Montegut.

No collation is due to the succession of the wife for advances by the husband to one of his children made in his own name and right, while the Code of 1808 was in force, where the father has died, and the widow has not accepted the community. Code of 1808, b. 3, tit. 5, art.

21. Nor will the circumstance that she did not renounce the community in strictly legal form be viewed as an acceptance, though the law in force at the time required the same formalities in renouncing. as in accepting, a succession.

A PPEAL from the Second District Court of New Orleans, Strawbridge, J., presiding. In 1807, a marriage contract was entered into between J. B. Neurisse and Marie Montégut, in which Joseph Montégut, sr., settled a dowry of ten thousand dollars upon his daughter, the said Marie, which he promised to pay in May, 1808. In April, 1814, Joseph Montégut, sr., gave to Mrs. Neurisse, in payment of the dowry, which had not been paid as promised, a house and lot. In January, 1808, the said Montégut, sr., made a donation intervivos to his son,

Joseph Montegut, jr., of a certain plantation, valued at ten thousand dollars, in Succession advance of the donee's share in his father's succession. An advance of a like MOSTROUT. sum was made as dowry to a daughter married to Roffignac, in 1806. In 1814, Joseph Montégut, sr., made a cessio bonorum, and his wife, Françoise Delille, was paid, contradictorily with her husband's creditors, the amount of her matrimonial rights, as liquidated by the syndics' account. In November, 1819, Joseph Montégut, sr. died insolvent, and his succession was never opened. In December, 1836, Françoise Delille, the widow of Joseph Montégut, sr., died, leaving some property, and her succession was administered by E. Montegut, one of her grand-children and heirs. The administrator filed his account in March, 1846, to which an opposition was made by the children of Mrs. Clamageran, a daughter of the late widow Montégut, calling upon the appellees to collate to the succession of said widow Montégul what those whom they represent had received from Joseph Montégut, sr., as explained above. The opposition was dismissed, and the opponents appealed.

Benjamin and Micou, for the appellants. A donation by one parent to a child of both, out of the property of the community, is esteemed the donation of both parents. C. C. 2373, 1320. Code Nap. 1439, 856. Old Code, p. 194. A donation of community property by the husband to one of the children, must be collated one-half to the father's and one-half to the mother's estate. v. Baillio, 5 Mart. N. S. 228. 4 Touillier, p. 461, no. 464. 6 Pothier, Communauté, p. 393, no. 648. To this rule there is an exception, if the widow renounce the community. 4 Touillier, no. 464. Code Nap. art. 1439, Rogron, note. But Mrs. Montégut never renounced. During the life time of the husband, renunciation could only have been made after a judicial separation; after his death, only upon inventory made. But no such proceedings occurred, and of

course renunciation cannot be presumed or implied.

Le Gardeur, contrâ. Property received from the husband is not subject to collation in favor of the succession of the wife. C. C. 1320. Chabot, Successions, vol. 2, p. 389. 7 Duranton, nos. 242, 243. 4 Zachariæ, Droit Civ. Français, p. 447, § 631. This case must be determined by the Code of 1808. Under that Code the powers of the husband, as head of the community, were infinitely greater than those given by the Code of 1825. Now, the husband can blenter the property of the community. But under the alienate by onerous title only the property of the community. But, under the Code of 1808, he had a right to dispose of it by gratuitous as well as by onerons title, and this without the consent of the wife. Art. 66 of the old Code (p. 336) is positive to that effect. Under the old Code, when the husband, after making a cessio bonorum, died insolvent, there was no community; indeed, none could have existed, since the wife had no right whatever until her husband was dead.

Let us now see how the settlement of dowry was made, and at whose charge it was, under the old Code. Art. 20, p. 326, says: "Dowry can be settled either by the wife herself, or by her father or mether, or other ascendants, or by her other relations, and even by strangers." The next article (21) provides as follows: "If the father or mother settle jointly a dowry, without distinguishing the part of each, it shall be supposed constitued by equal portions. If the dowry be settled by the father alone for paternal and maternal rights, the mother, although present to the contract, shall not be obliged, and the father alone shall remain answerable for the whole of the dowry." The french Code contains an article, from which article 21 of the old Code is copied verbatim. Article 1544 reads thus: "Si les père et mère constituent conjointement une dot sans distinguer la part de chacun, elle sera censée constituée par portions égales. Si la dot est constituée par le père seul pour droits paternels et maternels, la mère, quoique présente au contrat, ne sera point engagée, et la dot de-meurera en entier à la charge du père." The construction put on this article of the french Code by some of the most distinguished commentators of France will assist us in coming to a correct understanding of art. 21 of the old Code. Touillier, vol. 14, no. 86, says: "Nous avons dit que si la dot n'a pas été conjointement constituée, la femme n'étant point engagée par l'é-nonciation que la dot est pour droits paternels et maternels, la totalité demeure à SUCCESSION OF MONTAGUT.

Loin de voir rien de bizarre dans la la charge du mari: second disposition de l'art. 1544, qui laisse à la charge du père la totalité de la dot qu'il a constituée seul, pour droits paternels et maternels, on n'y voit donc rien que de fort juste et de conforme au droit commun." Zachariæ, Droit Civil Français, vol. 3, page 389, says: "La constitution de dot, faite par le père seul, n'engage pas la mère, lors même que le père a déclaré constituer la dot pour droits paternels et maternels, et que la mère a été présente au contrat." Beneit, Traité de la Dot, p. 117, no. 28, says : "La dot constituée, du vivant de la mère, par le père seul, est en entier à la charge du père : 10. Si la constitution est faite purement et simplement, sans explication de ce que le père a entendu donner de son chef et de celui de son épouse. 20. Si la dot est constituée, effuso sermone, pour droits paternels et maternels; et cela quand bien même la mère eût apposé sa signature à ce contrat, la présence de la mère à ce contrat étant insuffisante pour faire présumer son consentement. 30. Si même dans le cas d'une société d'acquets existante entre les époux, le père avait con-stitué la dot en avancement de sa succession." Thus, all these jurists unite in saying that when the dowry is settled by the father alone, he is answerable for the whole of the dowry, or rather the whole of the dowry is at the father's charge, and the mother remains a stranger to it. The language of art. 21 of the Code of 1808, is verbatim that of art. 1544 of the french Code. Therefore, under the old Code, the whole of the dowry was at the charge of the father, when he alone had settled it. In this case, the dowry of Mrs. Neurisse was settled and paid by Mr. Montégut alone. The french commentators, after stating, under art. 1544 of the Napoléon Code, that the dowry is at the sole and exclusive charge of the father when it is settled by the father alone, say that when the dowry has been settled and paid out of community property, although by the father alone, one half of it is chargable to the father, the other half to the mother. But their opinion is founded on an express provision of the Code Napoléon, art. 1439, which says : "La dot, constituée par le mari seul à l'enfant commun en effets de la communanté, est à la charge de la communanté; et, dans le cas où la communauté est accepté par la femme, celle-ci doit supporter la moitié de la dot, à moins que le mari n'ait déclaré expressément qu'il s'en chargeait pour le tout, ou pour une portion plus forte que la moitié." No such provisions are to be found in our old Civil Code, nor even in that of 1825. They both provide that when the father settles alone the dowry, the whole of it is chargable to him. Neither says that when the father settles a dowry out of community property, one half of it is chargable to the father and the other half to the mother. In other words, the provisions of art. 1439 of the Code Napoléon have not been incorporated into our Codes. The rule under our law is beolute. No distinction or exception has been made, and we have no right to admit distinctions which the law itself has not admitted; ubi lex non distinguit, nec nos distinguere debemus. Should the court, however, adopt the whole rule, as set down by the french commentators, it must be adopted with the restrictions put upon it by those commentators, it must be adopted what the restrictions put upon it by those commentators themselves. They all require that the community should have been accepted by the wife. Indeed the very article requires that. Code Napoléon, art. 1439. Duranton, v. 7, no. 244. Zachariæ, v. 3. p. 390. Benoit, v. 1, p. 121. Until the acceptance by the wife, it cannot be said that a community ever existed. 7 Mart. N. S. 68. Guice v. Laurence, ante, p. 226.

Has the acceptance of the wife been shown? Montegut died in 1819, and this case is to be tested by the provisions of the old Code, which, although it provides as the new one, that the wife's renunciation shall be made in a certain form, provides also that her acceptance must be made in the same form. Art. 81, p. 340. The last paragraph of that article says: "The acceptance of the partnership or community of gains shall be made (doit se faire) in the same form as is above prescribed for the renunciation of the same." Thus, if we are in default in not showing a renunciation in due form, the opposite party is equally in default in not producing an acceptance, as required by the law of 1808. Under these circumstances, it is plain that the court are left to infer the fact of a renunciation or an acceptance, from all the circumstances of the case. The opposite party have shown nothing tending to establish an acceptance, whereas we have brought forward a mass of facts from which nothing but a renunciation can reasonably be inferred. If Mrs. Montégut had accepted the community she would have been answerable for one half of its debts, and certainly would not have

been paid the amount due her out of the proceeds of the sale of the community property. She would have been compelled to pay the balance of the community debts. Now, was this the case? No. She gave a release of her legal mortgage on the property. She was set down on the tableau, to be paid concurrently with the other creditors. If she had not renounced the community, she would have been treated not as a creditor, but as a debtor.

It was contended below that the late Supreme Court, in the case of Baillio v. Baillio, 5 Mart. N. S. 228, has laid down the principle, that when the donation is of common property collation takes place by moiety, although the husband were the sole agent in the gift or advances to the children. This is true; but in that case, which differs toto celo from this, there was a community, the partition of which was before the court. At all events, an isolated decision is entitled to no weight, especially when, as in the case of Baillio, it clearly violates the law of the land.

Blacke, on the same side. Had the dowry been settled by the father alone, for paternal and maternal rights, even in the presence of the mother, the latter would not have been bound therefor, and the father alone would have remained answerable for the whole of it. Code of 1808, p. 326, art. 21. Code of 1825, art. 2322. Admitting that the dowry was constituted by the father out of the common funds, it was, on his part, the exercise of the power which the husband, as the head and master of the community of gains, had to self or give away the effects belonging thereto, without the consent and permission of the wife, who had no sort of right in them until the death of her husband. Code of 1808, p. 336, art. 66. The community of gains which existed between Françoise Delille and her husband, Joseph Montégut, sr., not having been formally necepted by her, as required by art. Si of the Code of 1808, p. 340, but she having done acts which evinced a manifest intention on her part to renounce the community, she must be considered as having in fact renounced it. Having renounced the community of gains, the widow Montégut lost all right to the effects belonging thereto, which might have existed at the time of its dissolution; a fortiori, to those which her husband had long before disposed of, by virtue of the provision of art. 66 of the Code of 1808, p. 336, and in particular to the dowry of \$10,000, settled by him alone on their daughter, the wife of Roffgnac. The heirs of the widow Montégut, to whom she could not transfer by inheritance a right which she herself did not possess, cannot claim the collation to her succession of one-half of the said dowry, or any other property of the community, disposed of in the same manner.

The judgment of the court was pronounced by

Rost, J. This appeal was taken from a judgment dismissing in part the opposition of the appellants to the homologation of the tableau filed by the administrator of their grandmother's succession. The object of the opposition was to cause all the advances made by the grandfather and grandmother of the opponents to some of their children, to be brought into collation in the final partition of this succession. The advances made by the father were made in his own name and right, previous to the year 1814, when he became insolvent and surrendered his property to his creditors. The matrimonial rights of his wife were liquidated by the account of the syndics, and, in 1818, she gave them a receipt for \$7,000, " pour solde et final payement des droits de la comparante; pour ses apports de toute nature, se reconnaissant entièrement satisfaite pour toute somme qu'elle pourrait et avait droit de réclamer, à raison de tous ses apports." The syndics further relinquished in her favor their commission, amounting to the sum of \$2,816 15. On the 2d of November, 1819, Montegut died, without having come to a better fortune, leaving a large amount of debts unpaid, and no community property. His succession, being exclusively composed of his debts, was not administered upon; his widow never accepted the community of acquets and gains; and it is clear that she could not have done so, without becoming responsible for one-half of its liabilities.

The judge of the court below, being of opinion that the acts of the wife must

SUCCESSION OF MONTEGUT.

be regarded as a renunciation of the community; and farther that, by an express provision of the Code of 1808, the dot, if settled by the father even for paternal and maternal rights, although the mother was present to the contract, bound the father alone, dismissed the opposition so far as it related to the advances made by the father. Code of 1808, p. 326, art. 21.

The appellants contend that there is an error in the judgment; that a donation by one parent to a child, out of the property of the community, is esteemed a donation of both parties, and must be collated, one half to the father's and the other half to the mother's succession; and they rely in support of that position, on the case of Baillio v. Baillio, 5 Mart. N. S. 228, and also on the Civil Code, arts. 2373, 1320. Code Napoléon, 850, 1439. Code of 1808, p. 194. 4 Toullier, no. 464. 6 Pothier, Communauté, p. 393, 648.

The appellants have failed to show that the donations made by the father were of community property, and if they were that the eventual rights of the wife in it had ever become absolute by her acceptance. This is absolutely required by the authority to which we are referred. 4 Toullier, 464. So far from there having been an acceptance in this case, the intention of the wife to renounce; and her belief that she had renounced, are rendered manifest by all her acts. The circumstance that she did not renounce in strict legal form, at a time when the law required the same formalities for renunciations and acceptances; cannot be viewed as an acceptance on her part.

If the appellants should succeed, after so long a time, in reviving the community, and in bringing into it property donated by their grandfather before his failure, it is probable that the claims of his creditors would also revive, and that it would become our duty to place that property at the disposal of the syndics. What further responsibilities the appellants might thereby incur, it is unnecessary to determine.

We are satisfied there is no error in the judgment appealed from.

Judgment affirmed ..

Succession of Guillemin.

The term absence embraces persons residing abroad who have never been demiciliated in this State, as well as those who, having once resided here, have since left the State.

The prescription of five years, established by art. 3505 of the Civil Code as to bills of exchange, applies to actions upon the instrument itself, for breaches of the contract of which it is the evidence.

Quoad creditors, the wife or her heirs must show, otherwise than by the confession or acknowledgment of the husband in the marriage contract, the origin and payment of the dowry. By the french law, the receipt of the hasband to a person by whom the dowry was due, although by private act, provided its date be certain and anterior to suit by the creditors, is sufficient evidence of payment, subject to the right of the latter to controvert the receipt and prove its simulation; but the acknowledgment is not received as proof when the dowry purports to have been constituted by the wife herself, the legal presumption being that "c'est donner à sa femme que de reconnaître en avoir recu quoique ce soit;" in such a case the acknowledgment of the husband is not even binding on him or his heirs—the wife must prove the origin of the money, and the truth of the receipt. Aliter, as to the acknowledgment by the husband in the marriage contract of the estimated value of clothing-linen, and jewelry brought by the wife into the marriage, to an amount suitable to her condition; the presumption is that she had such things.

- Where a father resides in this State, he will, though a foreigner, become of right the tutor of his children, on the death of their mother, and a legal mortgage will attach, in favor of his minor children, on real property owned by him here.
- A foreigner residing in this State may be appointed a tutor by our courts.
- It is the duty of a tutor, immediately after appointment, to reduce the property of his wards into possession, to render it productive, and to administer it as a prudent father of a family administers his own affairs.
- In settling the accounts of a tutor he will not be allowed to make a donation to his wards, at the expense of his creditors.
- A PPEAL from the Second District Court of New Orleans, Canon, J. St. Paul, for O. Guillemin, appellant. Pilié and Le Gardeur, for De la Paqueraie, appellant. Castera and Soulé, for the appellees. The judgment of the court was pronounced by
- Rost, J. This litigation arose upon the account rendered by the administrator of the succession of the late 1. F. A. Guillemin, and has its origin in the following facts:
- The marriage contract entered into in Paris, in the year 1812, between the deceased and Caroline de Pierray, his first wife, contains this clause:
- "La future épouse apporte au dit mariage, et se constitue en dot tous les biens et droits à elle appartenant, consistant en une somme de 25,000 francs, argent comptant, et en ses habits, hardes, linge, et bijoux, de valeur de 5,000 francs, ainsi qu'elle en a justifié au futur époux, qui consent à demeurer chargé de tout envers elle, par le soul fait du mariage." The marriage took place at the date of the contract. In 1817, the deceased came to this place, with his wife and three children, who are the appellees in this suit. A few months after their arrival, Caroline de Pierray died, and, in 1821, the deceased married Hortense Arnaud, a native of Louisiana, who brought into marriage, as her dowry, two slaves, and various sums of money, amounting together to \$6,856. In 1825, Hortense Arnaud died, Jeaving two children, the survivor of whom, Oneida Guillemin, in her own right, and as administratrix of the late Hortense Guillemin, her sister, is one of the appellants. In 1830, the deceased Guillemin was entrusted, at his own request, by Martin de la Paqueraie, who resides in Paris, with sums of money to be invested in Louisiana, and at his death, which occured in the city of Havana, in 1834, he was indebted to Dela Paqueraie, on that account, in the sum of \$10,407 41.
- In 1835, Julien Arnaud, the maternal uncle of Hortense and Onfida Guillemin, was appointed their tutor, and no steps were taken for the settlement of the succession, till 1840, when the tutor caused himself to be appointed administrator. Several years after his appointment, the property of the succession was sold, and, in 1845, he rendered an account of his administration, showing a balance in his hands of \$18,273 60, which he attempted to distribute as follows:
- To the children by the second marriage, the amount of their mother's dowry, - 89,136 80
- To the same, for interest on said dowry, from the time of their mother's death,
- De la Paqueraie opposed the homologation of the account, and claimed the balance due him. The children of the first marriage also made opposition, alleging their right to be paid by preference 30,000 francs, the amount of their mother's dowry. The court below having dismissed the first opposition and sustained the last, De la Paqueraie and Onéida Guillemin appealed. The opi-

GULLENIS.

nion we have formed renders it necessary that the claim of De la Paqueraie be first noticed.

I. His claim is resisted on the ground of prescription, and it is alleged to be barred by lapse of time, under art. 3508 of the Code, which enacts that all personal actions are prescribed by ten years, if the creditor be present, or by twenty, if he be absent; and also under art. 3505, which provides that actions on bills of exchange and on all effects negotiable or transferable by endorsement or delivery, except bank-notes, are prescribed by five years, reckoning from the day when these engagements were payable. This claim originated in 1830, and the prescription of twenty years has not yet matured. It is contended that the prescription of ten years applies, because De la Paqueraie is not an absentee in the legal meaning of that word. That to be absent, one must have been present. 'The french authorities relied on in support of that position are not applicable to cases of prescription, even in France (Troplong, Prescription, no, 864); and if they were, we could not take them as our guides in opposition to an express provision of our Code not inconsistent with the other dispositions contained in that body of laws in relation to absentees. C. C. 3522. 14 La. 445. 15 La. 81. It cannot surely be said that De la Paquergie was present; and, as ander the article last cited all persons not present are absentees, his claim is not barred by the lapse of ten years.

It is now contended that the funds were transmitted to Guillemin by means of bills of exchange drawn by him on De la Paqueraie, with the previous authorisation of the latter; that he, De la Paqueraie, subjected himself thereby to the responsibility and rules relative to the instruments he adopted as a medium of transfer; and that, in as much as the gist of his action is the bills of exchange, his action must be barred by the prescription applicable to those instruments.

The argument of the counsel for De la Paqueraie, in opposition to this ground, has not been answered, and is unanswerable. Admitting De la Paqueraie to be subject to the rules applicable to bills of exchange, he could not, under those rules, have sued himself upon bills of which he was the acceptor, nor could be have brought suit on those bills against the drawer. He must have declared specially on the implied contract to indemnify, or for money paid to the drawer's use. The prescription of five years applies to actions upon the instrument itself, for breaches of contract. Here there was no breach of contract. The bills were duly honored and paid. The obligations which arose between the parties by reason of their payment are subject to the general rule for the prescription of personal actions. 3 Kent's Com. 86. Chitty on Bills, 334, 569, 648. Pardessus, Droit Commercial, vol. 2, pp. 184, 379, 402, Bailey on Bills, 343.

We have, therefore, come to the conclusion that the plea of prescription is not sustained by the authorities adduced in support of it; and, in ascertaining the rights of other parties, we will deem it our duty to give De la Paquerais the benefit of all deductions which Guillemin himself, or the tutor of the children of the second marriage, might lawfully claim in a settlement with those children.

II. De la Paqueraie and Onéida Guillemin both contend that nothing is due to the children of the first marriage, because they have failed to show, by legal avidence, the origin and numeration of their mother's dowry. Under our jurisprudence it is well settled that, quad creditors, the wife or her heirs must show, otherwise than by confession or acknowledgment of the husband, the

origin and payment of the dowry. Curia Filipica, 420, nos. 27, 38. Gomez Succession ad leges Tauri, law 53, no. 52. 4 Febrero, part 1, book 3, § 1, no. 4; book 3, ch. 3, no. 136. 7 Mart. N. S. 46u.

In France, where the contract was made, Zacharim lays down the rule on the subject as follows: "La fomme n'est en général admise à reclamer la restitution de sa dot, qu'à charge de prouver qu'elle a réellement apportée. Cette preuve doit se faire après les principes du droit commun." Vol. 3, p. 602, 33 He states, however, that the receipt of the husband to the person who owes the dowry, although by private act, provided its date be certain and anterior to the institution of the suit by the creditors, is sufficient evidence; reserving to them the right to controvert the receipt and prove its simulation. But under the principes du droit commun, as settled by the jurisprudence of that country, the acknowledgment of the husband is not received as proof when the dowry purports to have been constituted by the wife herself, by reason of the legal presumption prevailing there, as with us, c'est donner à sa femme que de reconnaître en avoir reçu quoique ce soit; and accordingly, the acknowledgment of the husband that he has received from his wife a sum of money as her dowry, is not of itself binding even upon him or his heirs; the wife must in all cases prove the origin of the money and the truth of the receipt. Cochin, tom 2, p. 580. Coquille, question 120. Roussilhe, De la Dot, pp. 103, 104.

The law of France applicable to this controversy is believed not to differ from that of Louisiana, and the children of the first marriage have complied with the requisites of neither, in relation to the 25,000 francs, alleged to have been received in money by their father. The acknowledgments of the latter have not even the force of receipts; and we agree with the counsel for De la Paqueraie that, if the claim of the deceased against the Princess Poniatowski has any thing to do with the matters at issue, the evidence adduced in support of it raises a strong presumption that the dowry of Caroline de Pierray was not paid. Should this outstanding claim be collected and its amount brought into court for distribution, a very different case would be presented. But we are constrained to say that, the appellees have failed to make out their rightt o receive the 25,000 francs mentioned in the marriage contract of their mother, out of the fund now in the hands of of the administrator. It is otherwise for the estimated value of the habits, hardes, linges, et bijour, brought by her into marriage. The legal presumption is, that she had those things to an amount suited to her condition; and the sum of 5,000 francs, at which they were appraised, is every way reasonable. It is not shown that at her death they were taken back by her heirs; the succession must, therefore, account for their estimated value.

By the death of Caroline de Pierray, Guillemin became of right the Inter of his children. The succession was opened, and the tutorship commenced, in Louisiana. During its continuance, and before his second marriage, Guillemin acquired nearly all the property which he left at his death, and the circumstance of his not being a citizen of the country did not prevent a legal mortgage from attaching upon it in favor of the minors. The real property of the State is undonhtedly, as a general rule, subject to its laws. If the appellees were deprived of the protection of those laws because their father was a foreigner,

^{*} The counsel for the appellant De la Paqueraie, cited in support of this position, in addition to the authorities in the text, 14 Toullier, no. 275. 2 Benott, Traité de la Dot, p. 233. 3 Zacharies, p. 602. Lucket v. Lucket, 11 La. 245. Fennessy v. Gonsoulin, 1b. 425. Dimitry v. Pollock, 12 La. 296. Nores v. Carraby, 5 Rob. 295. Dimitry v. Pollock, 5 Rob. 350.

SUCCESSION OF GUILLENIN.

it is not easily perceived how Oneida Guillemin could claim to be paid by preference to De la Paqueraie, as a mortgage creditor.

In support of the ground that the appellees had not a legal mortgage in Louisiana on the property of their tutor, the appellants have adduced the authority of Grenier, a french jurist, who lays down broadly the rule, that the law of France only speaks for french subjects, and not for foreigners. Troplong, another french commentator of high repute, denies this, and insists that the foreign minor, whether or not he resides in France, has a legal mortgage on the real property, which his tutor owns in that kingdom. Priv. et Hyp. vol. 1, p. 247. However this may be, our laws are not framed with reference to citizens alone. This country was the first to recognise the right of expatriation as an essential element of constitutional freedom, and has at all times discharged towards foreigners the obligations, imposed upon it by the recognition of that right, to give them, not merely an asylum, but a home. Before they are per mitted to exercise political rights, a few years of probation are wisely required. But so far as civil rights are concerned, the citizen and the foreigner residing here, are believed to be equal before the law. Appointments of foreigners residing here as tutors are of daily occurrence, and their capacity has never been

The appellees are entitled to be paid, by preference, the sum of \$952 38. They have set up no claim for interest; and we consider the earnest desire expressed by their counsel in argument that *De la Paqueraic* should be paid, as an honest and sufficient motive for having abstained from doing so.

The dowry of the second wife, exclusive of the two slaves which have returned to the possession of Oneida Guillemin, is admitted to be as stated in the marriage contract, \$6,856. By a settlement made by Guillemin with the father of his wife, in January, 1823, the latter remained indebted to his son-in-law, on account of said dowry, in the sum of \$4,091 20, on which he agreed to pay him interest at the rate of ten per cent per annum. The capital and interest were both paid in 1828; and the appellant Oneida Guillemin claims the sum of \$1,392 06, heing the portion of the interest which accrued after the death of her mother. It is in evidence that, from that time to that of the payment, she and her sister lived with their grandfather, and that no provision of any kind was made for them by their father. Under these facts we consider the appellant entitled to the interest she claims. Her father could not have compensated that interest against the subsequent expenses of the minors,

From the date of the settlement in 1828, to the death of Guillemin, in 1834, the two minors resided with him; and it is clearly shown that the income of their property was not sufficient to defray the expenses incurred for their maintenance and education. Whether or not their father intended to charge them for those expenses, to the full amount of their income, is immaterial. He had the right to do so, and De la Paqueraie must have the benefit of that right. Up to the death of their father, the appellees have no claim for interest. As soon as the tutor was appointed, it was his duty to reduce to possession the property of his wards, to render it productive, and to administer it as a prudent father of a family administers his own affairs. His failure to do so subjected him towards the minors to damages, at least equal to the interest of the amount due them. Ten years had elapsed since his appointment as tutor, when he filed the account of his administration. The property was sold for upwards of \$22,000. It consisted of slaves, houses and lots. It apppears also that, at the death of

Guillemin, he owned some stock, and one hundred thousand cigars are mentioned in the inventory. The administrator does not state whether the cigars ever came into his possession, and renders no account whatever of the rents and profits of the property since 1834. It appears that he has defrayed the expenses of his wards during that time, and although he does not so state it in his account, we must presume, in justice to him, that those assets, if received by him, have gone to pay those expenses; and that, if he did not receive them, and suffered the property to remain unproductive, he defrayed the minors' expenses by way of reparation for his negligence.

SUCCESSION OF GUILLENIN.

Had Oncida Guillemin made opposition and required the administrator to account for the missing assets, and for damages caused by his mal-administration, he would have had the right to compensate the expenses incurred by him on account of the minors against the share of the rents, profits and damages coming to them. Considering that the tutor cannot make a donation to his wards at the expense of an honest creditor, we will give effect to this compensation, for the benefit of De la Paqueraie. The interest on the sum due the minors would have been barely sufficient to pay their personal expenses; and, being of epinion that those expences must be held to have been paid by the succession, we are satisfied that Oncida Guillemin has no claim for interest since the death of her father.

We have not gone into the enquiry whether the new Code has made any change in the former laws requiring the tutor to pay interest on the sums that come to his hands from the day he receives them. Supposing the law to be unchanged, the appellant Oneida Guillemin has not shown herself entitled to receive interest since 1828.

For the reasons assigned, it is ordered that the judgment in this case be reversed. It is further ordered that the opposition of Mrs. Andry, Mrs. Knight, and Auguste Guillemin be sustained for the sum of \$952 38, and that they be paid said sum by preference as creditors by the first mortgage. It is further ordered that Oneida Guillemin, in her name, and as administratrix of the succession of hereister Hortense Guillemin, be placed on the tableau for the sum of \$8,248 06.

It is further ordered that Martin de la Paqueraie, be placed on the tableau for the sum of \$10,407 41, to be paid as far as the assets will permit, after the other two claims, and all expenses in this suit and in the settlement of the succession generally, are satisfied. It is further ordered that the costs of the court below, and one-half of those of this appeal, be paid by the administrator; the other half of the costs of this appeal to be paid by the three appellees.

WHITE v. KEARNEY et al.

A copy of a clearance granted to a coasting vessel at another port in the United States, certified by the deputy collector, under the custom-house seal, to be a true copy of the original, on file in his office, is admissible and sufficient evidence to establish the date of the clearance, when accompanied by the testimony of a clerk in the custom-house of the port for which the vessel was cleared, that the person by whom the certificate was signed was, at the date of the cartificate, the acting deputy collector, that the seal was the custom-house seal, and that a search had been made for the original clearance and that it could not be found; and by

WHITE O. KEARNEY.

that of another witness, that he had seen the original on file in the custom-house of the port for which the vessel was cleared, and that the signature to it was the genuine signature of the person who was deputy collector.

Where the credit of a commercial firm is used by the sufficiently of one of the partners, and is relied upon by the other party in a transaction in the ordinary course of trade, all the partners will be responsible, whatever may be their liability inter se.

The fact of the dissolution of a partnership does not render a partner incompetent to receive, on behalf of the firm, an offer of delivery of goods sold to the partnership, or a demand of payment of the price. It is not necessary to put each partner separately in default upon a contract made before the dissolution.

Where on the refusal of the purchaser to comply with the contract for the sale of merchandise, the vendor sells it at the risk of the former, it is not necessary that the sale should be
in all cases at auction. By the breach of the contract the vendor becomes the trustee of
the purchaser, to dispose of the merchandise in good faith and with reasonable diligence;
and where the property is sold for a fair price, though not at auction, the amount for which
it is sold will fix the liability for damages for the breach of contract.

A PPEAL from the Commercial Court of New Orleans, Walls, J. Winthrop, for the plaintiff. Elwyn, Elmore, and W. W. King, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This case has already been before the Supreme Court. 9 Rob. 495. The pleadings in the cause, a large portion of the testimony, and the grounds of defence, were then stated. The question of the admissibility in evidence of a certified copy of the vessel's clearance at Thomaston is again made, but under a different state of evidence. The document in question is signed by C. Baquie, deputy collector, and has the seal of the custom-house annexed to it. He certifies that "the within is a true copy of the original on file in this office." The copy thus certified is the usual clearance, or permission to the brig Lucy Ann, of Thomaston, to proceed to the port of New Orleans, signed by the deputy collector of the port of Thomaston. The presentation of this document in evidence, was accompanied by the testimony of a clerk in the New Orleans custom-house, who deposed that Baquie was, at the date of the certificate, the acting deputy collector, and that the seal was the custom-house seal. He also stated that search had been made for the original clearance, and that it could not be found. Another witness deposed that he had once seen the original, of which the document is a copy, on file at the customhouse at New Orleans. That the signature to said original was the genuine signature of Spears, who exercised the functions of deputy collector at Thomaston. Under this evidence and state of facts we think the court below did not err in receiving the document, and considering it as establishing the fact that the vessel was cleared, at Thomaston, on the 31st August, 1843.

It is satisfactorily shown that the vessel was also, in other respects, ready for sea on the 1st September, 1843. She was prevented from leaving port by stormy weather, during the prevalence of which it would have been imprudent to sail, and started as soon as this obstacle ceased. The contract with the defendants' agent was therefore fairly fulfilled, which was, "that the above named brig is to be all ready for sea on the morning of the first day of September."

We find nothing in the evidence justifying the position that the defendants' agents, in making the contract, exceeded the orders of Kearney.

It is contended that Sims, one of the house of Kearney & Co., was not bound by the contract; that it was the individual contract of Kearney, the other partner. The written contract was made by the agent, on behalf of Kearney & Co. A portion of the letters, which contain the instructions and





WHITE

authority to the agent, were written to him by Kearney, under his individual signature; but he speaks repeatedly in them of shipments to the house. One of the written communications of Kearney to the agent was in these words: Go as high as \$1 50 for the lime.—K. & Co." The answers of the agent, From time to time, advising his contract for purchase and subsequent proceed ings, were addressed to the house, and the letter enclosing the contract with plaintiff was received and filed by Sims. No objection to the transaction appears to have been made by him in the mean while, nor until after the arrival of the vessel. The agent, who had been a clerk of the house, and was on an intimate and confidental footing with both partners, had verbal communications with Kearney on the subject of shipments before his departure for Thomaston. It is evident that in these transactions the credit of the house was used with the full authorisation of one of the firm, and that it was relied upon by the plaintiff. The other partner cannot escape the responsibility to the plaintiff, who dealt with the house upon the faith of Kearney's written and verbal instructions on behalf of the partnership, whatever, inter se, may be the liability of the partnership for this adventure.

There has been much discussion in argument, as to whether Kearney & Co. were put in default upon their contract to receive and pay for this merchandise. There is no doubt whatever on this point, as to Kearney. The evidence is not so full as to Sims, who contends that he is not bound by acknowledgments of Kearney made after the dissolution of the partnership, which occurred about the time the merchandise arrived at New Orleans. But upon consideration of the evidence, other than that of Kearney's answers to interrogatories and his other acknowledgments subsequent to the dissolution, we think the court below was justified in considering the default proved as against the firm. The fact of the dissolution did not render Kearney incompetent to receive, on behalf of the house, an offer of delivery and demand of payment. We do not think it was necessary to put them separately in default, upon a contract made before the dissolution. See Cady v. Shepherd, 11 Pick. 409. It is proper also to observe in this connection that, neither Kearney, nor Sims, in the applications made to them for settlement before suit, objected on the score of a want of offer of delivery. Kearney refused to settle on account of the delay in the vessel's departure, and Sims upon the ground that the firm was not bound by the contract.

The plaintiff, upon the refusal of the defendants to take the lime, and having notified the defendants that he would sell it at their risk, did sell soon after, at private sale. The defendants contend that he had no right to sell otherwise than at auction. We are not aware that this is the inflexible rule. When, by the breach of the contract, the merchandise was thrown upon the plaintiff's hands, he became the trustee of the defendants to manage it in good faith, and with reasonable diligence. The judge below, who has heard this cause twices was of opinion that the sale made by the plaintiff, though not at an auction, was at the fair market value. The small profit realised by the purchasers is not a suspicious eircumstance, as they retailed it. We are satisfied that the decree of the Commercial Court has done justice between the parties.

Judgment affirmed.

NEWMAN P. GOZA.

Where the transcript of a record from a court of another State, commences as follows: " Pleas before the Hon. G. C., Judge of the First Judicial District of the State of M., at a Circuit Court begun and held at the court-house in and for C. county," &c.; and the clerk, in his certificate, describes himself as Clerk of the Circuit Court for the county of C.; and the judge, in a certificate commencing "State of M., C. county," styles himself Judge of the First Judicial District of said State, an objection that the certificate of the judge does not show that the county of C. was within his circuit, will be disregarded.

In the absence of any suggestion that the certificate of a judge, authenticating the transcript of a record from a court of another State, and attached thereto, at the foot of the clerk's certificate, by a wafer, was improperly obtained, it will be presumed that the judge did not violate his duty, and that he affixed the certificate himself to the transcript; nor will this presumption be affected by the fact that there was room enough to have written the judge's

certificate on the same sheet on which the clerk's certificate was written.

It is no defence to an action against the maker of a note, by the last endorser, who had paid a part of its amount, after protest, to the holder, that the defendant made the note for the accommodation of a previous endorser, who had put it in circulation, where there is no proof that the relations between the latter and the maker were known to plaintiff. In the absence of such proof the defendant must be considered to have endorsed the note upon the faith of the antecedent names.

The testimony of a witness that the last endorser of a note, who had been compelled to pay its amount, told him that he looked only to a previous endorser, and knew nothing of the maker in the matter, is insufficient to discharge the latter. Per Curian: Such loose declarations, made without consideration to a third person, cannot be treated as an abandonment of a lawful claim.

Where the endorser of a note, after protest for non-payment by the maker, pays a part of

its amount, he may recover such partial payments from the maker.

Where the maker of a protested promissory note, in settling certain partnership transactions with an endorser, transfers property to the latter on his agreeing to pay the amount of the note to the holder, it will amount to an acknowledgment of the debt by the maker, interrupting the prescription running in his favor, and may be taken, advantage of by another: endorser, who had been compelled to pay a part of the amount of the note. C. C. 3466,

Questions of prescription must be determined by the law of the forum

An endorser of a bill or note, against whom an action has been brought by the endorsee, cannot recover from the maker or acceptor the costs of the action, unless in case of an express and collateral contract of indemnity.

PPEAL from the District Court of Carroll, Curry, J. The facts of this case are stated in the opinion of the court, infra.

Short, Prentiss and Finney, for the appellant. The payment by plaintiff on the judgment against him as last endorser, was in law a payment for the use of defendant, out of which arises a legal obligation on his part to refund; plaintiff has a right to enforce this obligation, and is not obliged to sue on the nete, but may use it in evidence to sustain his action for money paid to defendant's use. This obligation to refund arose in Mississippi, where the payment, out of which it originated, was made. It is to be governed by the lex loci contractus, which is the common law.

It is settled in the United States, as well as England, that the payment of the whole or part of a note or bill by an endorser, produces, by mere operation of law, a perfect obligation on the part of the maker or acceptor to refund. This doctrine is founded on the general principle that, whenever a man is compelled to pay the debt of another, such payment is considered as made for the use and at the request of the primary debtor, and the law raises an implied promise on his part to refund. An endorser who has paid part of a note may sue the maker upon this implied promise; and afterwards, upon further payment, sue again.

If he has paid the whole note, he is still not bound to rely upon the express contract, but may rely upon the implied one, arising out of his payment of the note, and sue for money paid to the use of the maker. In the case of Butler v. Wright, 20 John, R. 367, it was decided that a second endorser, who had paid part of a note, could maintain an action against a previous endorser, for money paid to his use, provided the statute of limitations had not attached at the time of payment. The same case was affirmed in 2 Wend. 369, and re-affirmed in Wrightv. Butler, 6 Wend. 284. That an endorser who has paid a bill or note may maintain his action against the maker, for money paid to his use, without resorting to an action on the instrument, is also fully settled in Pierce v. Crafts, 12 John, R. 90, and in Wild v. Fisher, 4 Pick. 421. In Cole v. Cushing, 8 Pick. 48, the principle was recognised and applied, although it appeared in evidence that the maker signed the note merely for the accommodation of the payee. The doctrine established by the foregoing cases in New York and Massachusetts, is fully recognised in England. In the case of Pownalv. Ferrand, 6 Barn. setts, is fully recognised in England. In the case of Pownalv. Ferrand, 6 Barn. & Cress. 439 (13 Eng. Com. Law R. 230), it was ruled: "That the endorser of a bill being sued, and having paid part of the sum mentioned therein, might recover the same from the acceptor in an action for money paid to his use." Mr. Justice Holroyd put the case upon the same footing with that of a surety. Vide also Bailey on Bills, 390. In the case now before the court, the plaintiff did not pay the whole of the note, and had no right to sue on the note, for he had only paid a part of it. An action for money paid was the proper proceed-Upon his payment, the law raised an implied obligation on the part of defendant to reimburse him. That obligation did not come into existence till the payment was made, to wit, July, 1843. Of course, prescription could not commence running before the cause of action arose; and the plea was improperly sustained.

Prescription was interrupted in 1840, by defendant's acknowledgment of the debt. It will be perceived that the prescription of five years was not completed in 1840; and, if then interrupted, it had not matured at the commencement of

this suit.

The transfer by defendant to J. H. Moore & Co. of property to the amount of the debt, and his arrangement that they should pay it for him, is sufficient to interrupt prescription. Civil Code, art. 3486. Carrabyv. Navarre, 3 La. 263. Shiff v. Hertzog, 12 La. 455. Rivière v. Spencer, 2 Mart. 82. It is not necessary to prove a direct acknowledgment, but it may be inferred from facts without words. 1 Harris & Gill, 204. Whitney v. Bigelow, 4 Pick. 110. 9 Pick. 488. 8 Wend. 600. 13 Wend. 267. Bailey on Bills, 102, 349, 622.

Nor need the acknowledgment be made to the creditor himself. 1 Esp. 435. 4 Esp. 46. 3 B. & A. 141. Oliver v. Grey, 1 Harris & Gill, 204. Whitney v. Bigelow, 4 Pick. 110. St. John v. Garrow, 4 Porter, 223. In Dean v. Hewit, 5 Wend. 257, the promise relied on was made to the payee of the note, and was held to enure to the benefit of the holder. Pothier makes a distinction between acknowledgments made before, and after prescription has been accomplished. In the former case very slight ones suffice to interrupt prescription, and they need not be made to the creditor, nor with his knowledge; while in the latter case, to revive a debt already barred, the acknowledgment must be made to the creditor himself. The mere registry of the debt among the charges, in the inventory of the effects of the debtor, though not made with the concurrence of the creditor, is an act which recognises the debt and interrupts prescription. Pothier on Obligations, part. 3, ch. 8, art. 2, ss. 3, p. 457. English translation.

Until he satisfied the judgment in 1843, plaintiff had no right to sue for money paid, nor on the note. The note belonged to the Planters' Bank. Plaintiff could not force the bank to sue the maker, nor was he entitled to an action

himself.

The holder of a note, who has neglected to sue the maker, cannot avoid the plea of prescription on the ground that he instituted suit in due time against one or more of the endorsers, because he had all the time a right of action against the maker, and where the right of action exists prescription runs. The former Supreme Court decided in Allain v. Longer, 4 La. 152, that suit against one of the parties to a note interrupted prescription as to all. This decision was based upon the assumption that all the parties to a note are bound in solido; but was very properly reconsidered, and the principle reversed in the case of Jacobs v. Williams, 12 Rob. 183. The latter case was one in which the holder sued,

NEWMAN U. GOZA. NEWMAN 9. GOZA.

and prescription attached, because the right of action had always existed in him. But how is it with an endorser? He is entitled to expect that the maker has paid, or will pay; in other words, that he will fulfill his obligation. Suppose the holder does not apply to the endorser until the very last moment of pre-scription, it would be injustice to say that the maker should be entitled to plead against the endorser the same prescription which he was entitled to against the It is the holder's own fault that he did not sue the maker in time, but it is not the fault of the endorser; he could not sue till he had paid; and, as between him and the maker, he was not bound to pay, but had a right to expect that the maker would pay, the rule ought to be that prescription shall not run in favor of the maker against an endorser, but from the time the endorser has taken up the note or bill. "Indeed the idea, observes Judge Porter, in the case of Hernandez v. Montgomery, 2 Mart. N. S. 433, of a man losing his right by not bringing an action which it was impossible he could bring, involves such a contradiction in itself, and leads to such monstrous injustice, that nothing short of the most positive law could authorise any tribunal to sanction such a doctrine.

Dupuy, for the defendant.

J. Dunlap, on the same side. 1. The note sued on matured on the 5th March, 1837, and this suit was first instituted on the 12th day of February, 1844.

2. The note was made by defendant for the benefit of *Moore & Co.*, and without any privity with any of the endorsers, especially with plaintiff, who declared, when advised to pay the note and sue *Goza*, that he endorsed for the benefit of *Moore & Co.*, and looked to them only.

benefit of Moore & Co., and looked to them only.

3. The payment by plaintiff of the amount of the note, was not made within

five years of the institution of this suit.

4. There is no evidence of any promise or acknowledgment of the note, on the part of Goza. The settlement of account between him and Moore & Co., in which the credit to Goza, caused by Moore & Co.'s using the note, may have been an item, is not evidence of such a promise. The prescription of five years, pleaded under our Code, art. 3505, runs against plaintiffs wherever they reside, and in favor of defendants wherever they reside. C. C. 3487, 2218. 15 La. 145. Story's Conflict. s, 576. The prescription of our law is a discharge, an extingnishment of the debt. C. C. arts. 3421, 3422. The limitation statutes of common law States have no such effect. Joynes' Essay, p. 15. The acknowledgment of the debt, if specifically made by Goza to Moore & Co., would not avail the plaintiffs, according toart. 3486 of the Code, which declares that, "prescription ceases likewise to run whenever the debtor or possessor makes acknowledgment of the right of the person whose title they prescribed." It is said that Moore received property to pay the debt to the bank. How could this, if true, be called an acknowledgment of the right of Newman to recover of him the amount again? Conway v. Williams, 10 La. 569. Moore v. Bank of Columbia, 6 Peters, p. 90. As to the form of the action, as for money paid by plaintiff to the use of defendant—no such action will lie in Louisiam by an endorser against the maker of a note, unless the payment be made at the request of the party.

5. The payment by plaintiff was made, if at all, more than five years after the maturity of the note, when the note or debt was extinguished by the laws of

Louisiana, where defendant resided. C. C. 3421.

6. The record introduced to prove payment was improperly received. The certificate does not show that Claiborne is in the district over which the judge presided, nor that he was the presiding, or only, judge. The statement of the clerk, in the beginning of the transcript, was made six years before the certificate of the judge. 2 Mart. N. S. 497.

7. If payment was made by plaintiff, it was made in the notes of the Planters'

Bank, then worth only fifty cents in the dollar.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiff was the last endorser of a promissory note for the sum of \$3,805 27, made by the defendant, George N. Goza, in the State of Mississippi, dated 5th May, 1836, and payable ten months after date, to the order of and endorsed by Aaron Goza, also by Joseph H. Moore & Co., and Moore,

NEWMAN Goža.

Burroughs & Co. The note matured and was protested on the 8th March, 1837, and in the same year suit was brought by the Planters' Bank, the holder, against Newman; judgment was obtained, and upon execution various amounts, in partial payment, were collected from him, the reimbursement of which he claims of Goza. The residue was paid to the holder by Moore, Burroughs & Co. The note was offered in evidence, together with the protest, and the record of the suit in Mississippi.

Our first enquiry must be directed to a bill of exceptions, taken by the defendant to the admission in evidence of an authenticated transcript of the record of the suit in Mississippi. The objections were: first, that the judge's certificate did not show that the county of Claiborne was within the circuit of said judge; and secondly, "because the certificate was not upon the same piece of paper with the clerk's certificate, although there was ample room for the same, which will appear from the original transcript sent up." The record commences as follows: "Pleas before the Honorable George Coalter, Judge of the First Judicial District of the State of Mississippi, at a Circuit Court begun and held at the court-house in and for Claiborne county, on the fourth monday," &c. The clerk, in his certificate, describes himself as clerk of the Circuit Court for the county of Claiborne. The judge's certificate is headed " State of Mississippi, Claiborne county," and he styles himself therein judge of the First Judicial District of said State. In view of all these circumstances, the objection is plainly untenable. The next objection seems to us equally so. The judge's certificate is fastened to the transcript, at the foot of the clerk's, by a wafer. In the absence of any suggestion, or offer of proof, that the judge's certificate was improperly obtained, we must presume that he did not violate his judicial duty, and that he affixed this certificate himself to the document before us.

On the merits several grounds of defence have been urged, which we shall proceed to consider. It is no defence against Newman, that Goza made the note for the accommodation of J. H. Moore & Co. The relations between Goza and Moore & Co., are not proved to have been known to Newman. When Newman endorsed the note for the accommodation of Moore & Co., who put the note in circulation, he must be considered as having done so upon the faith and protection of all the antecedent names; and the statement of one of the defendant's witnesses, that Newman, in a conversation with the witness after protest, told him that he looked only to Moore & Co., and knew nothing of Goza in the matter, even if admissible under the pleadings, is insufficient to establish a discharge of the defendant's liability. Such loose declarations, made without consideration to a third person, cannot be treated as an abandonment of a lawful claim.

Although the payments made by Newman were partial, the maker is bound from the nature of the contract and his primary liability to reimburse them. This point of the commercial law is well settled by high authority. The case is assimilated to that of principal and surety, where the request to pay is implied from the legal liability of the latter incurred for the benefit of the former. See Wright v. Butler, 6 Wendell, 289, and the opinion of Lord Tenterden, in 6 Barnwell & Creswell, 439.

The defence of prescription is set up. We deem it unnecessary to consider the question argued by counsel, whether prescription begins to run in such a case from the date of the payment by the endorser. It is shown by testimony, offered by the defendant himself, that, within five years prior to his citation NEWHAR V. GOZA. in this cause, to wit, in the early part of the year 1840, he acknowledged his liability upon the note. The facts shown are that, in a settlement of certain partnership transactions between Goza and Moore & Co., the latter received from Goza property to the value of the debt to the Planters' Bank, and agreed on their part to take up the debt to the bank. This proves an acknowledgment by Goza, in the year 1840, of his liability upon the note to the holder, and this action was brought in 1844. It is unnecessary to enquire what would be the effect of such an acknowledgment, under the statute of limitations in Mississippi. Questions of prescription affect the remedy, and must be determined by the law of the forum. Story's Conflict of Laws, § 576. Union Cotton Manufactory v. Lobdell, 7 Mart. N. S. 108. Prescription, says our Code, art. 3486, ceases likewise to run whenever the debtor, or possessor, makes an acknowledgment of the right of the person whose title they prescribe.

"Par quelque acte que le débiteur reconnaisse la dette, cet acte interrompt le temps de la préscription, soit que cet acte soit passé avec le créancier, soit qu'il soit passé sans lui. Par exemple, si, dans l'inventaire des biens du débiteur, la dette est comprise parmi le passif, cet inventaire, quoiqu'il ne soit pas fait avec le créancier, est un acte recognitif de la dette, qui interrompt le temp de la préscription." Pothier, Traité des Obligations, part 3, chap. 8, art. 2, § 4. See also Merlin's Rep. verbo Interruption de Préscription, no. 8.

The plaintiff has incurred heavy expenses by the suit against him in the form of costs, and these form part of his claim. But these he is not entitled to recover. His claim must be confined to the amount collected on execution, which actually went to the payment of the note, with such interest from the dates of payment as the maker was bound for upon the note. It is well settled that an endorser of a bill or note having had an action brought against him by the endorser, is not entitled to recover from the acceptor or maker the costs incurred in such action, unless there was an express and collateral contract of indemnity.

It is therefore decreed that the judgment of the court below be reversed; and it is further decreed that the plaintiff recover of the defendant the sum of \$5,612 73, with interest at the rate of eight per cent per annum on the sum of \$1,243 39, part thereof, from the 22d May, 1843, till paid; and interest at the like rate on the sum of \$4,369 34, other part thereof, from the 3d day of July, 1843, till paid, and costs in both courts.

SAME CASE-ON A RE-HEARING.

A judicial record from another State is sufficiently authenticated, when, by a reference to the record itself, taken in connection with the certificate of the judge, there is evidence to show that the person by whom the certificate was given was the judge of the court from which the record was certified. Per Curiam: It is not necessary that the judge should repeat in his certificate what his very act implies.

Prentiss and Finney, for the appellant. The only question submitted for argument on the re-hearing in this case is, the sufficiency of the judge's certificate authenticating the record of the proceedings in Mississippi, upon which the writ was founded. The act of Congress requires that, the record from another State shall be certified by the "judge, chief justice, or presiding ma-

gistrate." In the present case, the judge describes himself as "judge of the First Judicial District" of said State, &c. It is contended by the defendant, that the certificate must contain intrinsic evidence, that the judge was the judge of the court from whence the record is certified, and that reference cannot be had to the record to assist or explain the certificate. The case of Kirkland v. Smith, 2 Mart. N. S. 497, seems to go that length, but that case has gone beyond both authority and principle. In the case of Mudd v. Beauchamp, Littell's Selected Cases, 142, the Supreme Court of Kentucky decided that, "it is not necessary that the president or presiding judge should give himself such title in the certificate; if the record shows he was so, it is sufficient." In the case now before the court, the certificate shows that George Coalter was then judge of the First Judicial District"—not a judge, or one of the judges, but the judge—the sole judge. The body of the record shows that the Circuit Court of Claiborne, is in, and a portion of, the First Judicial District. This is conclusive that the judge whe signed as judge—as the judge of the First Judicial District—was, at the time, judge of the court from whence the record came.

J. Dunlap, for the defendant. The case of Kirkland v. Smith, requires intrinsic evidence in the certificate of all the requisites of the act of Congress. This is admitted by plaintiff's counsel, but they contend that Judge Martin went too far. We quote in aupport of Kirkland v. Smith, the authority of Greenleaf on Evidence, 1 vol. p. 552, § 506, who lays down the same rule, and en-

dorses the decision of Judge Martin.

Plaintiff relies upon the case of Mudd v. Beauchamp. That case, even if authority, is in our favor. There the record certified showed that, "John Marshall Gault, ehief justice." The certificate read: "The said John Marshall Gault, ehief justice." This certificate contained intrinsic evidence; for "the said John Marshall Gault," means the judge named in the record. But the case of Mudd v. Beauchamp, was decided in 1812. In 1814, in the case of Stephens v. Bannister, 3 Bibb, 369, there were certificates of two judges. One says he is "the judge that presided;" the other calls himself, "senior judge of the courts of Seuth Carolina." The record effered in evidence was rejected. In Sampson v. Overton, 4 Bibb, 499, decided in 1816, the same strictness in pursuing the act of Congress was required. These cases are later decisions of the court which decided the case relied on by plaintiff, and must be considered as overruling that case.

The opinion of the court on the re-hearing was pronounced by

Eustis, C. J. We granted a re-hearing in this case for the purpose of further examination of the subject, inasmuch as our decision conflicts with the rule laid down in the case of *Kirkland* v. *Smith*, 2 Mart. N. S. 497.

We do not understand that that case has been considered as an authority, settling the question which it determines. It has been cited in the work of Mr. Greenleaf, as a decision made, but only as such. We consider that some weight must be given to the authority of a judge when he performs a judicial act; and that when, by a reference to the record itself, taken with his certificate, the proceedings are in point of form complete, there can be no necessity for the judge's repeating in his certificate what his very act implies. The repetition in the certificate would add nothing to it. His act is under the sanction of his oath, and the responsibility of his official station.

The case of Mudd v. Beauchamp, Littell's Selected Cases, 142, we think lays down the correct rule on this subject.

The judgment of the court therefore remains unchanged.

NEWHAN O. GOZA.

BANK OF LOUISIANA v. DELERY et al.

An allegation that a judicial sale is null, is inconsistent with a claim to be paid by preference out of the proceeds. If the sale be null the claimant must exercise his privilege upon the

property itself.

Nullities resulting from the non-observance of the formalities required in the alienation of the property of a minor, can be taken advantage of by him alone, and may be cured by his express or implied ratification after coming of age. They can only be taken advantage of in a direct action, before the proper tribunal.

A probate sale made to effect a partition cannot be set aside, unless all who are interested be

made parties to the proceeding.

Questions of fraud, or revocatory actions, cannot be tried summarily, without the intervention of a jury, where either party insists upon his right to a jury. Such issues must be tried in a direct action; but where a person considers himself entitled to funds in the hands of a sheriff, he may arrest them till a final decision in a direct action.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. No counsel appeared for the plaintiff. Schmidt, for the defendant, cited Chambliss v. Atchison, 1 A. R. 488. J. Seghers and Roman, for the appellant, contended that the case was one in which summary proceedings were authorised, citing Larthet v. Hogan, 1 A. R. 330; and that in such cases a trial by jury is not allowed. C. P. 401, 757. L. Janin, on the same side. The judgment of the court was pronounced by

Rost, J. The Bank of Louisiana obtained a judgment upon two mortgage notes, subscribed by the defendant Delery, and endorsed by the two other defendants. The land mertgaged was sold to satisfy this judgment, and Michel Albert Fabre claimed the price in the hands of the sheriff, by the way of third opposition, on the ground that he had a legal mortgage on the property anterior in date to that of the plaintiffs. The defendant Delery excepted to this proceeding, alleging it to be a revocatory action in disguise; and further, on the ground that the matters set forth in the opposition could not be enquired into summarily. The plaintiff filed a general denial, and prayed for a trial by jury. The court below sustained the exception of the defendants, and Fabvre has appealed from the judgment dismissing his opposition.

It is in evidence that the property sold had formed part of the community of acquets and gains, formerly existing between the mother of the opponent and her second husband, Sylvain Peyroux; that the mother of the opponent died leaving five children, issue of her second marriage, and that Sylvain Peyroux was appointed natural tutor of those children, and dative tutor of the said opponent; that, upon the advice of a family meeting, the property of the community was sold to effect a partition, and that Delery derives his title from this judicial sale. It is also shown that, after the sale, Sylvain Peyroux rendered an account of his tutorship of the opponent, which was homologated by the Court of Probates.

The opponent now asks that the decrees of the Court of Probates, ordering the sale and homologating the account of the tutor, be considered as absolute nullities; and further, that the judicial sale, and all the mesne conveyances under which *Delery* holds, be set aside as fraudulent. At the same time he claims to receive by preference the proceeds of the property itself. These demands are

manifestly inconsistent. If the judgments of the Court of Probates were nullities, and the sales which have been made void, on the ground of fraud, the property must return to the community to which it originally belonged; the opponent cannot receive the price paid by the evicted purchaser, and must exercise his claim upon the property itself.

BANK OF LOUISIANA V. DELERY,

Taking the allegations of the opponent to be true, as we are bound to do in deciding upon the exception, the equity of his claim cannot be doubted. But he has mistaken his remedy. Nullities resulting from the inobservance of the formalities required in the alienation of the property of a minor can be taken advantage of by himself alone, and may be cured by his ratification, express or implied, after he becomes of age. They are not therefore absolute nullities; and, if he wishes to take advantage of them, he must resort to a direct action before the proper tribunal. The probate sale was made to effect a partition, and cannot be set aside, unless all the persons interested be made parties to the proceeding.

Third oppositions are summary proceedings, to be tried without the intervention of a jury. In this case the plaintiff has prayed for a jury; and, as there can be no doubt of the legal right of parties to that form of trial in all issues of fraud, except in cases specially excepted, we are satisfied that the legislature did not intend that issues of that description should be tried summarily.

In the case of Larthet v. Hogan, 1 An. Rep. 330, relied on by the opponent's counsel, we held that it was not necessary, in all cases, that the seizing creditor should resort to a direct action against those who nominally held privileges or mortgages on the property sold, and that the holder of such mortgages might be compelled to proceed, by way of third opposition, to establish them. But we never intimated that questions of fraud, or revocatory actions, could be thus tried. Our views in relation to summary proceedings in the case of Chambliss v. Atchison, lately determined, ante p. 488, are more properly applicable to the question now before us.

Issues, such as the opponent has made, cannot be tried otherwise than in a direct action; and if he considers himself entitled to the fund in the hands of the sheriff, he may arrest it there, by legal process, till the final decision of the court.

It is therefore ordered that the judgment be affirmed with costs.

SAME CASE—APPLICATION FOR A RE-HEARING.

Where the property of one against whom a judgment has been rendered appears to be subject to privileges or mortgages, the judgment creditor, as incidental to the right of having the property sold for the payment of his debt, may call apon the creditors claiming such privileges or mortgages inpreference over his debt, by a rule, to show cause why they should not be erased; and to this rule the creditors are bound to plead, and if a sufficient reason be not alleged for not doing so, the court may order the privileges or mortgages to be erased to enable the sale to be effected. The pendency of a suit in which his debt, mortgage, or privilege is involved would be a good plea, and would arrest the distribution. Litigations concerning such privileges or mortgages are not required to be cumulated with the proceeding by rule, nor is the right to a trial by jury to be taken from a party entitled to it, nor that of having his rights as a creditor tested before any other competent tribunal. Per Curiam: The object is to compel the creditor claiming an apparent charge upon the property subject

BARK OF LOUISIANA U. DELERY. to execution to vindicate his right to determine the validity of his claim by suit, but not to oblige him to litigate it in the action in which he is called upon to answer, if he have a right to proceed in another form or before another tribunal.

ON an application by the counsel of the appellant for a re-hearing, the opinion of the court was delivered by

EUSTIS, C. J. By the petition for a re-hearing which has been presented by the counsel for the third opponent, we are led to believe that we have not succeeded in making ourselves understood in the opinion which has been delivered; and as the question involved is one of practice, it is very desirable that no mistake, or difference of opinion, should exist as to its extent and meaning.

In the case of Larthet v. Hogan and others, it was determined by this court, that when the property of one against whom a judgment has been rendered, appears to be subject to privileges or mortgages, the judgment creditor, as incidental to the right of having the property sold for the payment of his debt, has a right to call upon the creditors claiming such privilege or mortgage in preference over his debt, to show cause why it should not be erased, and that this may be done by way of rule, and to this rule the creditor so called upon is bound to plead.

We by no means decided thereby that, with this proceeding the litigation concerning all such privileges or mortgages was to be cumulated, and that the right of a trial by jury was to be taken from a party entitled to it, or that of having his right as a creditor tested before any other competent tribunal, by connecting it with the cause in which the rule was taken. But we decided that the party should be bound to plead, and, if a sufficient reason should not be alleged, the court was authorised to order the privilege or mortgage to be erased, in order to enable the sale to be effected under execution. The object to be obtained was to compel the creditor claiming an apparent charge upon the property subject to execution, to vindicate his right to determine the validity of his claims by suit, but not to oblige him to litigate them in the suit in which he is called upon to answer, if he have, from the nature of his case or otherwise, a substantive right to litigate them in another form, or before another tribunal.

In this case the dispute between the parties is as to their respective rights as mortgage creditors, on the proceeds of property sold under execution; and we held that the court having the control over the fund did not necessarily have the exclusive jurisdiction over the right of the parties growing out of their different claims, but only the disposition of the fund after they should be determined according to law. The case of reserved dividends of bankrupt estates, which is familiar to the profession, is an illustration of the idea which we intended to carry out.

We say, the creditor claiming a preference by mortgage or privilege, when called upon, is bound to plead. The pendency of a suit in which the validity of his debt, mortgage, or privilege is involved, would be a good plea, and would arrest the distribution. But the court can compel the creditor to litigate, or erase from the records an encumbrance, which the party refuses judicially to assert.

Proceedings of this kind, as we have said in Larthet's case, are authorised, as we conceive, by the Code of Practice, and are required by public policy, which forbids that records, which are ordained and established in the interest of bond fide creditors, should be made to perpetuate and keep alive encumbrances which have no existence except for purposes of collusion and fraud.

Re-hearing refused.

LAWRENCE v. THE SECOND MUNICIPALITY.

Where the corporation of a city, under authority conferred on them by law, take possession of a town lot, and dedicate it to public use, interest on the price will be due from the time of their taking possession. Per Curiam: Town lots in the improved parts of a city, are productive property. C. C. 2531.

A PPEAL from the Parish Court of New Orleans, Maurian J. L. Janin, for the plaintiff. Rawle, for the appellants. The judgment of the court was pronounced by

Rost, J. This suit was originally instituted by the plaintiff to recover from the defendants the value of a lot of land, taken by them for the purpose of opening Roffignac street. It came before the late Supreme Court, who remanded it for further evidence of the value of the lot. 12 Rob. 453. On the second trial, further evidence of the value of the lot was adduced as directed by the Supreme Court, and the court below gave judgment in favor of the plaintiff, for the sum of \$4,100, with legal interest from the 23d of February, 1837, the date at which the defendants took possession of the property. After the judgment, by virtue of an agreement found in the record, the defendants paid the plaintiff \$4,100, on condition that there should be no execution taken out for the balance of the judgment until the final decision of this court, and that the rights of the defendants should in no wise be impaired by this agreement. The case comes before us on a devolutive appeal taken by the defendants.

The evidence in the record fully justifies the value put upon the property by the court below; and the only question that can arise is, whether the defendants are liable to pay interest, and if so, from what date.

It does not appear that there was any private agreement between the plaintiff and the defendants in relation to this lot. But the defendants took possession of it on the 23d of February, 1837, in pursuance of a special ordinance, and dedicated it to public use, by making it a part of a new street. The plaintiff could not have prevented them from doing so. The alienation was forced upon him, and it must be considered as having taken place when he lost possession of the property. Town lots in the improved parts of the city are productive property, and interest is due on the price of them. C. C. 2531.

Judgment affirmed.

LOUISIANA STATE BANK v. DUPLESSIS et al.

A prayer for a trial by jury is not too late, though made after the case had been set for trial and continued, if it be not actually fixed for trial at the time of the prayer. The object of art. 495 of the Code of Practice is to prevent a cause from being delayed, by interposing a prayer for a jury after it has been set for trial on a particular day.

A PPEAL from the District Court of the First District, Buchanan, J. Grima, for the appellants. R. Hunt, and Grymes, for the defendants. The judgment of the court was pronounced by

LOUISIANA STATE BANK V. DUPLESSIS. SLIDELL, J. After issue joined, the defendant *Ledouz*, by a supplemental answer, prayed for a trial by jury, which the court refused, and a bill of exceptions was taken.

The Code of Practice, art. 495, declares that the defendant, who wishes for a trial by jury, must pray for it in his answer, or previous to the suit being set down for trial. It appears that this cause had been set for trial several times, and had been continued without day. At the time that the prayer for a jury was made, it does not appear that the cause was then set down for trial. If this reason had existed, we should have sustained the refusal; but the mere fact that on former occasions the cause had been set for trial, was not a sufficient reason for rejecting the application. There is, we are informed, a difference of opinion among the district judges of New Orleans, on this point; but that which we have expressed we believe to be in accordance with the intention of the lawgiver. The object was, that when the cause stood assigned for a particular day on the trial list of court cases, the cause should not be delayed by interposing a prayer for a jury.

The plaintiff cites, as sanctioning a different interpretation, the decision in Menefee v. Johnson, 2 Rob. 277. But on examining that case, we find the court merely stated, in the words of the Code of Practice, that the prayer for a jury came too late, after the cause had been set for trial. What the particular circumstances then were the opinion does not state, nor, on examining the record, have we been able to ascertain them. So that we are unable to say, whether the facts are the same as those now presented.

Considering that the defendant had a right to have his cause tried by a jury, and has been deprived of that privilege, we are obliged to remand the cause. See the case of Whitehead v. Brigham, 1 An. Rep. 317.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for a trial by jury; the plaintiffs paying the costs of this appeal.

ANGELLOZ v. RIVOLLET.

Where a party contracts with another to accompany her to this country, and to assist her in recovering an inheritance, for a certain sum to be paid out of it, and the former complies with his part of the agreement, but soon after his arrival here, and before the recovery of the inheritance, is discharged by his employer, without cause, he may demand at once, and without waiting for the recovery of the inheritance, the whole amount to which he would be entitled had he continued in her service until the expiration of the stipulated term. C. C. 27204

A judgment will not be reversed, and the appellee amerced in costs, for an error in calculation, to the prejudice of the appellant, of about eight dollars, where no application was made for a new trial in order to correct the error.

A PPEAL from the Second District Court of New Orleans, Canon, J. Tissot, for the plaintiff. L. Janin, for the appellant. The judgment of the court was pronounced by

King, J. The plaintiff claims, in this action, a sum of money, which the defendant stipulated to pay him for his services, in accompanying her from Paris to this city, and in aiding her to recover the amount of her inheritance from the succession of her deceased uncle, C. F. Girod. He also claims a sum sufficient

to defray his expenses back to Europe, and damages which he has sustained by reason of an alleged violation of the contract, in dismissing him unseasonably, without cause. From a judgment rendered in favor of the plaintiff, for a part of his claim, the defendant has appealed.

ANGELLOE B. RIVOLLET.

The conditions of the contract entered into between the parties were, that the plaintiff should accompany the defendant to New Orleans, and aid in recovering possession of the inheritance which had devolved upon her; and, as the reward of his services, he was to receive a stipulated sum out of the succession. The defendant further undertook to bear all the expenses of the plaintiff's journey to this city and back to the place of departure, and to furnish him with boarding and lodging during his sojourn here. The evidence shows that the plaintiff was extremely attentive to his duties, and rendered promptly and cheerfully every service required of him by his employer. The defendant, however, became dissatisfied, without any sufficient cause that has been shown, and resorted to various devices to disgust the plaintiff, and induce him to abandon her service. Finally, a few weeks after her arrival in this city, she informed the plaintiff, in terms by no means complimentary, that he was incapable of rendering her such services as she needed, that he could leave if so disposed, and that she intended to pay him nothing.

The defence mainly relied upon in this court is, that the action was premature; that, by the terms of the contract, the plaintiff was only to be paid after the succession of Girod had been settled, and the defendant had received her share; and that, at the inception of the suit, she had received but a small portion of her inheritance, the succession being still unsettled. This defence cannot avail the defendant. By her own acts she violated and put an end to the contract without just cause, and gave the plaintiff the right, immediately upon his discharge, to exact the entire amount of his wages. He was not required to await the settlement of Girod's succession before enforcing it. C. C. art. 2720. Sherburn v. The Orleans Cotton Press, 15 La. 361. 8 La. 181. The judge correctly awarded to the plaintiff the sum to which he would have been entitled if he had continued in the service of the defendant until the expiration of the stipulated term, and the further sum which, under the evidence, appeared to be necessary to defray the expenses of his journey back to Paris.

It is objected that, if the sum due has been correctly determined by the district judge in francs, it has been incorrectly converted into dollars. The standard adopted by the court below was 5 francs 25 centimes to the dollar. The act of Congress, regulating the value of coins, approved June 25, 1834 (Acts, p. 36), has fixed the value of the five franc piece at ninety-three cents, and made it receivable in payment of debts at that rate. The rate adopted by the district judge makes a difference to the prejudice of the defendant of about eight dollars. We have, however, on several occasions, refused to reverse judgments and amerce parties in costs, when the only error consisted of a small sum, unless the appellant has made such error the ground of an application for a new trial, and has thus afforded the judge of the first instance an opportunity of correcting it. This error was not suggested as a ground for a new trial below. Grailhe v. Hown, 1 An. Rep. 140.

Judgment affirmed.

TAYLOR v. THE MEXICAN GULF RAILWAY COMPANY.

Defendants will be liable for any injury sustained by third persons in consequence of negligence in drifting a raft, where it is shown that they had purchased and paid for the raft, and that it had been delivered to their agent. Nor will proof that their agent took upon himself the risk of its safe transportation excuerate them, as owners, from liability to third persons.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. This was an action for damage sustained by the owner of a flat-boat, loaded with coal, which was sunk by a raft of timber belonging to the defendants. The defendants contended: 1st, that they were not the owners of the raft at the time of the accident; 2d, that the damage was not occasioned by any negligence on the part of those in charge of the raft; 3d, that the amount of the loss is overrated. There was a judgment below against the defendants, for the amount of the damage proved, from which they appealed. The second and third grounds of defence involved only questions of fact. In regard to the first ground, the judge of the District Court says, in his opinion:

"Byrne, who purchased the raft, was clearly the agent of the defendants. He was by them authorized to buy. The money was furnished by them. He received a commission for the purchase and transportation. The price was paid, and the raft delivered to him before the accident. Even without these two latter incidents, the contract of sale was complete between the parties by the mere consent, and the raft was at defendants' risk. C. C. 1903, 2442.

"Much testimony has been introduced to show the manner of dealing of this company and others, in relation to the delivery and payment for rafts. In my opinion this does not affect the case. The mode of dealing of a company or individual, or even of several, cannot establish a custom, much less a custom contrary to express law. Whether Byrne, as a checker, took on himself the risk of a safe transportation to the depot of defendants, or whether other checkers pursued the same course, is a question between them and their employers. It can only make them insurers of the safe transportation. They still remain the agents of the owner, who, in right of that ownership, is liable to third persons for their agency, and cannot shift the responsibility by the substitution of a man of straw."

T. A. Clarke, for the plaintiff. L. Janin, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. We have examined the different questions of law and fact which this case presents, and concur in the view of them taken by the judge of the District Court, as expressed in his opinion delivered on the decision of the cause.

Judgment affirmed.

PHILLIPS v. MURPHY.

A book purporting to contain the statutes of another State, not authenticated according to the act of Congress of 26 May, 1790, is inadmissible to prove a statute of that State. But the printed statutes of a State produced from the office of the Secretary of State of this State, and proved to have been received by the executive of this State from the

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Elmore and W. W. King, for the plaintiff. Budd and Redmond, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The only point presented in this ease which requires discussion, arises from the rejection of certain evidence effered by the defendant. To prove that by the statute law of Alabama the contract of suretyship must be in writing, the defendant produced a printed book, entitled Clay's Alabama Digest, and offered to prove by a witness, as a foundation for the introduction of said book in evidence, that said work was read in the courts of Alabama as correctly exhibiting the statutes of that State, and also offered to prove by said witness that, by a statute of that State, parol proof could not be offered to prove a suretyship.

The court below did not err in rejecting the evidence. The book purporting to contain the statutes of Alabama was not authenticated according to the act of Congress, and parol evidence of a foreign statute was inadmissible. See Minor's Heirs v. Harding, 4 La. 381.

It is perhaps to be regretted that, all the courts of the Union have not adopted the more liberal rule which has been recognised in some of them, and which has received the sanction of the Supreme Court of the United States. Considering the connection, intercourse, and constitutional ties which bind the States together, as requiring a relaxation of the strict rule, it has been held, says Mr. Greenleaf, that a printed volume, purporting on the face of it to contain the laws of a sister State, is admissible as primá facie evidence to prove the statute laws of that State; but the practice in this State, as in some others, for example, Connecticut and New York has been the other way, and we do not feel authorised to disturb it.

In these remarks we wish it to be distinctly understood, that we do not disturb the practice which has grown up of admitting as primá facie evidence the printed statutes from other States, when produced from the office of the Secretary of State of this State, and proved to have been received in the course of executive intercommunication. That practice was recognised many years since, in Wakeman v. Marquand, 5 Mart. N. S. 271, and has been frequently followed since that time in the lower courts. But in our experience at the bar we recollect no instance, where the rule of evidence, upon objection made, has been carried as far as is contended for by the defendant in the present case.

With regard to the value of plaintiff's professional services, and the promise of the defendant that they should be paid, we find no error in the judgment of the court below.

Judgment affirmed.

BARRETT, Administratrix, v. ZACHARIE.

Under art. 172 of the Code of Practice, which requires that a petition "shall centain a clear and concise statement of the object of the demand, as well as of the nature of the title, or of the cause of action, on which it is founded," a defendant will be protected from any surprise resulting from the obscurity or duplicity of the allegations of the petition.

BARRETT U.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Fraser and Roselius, for the plaintiff. E. A. Bradford and T. A. Clarke, for the appellant. The judgment of the court was pronounced by

Eustis, C. J.* The principal matter in dispute between the parties grows out of the adjustment of an insurance on a steamer, made by the defendant, in November, 1840. The plaintiff contends that the defendant is liable to the estate administered by her, as for a settlement under the policy for a total loss, he being bound, by the extent of the damage done the steamer and her value and condition, to have abandoned her to the insurers, and to have insisted on and effected a settlement with them as for a technical total loss, which they were in law bound to make. The settlement made by the defendant was for a partial loss.

The judge of the District Court gave to the very important questions which this case presents a most careful and thorough investigation, and we regret that we do not feel ourselves at liberty to close it by determining them. There is a preliminary matter which received the consideration of the district judge, and on which we have not been able to concur with him. He says: "Before examining this question, it is necessary that I should dispose of an objection made by the defendant's counsel. It is said that the petition claims nothing but what has been received by Zacharie from the Insurance companies. This does not appear to be the case, although some expressions of the petition certainly favor this interpretation. The petition was evidently drafted with a very imperfect knowledge of the case, &c."

The petition itself does not contain a clear statement of the cause of action on which the suit is founded. There are allegations in the petition which charge the defendant with refusing to account and pay over any portion of the funds received by him on account of the loss of the steamer, and that the meney received by him from the underwriters, on account of the loss of the steamer, was received by him for the sole benefit of the succession, which he is bound to pay over to the administratrix. This is certainly inconsistent with the repudiation of the adjustment and the basis on which it was made.

In another part of the petition it is alleged that the defendant received, or was entitled to receive, the amount of the insurance, &c.; but taking the whole of the petition together, which asks for judgment for the amount of the insurance against the defendant, we do not think that the objection of the counsel for the defendant was properly overruled.

The defendant's counsel took a bill of exceptions to the opinion of the judge, who admitted testimony showing the value of the boat, on the ground that the petitioner claims an account of an alleged agency of the defendant in the steamboat Claiborne, and, under such claim, has a right to show by evidence that the defendant was entitled to receive from the insurers, upon a just settlement, a larger sum than the one which he did receive in settlement of the policies of insurance held by him. The ground on which the evidence was objected to was, its irrelevancy to the claim made by the plaintiff for the amount received by the defendant on the policies of insurance.

The decision of the question turns on the construction of the petition, on which the rights of a litigant ought not to depend irrevocably, in cases where a party and his counsel may well be misled. Our Code, in requiring that the

^{*} SLIDZLL, J., having been of counsel, did not sit in this case.

petition should contain a clear and concise statement of the object of the demand, as well as of the nature of the title, and of the cause of action. on which it is founded, and that it must end with conclusions analogous to the nature of the action to which the plaintiff has resorted, has established a full protection for the defendant against surprise; and it is our peculiar duty to extend it to all cases in which parties have a fair claim for relief against the obscurity, or duplicity, of allegations, on which questions of construction may be raised. C. P. art. 172.

BARRETT U. Zacharie.

There is no prayer in this petition for an account, unless such a prayer may be inferred from the definite prayer for judgment for the aforesaid sum of \$12,000, after due proceedings had, &c. But if the action was for an account, the defendant having rendered an account, as appears by his supplemental answer, in which the sum of \$2,350 66 was credited as received from the underwriters, some notice surely ought, in common justice, to have been given the defendant of the serious grounds on which the allowance of this sum was to be contested, as there was a distinct allegation in the petition that the money received from the underwriters, on account of the loss of the boat, was received for the sole benefit of the succession, and that the defendant was bound to pay it over to the administratrix.

We abstain from giving any opinion on the merits of this case; and being apprehensive that justice has not been done between the parties, by reason of the manner in which the plaintiff's claims are set forth in her petition, and the evidence admitted as herein stated, we consider ourselves bound to remand the case.

It is therefore ordered that the judgment appealed from be reversed, and that a new trial be granted, with permission to both parties to amend their pleadings; the appellees paying the costs of this appeal.

THE UNION BANK OF LOUISIANA v. ERWIN.

Where the legal mortgage existing in favor of a minor on the property of his tutor has been released by a decree of court, on the substitution of a special mortgage in his favor, in conformity with the provisions of the stat. of 11 March, 1830, the court cannot afterwards, on the depreciation of the property specially mortgaged, set aside its own final decree, and reinstate the legal mortgage.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Denis, for the plaintiffs. Mott, for the under-tutor, appellant. Josephs, T. A. Clarke, Durant, and Fraser, for different appellees. The judgment of the court was pronounced by

Rost, J.* The plaintiffs caused certain property mortgaged to them by the defendant to be sold. The amount of the adjudication exceeded their claims by about \$22,500, and Isaac Osgood, the purchaser, instituted these proceedings for the purposes of ascertaining to which of the subsequent mortgagees this balance should be paid, and of obtaining the release of the unsatisfied mortgages, so far as they affect the property. This appeal is taken on behalf of the minor children of the defendant, whose claim to receive the surplus of the adjudication was disallowed in the first instance.

^{*} Eusris, C. J., being interested, did not sit in this case.

Union Bank e. ERWIN. It appears that James Erwin was originally the tutor of his children, and that they had a legal mortgage on all his property for their rights in the succession of their mother; but, in 1837, the defendant gave them a special mortgage on unencumbered property, and the legal mortgage was released by a decree of court, in conformity with the provisions of the act approved on the 11th March, 1830. In 1842, the under-tutor of the minors presented a petition to the Court of Probates, alleging that the property specially mortgaged had greatly depreciated in value, and was insufficient to secure their claims. The prayer of the petition was that James Erwin be cited to furnish additional security, and that, in default thereof, the general mortgage be reinstated, be recorded in the books of the recorder of mortgages, and be declared binding on all property then owned, or thereafter to be acquired by him. James Erwin admitted, in his answer, the depreciation of the property, and that it might not be adequate to the protection of the interests of his children, but expressly refused to give an additional mortgage.

The judgment of the court on that issue was: "That the decree of this court, rendered on the 12th of April, 1837, be rescinded and annulled, so far as it directs the cancelling and annulling of the general mortgage existing in favor of the minors. That the general and tacit mortgage, which by law exists in favor of minors, be reinstated in their favor, against their father James Erwin ; that a copy of this judgment be recorded in the office of the recorder of mortgages of this parish, and in such other parishes as the under-tutor may deem necessary for securing the rights of the minors." This judgment was not recorded till the 12th of December, 1846, and is subsequent in the date of its registry to the mortgages of all the other opposing creditors. Supposing the mortgage to be valid, the court below correctly determined that it was inoperative, as to third persons, until it was recorded. But, with the most anxious desire to save the minors harmless, we cannot recognise its validity. Art. 548 of the Code of Practice provides that, a judgment when once rendered becomes the property of him in whose favor it has been given, and the judge cannot alter the same except in the mode provided by law. The various modes provided by law in relation to final decrees are found in the chapter of the Code of Practice, treating of the nullity of judgments, and this case comes within none of them. Legal mortgages exist by the operation of law. The law provides how the property of tutors may in certain cases be discharged from those operating in fayor of their wards, but, after the discharge has taken place, it nowhere authorises: courts of justice to revive them. The Court of Probates was without power to revive the mortgage, or to set aside its own final decree, five years after its rendition; and the judgment by which this was attempted to be done must be considered as an absolute nullity.

Should the minors sustain any damage from the view we have taken of their rights, the fault will rest exclusively with their father. It was his duty to have given a conventional mortgage on this or other property, when called upon to do so. But he refused, preferring that a general mortgage should be reinstated on all his property. The minors remain with their conventional mortgage, and have no capacity to contest the distribution of the fund claimed by them.

Judgment affirmed.

THE MERCHANTS BANK OF BALTIMORE v. THE BANK OF THE UNITED STATES.

Decision in Richardson v. Leavitt, 1 An. Rep. 430, affirmed.

The registry in the conveyance office of a copy of an act of sale of immovables situated here, executed before a notary in another State, whose official capacity is attested by the secretary of state under the great seal of the State, the copy being certified by a notary in this State to be a true one from an original instrument deposited in his office, is sufficient, without further proof of the execution of the act, to make the registry notice to third persons. Stats 20 March, 1827; 17 March, 1828.

A foreign creditor will not be aided by our courts in disturbing the possession of an assignee under a voluntary assignment of real property in this State, made in another State, by whose laws it was valid.

Actions by creditors to avoid contracts made, by a debtor by, which an illegal preference is given to certain creditors, are prescribed by one year.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. The facts of this case are stated in the opinion of the court, infra. The conveyance under which the appellants claim was admitted to record by the register of conveyances, on the production of a copy certified by a notary of this State to have been correctly made from an original instrument deposited in his office. This original was attested by a notary in Pennsylvania, and a certificate from the secretary of state of Pennsylvania, under the great seal of the State, attested that the person who professed to be a notary of the State of Pennsylvania, was duly commissioned as such, and that all his official acts are entitled to full faith and credit. There was a judgment below against the opponents, from which they appealed.

Wharton and Bonford, for the appellants. It is contended that no sufficient proof of a compliance with our registry laws had been presented by our opponents, to charge the Merchants Bank with constructive notice of the existence Art. 2250 of the Civil Code provides that "the record of an act purporting to be a sale or exchange of real property shall not have effect against creditors or bond fide purchasers, unless, previous to its being recorded, it was acknowledged by the party, or proved by the oath of one of the subscribing witnesses, and the certificate of such acknowledgment be signed by a judge or notary, and recorded with the instrument. This article would seem to make it incumbent on the holder of a title under private signature, in order to give effect to its registry as against creditors or purchasers, to record at the same time authentic proof of the signature of the parties. It is alleged that this is merely directory to the officer, and that if he choses to record the act without requiring the proof of its execution, the registry is good to raise constructive notice to third parties. This view is in direct opposition to the text and spirit of the article. The article is framed upon the assumption that the officer has no right or authority to require proof of the execution of the act before recording it. It supposes the recording to have taken place without such proof. By the third section of the act of 1827, it is provided that whenever acts of transfer shall have been passed under private signature, said register shall record them in toto, with an act ascertaining the signatures if the contracting parties wish the registering of the act to be accompanied with an act ascertaining their signatures. And the act of 1828, containing a similar clause, uses the expression " if thereunto requested." So that the officer is bound to register the act without the previous proof mentioned in art. 2250, if such be the will of the party, who runs the risk of having it declared ineffective against creditors and third parties. See Segrest v. Hood, 12 Rob. 210. We borrow the doctrine of notice, from the english and american law. Judge Story, in the case of Flagg v. Mann, 2

MERCHANTS BANK BANK OF

Sumner's Rep., inclined against the extension of the rule of constructive notice. All authorities agree that the mere registry is not sufficient to charge a party with notice, when the other requisites of the law of registry are not com-Bank of Usited States plied with. See Story's Equity Jurisprudence, vol. 1, § 404. Kent's Commentaries, vol. 4, p. 174. Latouche v. Rusenberry, 1 Sch. & Lef. 157. Frost v. Beekman, 1 John's Ch. Rep. 300. The language of Chancellor Kent has direct bearing upon the present case-"a deed unduly registered. either from the want of a valid acknowledgment or otherwise, is not notice, according to

the prevailing opinion in this country."

Cases arising under the laws regulating the inscription of mortgages are to be distinguished from the present. Article 3331 of the Civil Code, which determines the mode of inscribing an act of mortgage under private signature, differs from art. 2250. It is expressly provided that the recording officer may inscribe the original act on his own responsibility, without proof of its execution. The inscription is not declared to be void as to creditors and purchasers for the want of this proof, as in art. 2250. The cases therefore which affirm the validity of the inscription of an act of mortgage sous seing privé without previous proof of its execution, have the warrant of the text of art. 3331 to sustain them. The case of Ells v. Sims, recently decided, ante p. 251, and which may be

relied on as opposed to the position assumed here, goes no further than this.

The assignments by the Bank of the United States, of the 3d and 7th of September, 1841, so far as they effect the personal property therein transferred, have been held by the late Supreme Court to be valid. 8 Rob. 262. The question as to their effect upon the real estate situated in this State, was expressly reserved. The court below decided that as to the real estate situated here, those assignments were to be construed and governed by our law, the law rei sitæ. The clear dispositions of articles 10 and 483 of our Civil Code, render the examination of any authorities on this subject unnecessary. Assignments of property in trust for the benefit of certain creditors of an insolvent, are reprobated by the policy of our laws. Townsend v. Louisiana Ins. Company, 13 Ln. 551.

T. A. Clarke, for the appellants. The conveyance was recorded in the proper manner to give it effect against third persons. C. C. 2415, 2417. Stat. 20th March, 1837, ss. 3, 5. 2 Mart. N. S. 171-4. 4 lb. N. S. 369. 6 lb. N. S. 431. Ells v. Sims, ante p. 251. If the action be regarded as a revocatory one, the prescription of one year bars it. C. C. 1982. 6 Rob. 150. 4

The opinion of the court was pronounced by

EUSTIS, C. J.* This case arises out of the seizure of certain lots in this city, under a judgment rendered in Pennsylvania in favor of the plaintiffs against the late Bank of the United States, and made executory by the judge of the late Commercial Court of New Orleans, for the sum of \$159,626 29. The third opponents, James Robertson and others, alleged that they were the owners and possessors of the property seized, under a conveyance made to them from the president, directors and company of the Bank of the United States, executed at Philadelphia on the 12th of February, 1842, and recorded here on the 16th April, 1842. The opposition to the seizure and sale was dismissed after a hearing before the Fourth District Court of New Orleans, and the opponents have appealed.

The conveyance purports to be a sale for a fixed price, but in point of fact the lots in question formed part of the property of the late United States Bank, assigned to certain trustees for the use of certain creditors; and the conveyance was in furtherance of the assignments, and the opponents were in possession under it. The assignments, so far as relates to the personal property assigned. having been held to be valid by a decision made by the late Supreme Court, it is said, the question as to their operation on the real estate situated within this.

^{*}SLIDELL, J., did not sit in this case, having been of counsel.

State was reserved, and that, so far as concerns the real estate, the force and MERCHANTS effect of the assignments are to be governed exclusively by our own laws.

BANK

BANK OF

The plaintiffs, for all the purposes of this enquiry, must be considered as having all the rights on the property of the bank, their debtor, which the laws of UNITED STATES Pennsylvania confer, and no more. The remedies which the laws of Louisiana give to creditors, the plaintiffs possess and have exercised. The opponents were in the possession of the property seized under a title, legal in point of form, and what are the grounds on which the plaintiffs can question its validity? They are, that assignments of property in trust for the benefit of certain creditors of an insolvent are reprobated by our laws, and that no effect will be given to them by our courts.

We have lately-given our views in relation to this subject, after a very thorough argument at bar, and an examination of all the authorities which the assistance of counsel and our own research could furnish. They are stated in the opinion of the court in the case of Richardson v. Leavitt, 1 Ann. Rep. 430. We do not know that there is any part of that opinion which requires, after a revision of the subject, any change. It would result, from an application of the principles there laid down, to the present case, that, if these assignments made by the Bank of the United States in Pennsylvania, were valid by the laws of that State, and are obligatory on the plaintiffs, that is, if the bank had a right to give a preference to particular creditors, the plaintiffs could not, by any process of law, subject any property assigned for that purpose to the exclusive payment of their debt.

There are some preliminary matters, however, to be first considered.

There is nothing in the form of the conveyance which affects its validity, and all the plaintiffs can ask is, that the claims of the opponents be confined to rights created under the assignments, and conferred by the instrument itself in furtherance of their object. The mention of a sum of money as a consideration is a matter of no moment, as the case is before us under the evidence.

It is said that the conveyance was not recorded in the manner required by our laws, so as to charge the plaintiffs with notice; but we think that, under the acts of the legislature of 1827 and 1828, relating to the register of conveyances for New Orleans, the record as made of the instrument did operate as notice.

The case of Townsend v. The Louisiana State Insurance Company, 13 La. 551, is considered by the counsel for the plaintiffs as conclusive in their favor. But the facts of that case, and the decisions made on them, have no application to the questions which the case of Richardson v. Leavitt, and this case, present. In Townsend's case, the assignment was made by an insolvent debtor residing in Louisiana, to the detriment of his creditors, of property which was their common pledge, in which an undue preference was sought to be given, in palpable violation of his obligations and of the penal, as well as civil, laws of the land. That decision we have had occasion to recognise as correct; but we have also held that, where there was no common pledge, where by the law of the domicil of the parties where the contract was made, no right was created on the property of the debtor, and he might lawfully prefer one creditor to another in payment, a foreign creditor would not be aided by our courts in disturbing the possession of an assignee under a voluntary assignment, lawfully made for the purpose of carrying into effect a distribution of moveable property, which the debtor had the undoubted right to make. If the property in dispute were personal, we would maintain the possession of the opponents in the case made out by plaintiffs. Is there another rule applicable to real property?

MERCHANTS BANK BANK OF

As to the validity of the assignments, and binding force of the contracts under which the opponents held the property in dispute, under the laws of Pennsylvania, and of Maryland, the domicil of plaintiffs, the courts of those States UNITED STATES have removed all doubt by repeated recognitions of the principles on which they rest. 13 Sargeant & Rawle, 132. 6 Gill & Johnson, 371, 363, 206. Dana v. The Bank of the United States, in the Supreme Court of Pennsylvanin. United States Bank v. United States, 8 Rob. 262.

But the argument is, that our own laws operate exclusively upon real property within our jurisdiction; and arts. 10 and 483 of our Code are considered to be so formal and positive on that subject, as to supersede the necessity of any further enquiry. The clause of art. 10 referred to, provides that the effect of acts passed in one country to have effect in another, is regulated by the laws of the country where they are to have effect. The second paragraph of article 483 provides that, persons residing out of the State cannot dispose of the property they possess here in a manner different from that prescribed by its hws. It would not be reasonable to isolate these provisions from the great body of our laws, and give them an arbitrary and literal interpretation. They are the exponents of principles which are recognised under every system of laws, and their application is well understood. There are cases arising here relating to property in this State, and by no means a small number have been before us, which are governed and determined by laws other than those of Louisiana. There can be no question of the supremecy of the laws of every country over the property within its jurisdiction, real and personal; but their exclusive application indiscriminately to all cases occurring, would be contrary to those rules of comity which every civilised nation acknowledges, and those who administer the laws are bound to respect.

Merlin, Répertoire, verbo Loi, § 6, nos. 2, 3, says that, though the french law governs in all cases of immovables in France, even when the owners are foreigners, yet that there are exceptions to the rule. As, for instance, if the foreign law in the country where a contract is made respecting them, has been adopted by the contracting parties, and converted by them into an express contract; in such a case, he holds, that the contract is binding, because the foreign law, as such, does not act upon the immovables in France, but solely by way of contract. And he applies the same principle to cases where there is no express adoption of the foreign law, but it arises by way of tacit contract from the place of the contract.

But this is not a case in which we are called upon to give effect to a foreign law, adversely to our own. The opponents are in possession under a title perfect as to form, and competent to transfer the property from the owner to them, with a consideration adequate between the parties. The laws of Louisiana protect those rights of possession and ownership. 'The plaintiffs, third persons, without any form of law, seize the property, and have it exposed for sale. Now the first preliminary enquiry is as to their rights. Did they ever own the property, or have any right in it, or upon it? Has their debtor any power or dominion over it, or any right in it, which will authorise the seizure? This is answered by the assertion of the exclusive operation of the laws of Louisiana over all property within its jurisdiction, which is assuming the very point in dispute. The plaintiffs only can avoid the effect of the title of the opponents by setting up a right in themselves, for it cannot be supposed that any person at will can expel them from their possession; and when their pretensions are subjected to the test of truth, it is found that they are seeking to invalidate a con-Menchants tract perfectly valid and lawful by the laws of the country where it was made, and executed by the parties without any infringement on the laws of Louisiana. As we said in Richardson's case: By our laws the property of the debtor is the UNITED STAVES common pledge of his creditors. Every creditor has an action to annul contracts made in fraud of his rights. The violation of the common pledge is the basis of this action; and where there is no pledge violated, there is no injury to the creditor. The bank, in this case, has an undoubted right to make the disposition of its property which the assignments were intended to carry into effect; and the plaintiffs have no more right to interfere with it, than with any other lawful payment made by the bank. Besides, under our laws, actions can be brought by a creditor to avoid contracts made by a debtor with his creditor by which a preference is secured, only within one year from the time the contract was made.

BANK BANK OF

The plaintiffs can acquire no rights by this summary and unlawful mode of enforcing their claims, which can only be accounted for by the condition of wreck in which the late Bank of the United States closed its existence;

It is therefore ordered that the judgment of the District Court be reversed, and that the said opponents, James Robertson, Richard H. Bayard, James S. Newbold, Herman Cope, and Thomas S. Taylor, be decreed to be the lawful owners of the following described property, to wit: "The one undivided half part of all and singular those three contiguous lots of ground, marked as nos. 10, 11 and 12, on a plan drawn by J. Pilié, city surveyor, on the 22d day of December, 1835, and deposited in the office of Adolphe Mazureau, one of the notaries public of New Orleans, the same being situated in New Orleans, measuring each 24 feet 8 inches front on Tchoupitoulas street, between St. Joseph and Julia streets, by 86 feet in depth, between parallel lines, being the same property described in the act of sale, before Jules Mossy, one of the notaries of New Orleans, on the 6th day of July, 1840, by James Dick to the Bank of the United States.

And it is further ordered, in virtue of the agreement of counsel touching the effect of the decree to be rendered in this case now on the files of this court, of date the 25th May, 1845, that the opponents, James Robertson et al. take and receive the proceeds of the sale of said property made by the sheriff of the Commercial Court of New Orleans, on the 30th May, 1845, and that the plaintiffs pay costs in both courts.

FLORANCE v. RICHARDSON et al.

Where the law declares that the term of an office, to which the appointment is made by nomination by the Executive and confirmation by the Senate, shall expire on a certain day, but authorises the officer to hold over until his successor is appointed, and the re-nomination of the incumbent rests in the discretion of the Executive, and no particular mode is prescribed by law by which the unwillingness of the Executive to re-nominate the incumbent shall be manifested, an office-copy of a written communication, addressed to the auditor of auction sales by the secretary of the governor, informing him of the appointment of a person in the place of the former incumbent, accompanied by the testimony of the secreFLORANCE U.
RICHARDSON.

tary that the communication was written by him, under the orders of the governor, will be sufficient evidence of the appointment of another to the place of the former incumbent. The fact that the governor directed the communication to be written, may be proved by parol.

Where an auctioneer, who had received and advertised for sale certain goods, sells them after his term of office has expired, and converts the proceeds to his own use, the sureties on his official bond, who bound themselves "that he should perform his duty as an auctioneer to all persons who shall employ him as such, during his continuance in office," will not be highly for the amount so converted.

A PPEAL from the Commercial Court of New Orleans, Watts, J.

Benjamin and Micou, for the appellant, cited Kuhn v. Abat, 2 Mart. N,
S. 168. Duchamp v. Nicholson, Ib. 679.

R. Hunt, for the defendants, cited stats. 20 March, 1813 (Moreau's Dig. verbo Auctioneer); 16 Feb. 1825, and 18 March, 1839, ss. 2, 5, 13 (Bull. & Curry's Dig. pp. 37, 39). C. C. 2583. 9 Wheaton, 680. Theobald, Prin. and Surety, 49. 2 Mart. N. S. 169. 7 La. 103. 3 Camp. N. P. 52. 3 Wilson, 530.

The judgment of the court was pronounced by

SLIDELL, J. This suit was instituted to recover from Richardson, an auctioneer, and the sureties on his official bond, the amount of sales of certain furniture of the plaintiff's, sold at auction by Richardson, which he received, but failed to pay over. The case comes before us upon the liability of the official sureties, Stone and Freret. Their defence turns mainly upon the question whether, at the date of the auction sale and receipt of the proceeds, Richardson's official capacity had expired. The sale at auction was made on the 20th March, 1844. Richardson was appointed and duly commissioned as an auctioneer on the — day of — 1843. The act of 16 February, 1825, sec. 4, requires auctioneers annually to enter into bond, with security, in the sum of \$8,000. The act of 18 March, 1839, increased the amount of auctioneers' bonds to \$10,000, and subjected the bonds to the approval of the auditor of auction sales; and the 13th section of that act declared that, all commissions for auctioneers in the city of New Orleans thereafter to be issued, should expire on the first day of February of every year; but those persons who shall be in commission on that day, may hold over until others are appointed in their

It appears that, in February, 1844, the governor submitted to the senate the nomination of J. A. Bonneval and certain others, as auctioneers for the city of New Orleans. It was not stated in the message to the senate that Bonneval was appointed in the place of Richardson. These nominations were confirmed on the 7th March, ensuing. On the 8th March, the governor's private secretary sent a communication to the auditor of auction sales, in the following words: "J. P. Philips, J. Wilcox, D. Dupuy, and J. A. Bonneval in place of Richardson, appointed March 7th, 1844." This communication was signed by the secretary officially. The auditor endorsed the day of receipt, informed Bonneval of his appointment, accepted Bonneval's official bond on the 18th March, 1844, and he received his formal commission on the same day. On the 19th March, 1844, the auditor addressed an official letter to Richardson, informing him that his official character as an auctioneer had ceased, Bonneval having been appointed in his place, and having complied with the requisitions of law.

These facts were shown by the testimony of *Ledoux*, the governor's secretary, who produced the office copies of the written communications referred to,

and deposed that he addressed the auditor, informing him of the appointment in the place of Richardson, by the governor's orders. The auditor of auction RICHARDSON. sales was also examined as a witness, and stated that all these proceedings were according to the usual course and forms of executive action, with regard to appointments of auctioneers, their bonds, and the expiration of their functions. It also was proved by the testimony of these officers that, when the commission of an auctioneer expires, the place is usually filled, without mentioning in the communication to the senate in the place of whom the new officer is appointed; but when a vacancy occurred by death or resignation, it was always stated in place of whom the appointment was made.

To the admission of the testimony of Ledoux, and of the documents above mentioned, exception was taken by the plaintiff, upon the ground that the removal of an officer could only be proved by the formal appointment of a successor by the governor, by formal message to the senate, designating the efficer intended to be removed, as well as the officer appointed in his place; and upon the like ground, objection was made to the proof of executive usage. The testimony was, however, admitted.

This was not the case of the removal of an officer. By law, the term of office was fixed as expiring on the first day of February in every year; but with permission to the officer to hold over until another was appointed in his stead. The nomination of the officer was a matter resting in the discretion of the executive, and the law did not prescribe any particular mode in which the unwillingness of the governor to renominate an auctioneer should be manifested. The province of the senate was to confirm or reject nominations of suctioneers made by the governor. The name of Richardson never was sent in as renominated; and we think, under the statute, that the fact that the governor directed the secretary to address the communication in question to the auditor, was a a fact which could be shown by parol. As to the action of the auditor upon the written communication of the secretary, it is preserved in an official form, to which no objection, so far as the rules of evidence are concerned, is or can be made. We concur with the court below in the opinion, that the evidence was admissible to show the fact that Bonneval was appointed in the place of Richardson, and, being so admitted, that fact is clearly and unequivocally established.

The legal consequences from that fact are obvious. Richardson had ceased, before the 20th March, 1844, to be an auctioneer. No act of his, after the 19th day of March, was an official act. He had no official authority to make the auction sale on the 20th, and the sureties cannot therefore be held responsible for the receipt of the proceeds of the sale by him.

urged that the sale, and the collection of the proceeds, were the continuance and completion of a business, in which Richardson had been employed before his official character expired. It is true he had been so employed to make the sale, had advertised the goods for sale before the 19th, and the key of the dwelling house in which the goods were had also been given to him, to enable him to arrange it for the expected sale. But no wrong was done to the employer before the sale. Before the goods were sold and the proceeds were received the commission had expired, and the conversion, if there has been one, was the act of an individual and not of a public officer. The liability of the surety cannot be thus extended beyond the official term, either on general principles, or under the terms of the condition of the bond, which were that RichardFLORANCE 9. RICHARDSON.

son "shall perform his duty as auctioneer towards all persons who shall employ him as such, during his continuance in office." See the case of Duchamp v. Nicholson, 2 Mart. N. S. 680.

Judgment affirmed

NICHOLSON, Syndic, v. JACOBS.

Decision in Nicholson, syndic, v. Chapman, 1 Ann. Rep. 222, affirmed.

A PPEAL from the Commercial Court of New Orleans, Watts, J. T. A. Clarke, for the plaintiff. Grymes, for the appellant. The judgment of the court was pronounced by

King, J. This case was before the late Supreme Court, when the judgment of the District Court was reversed, and the cause remanded, for the purpose of enabling the plaintiff to amend his pleadings, and administer proof of the defalcation of Pritchard, the former syndic. 8 Rob. 233. The original defects of pleading and evidence have been supplied, and the record now exhibits substantially the same facts as those before us in the case of Nicholson, syndic, v. Chapman, and presents the identical questions then decided. I Ann. Rep. 222. In that case we held that the endorsement "G. W. Pritchard, syndic," was notice that the note belonged to the estate of the insolvents, and that it could not be discounted by the syndic without an order of the court; that a person taking a note of this kind can acquire no rights under it adverse to the party to whom it really belongs, and in whose favor such restrictive endorsement is made.

The proofs in this case, in relation to the dividends received by the present syndic from the bankruptcy of Taggart, are similar to those in the case of the present plaintiff against Chapman, and entitle the defendant to a credit in the proportion which the notes sued on bear to the amount proved in bankruptcy, with the further right to any additional dividends that may have since been declared, or may hereafter be declared. In these respects the judgment of the lower court must be amended.

It is therefore ordered that the judgment of the lower court be reversed. It is further ordered that there be judgment for the plaintiff for nineteen hundred and sixty-seven dollars and five cents, with interest at five per cent from the 19th May, 1843, reserving to the defendant the right of receiving such dividends as the syndic may have collected since the judgment rendered in the court below, or may hereafter collect, from the bankrupt estate of Joseph Taggart, jr., in the proportion which the sum of \$2,462 09 bears to \$9,777 76; the appeller paying the costs of this appeal.

THE STATE v. MARTIN.

Defects of form only will not render an act null in cases not expressly provided for by law, nor coming within the legal intendment of art. 12 of the Civil Code, as fixed by the jurisprudence of the country from which it was derived.

The blind are not declared by law incapable of contracting; and, as a general rule, all persons have that capacity except those whose incapacity is expressly declared.

Incapacities and defects of form are stricti juris. They cannot be extended from one person to another, nor from one case to another.

A nullity of form in a testament may be cured by lapse of time. or by voluntary execution or ratification, on the part of the heirs of the testator; and, even if enforced, leaves them under a natural obligation to execute the will. C. C. 3507, 1751.

A blind person may make a valid olographic testament.

A party will not be allowed to deny under one plea a fact alleged by him in another.

Natural incapacities, such as the alleged incapacity of a blind person to make an olographic will, are not questions of law, but matters en pais, dependent on the circumstances of each case.

Where parties attack a will on the ground that it contains a tacit fidei-commissum, it is not indispensible, under the rule of the civil law, that they should establish a pact between the testator and the legatee; it is enough that they establish, with certainty, by direct or circumstantial evidence, the intention of the testator that the legacy, or a part of it, should enure to the person for whose benefit the fidei-commissum was established, and that the instituted heir has discovered that intention, and has executed, or intends to execute, it.

The fisc cannot annul a testament for defects of form, although the heirs may do so.

PPEAL from the Second District Court of New Orleans, Canon, J. The petition alleges, that François Xavier Martin, who resided in the city of New Orleans, died on the 10th December, 1846, leaving an estate estimated in the inventory at \$396,841 17. That Paul Barthélemy Martin, a brother of the deceased, caused himself to be recognised as the executor, under a pretended olographic will, dated 21 May, 1844, and has taken possession of his estate: That the said pretended olographic will is void and of no effect, for this, that when it was made, François Xavier Martin was physically incapable, on account of blindness, of making an olographic will: That the estate of the deceased goes to heirs domiciliated out of any State or Territory of the United States: That by the 4th sec. of a statute of 26 March, 1842, a tax of ten per cent is imposed upon all successions, and every part thereof, going to persons domiciliated out of any territory or State of this Union: That the succession is liable to the tax imposed by that statute: That the tax amounts to \$39,608 41. The prayer of the petition is that P. B. Martin be cited; that the pretended olographic will be declared null and void, so far as the interests of the State are concerned; that judgment be rendered in its favor for the said tax, to be paid by privilege; and for general relief.

The defendant excepted to the petition, on the ground: That the State has no right of action against the respondent, as set forth in the petition, and cannot contest, in its own name, the validity of the olographic will of the deceased, because it has no direct interest in his succession; that if the said testament be voidable for the reasons alleged, which is denied, it can only be set aside by those on whom the estate would have devolved in case the will had not been made. In case this exception should be overruled, defendant answered: That the will is in due form and valid; that it has been duly proved and ordered to be ex-

STATE U. MARTIN.

ecuted; that by it he is instituted sole heir of the deceased; that the deceased has left no heirs to whom any portion of his property is reserved by law; and that the respondent, as sole instituted heir, is, by the death of the testator, seized of right of all the property and effects of his succession. He prays that the will may be declared valid, and that he may be quieted in his possession.

A supplemental petition alleges that the deceased, for the illegal purpose of depriving the State of the ten per cent allowed to it by law on all successions opened here, and going to persons not citizens and not domiciliated in the State, bequeathed, by an olographic will on file in the court, the whole of his property to his brother, P. B. Martin, a resident of New Orleans: That the latter was appointed universal legatee and sole heir of the deceased, with the understanding and agreement between him and the deceased, that the property thus bequeathed, or a part of it, should go to his other heirs, or to other persons, all foreigners and residents of France, or that all of said property should be divided between all his heirs in the same manner as if no disposition mortis causa had been made: That this was the motive which the deceased had in view in making the defendant his sole heir: That this, of itself, renders said olographic will null and void, as made contrary to law and public order, and to evade especially the statute of 1842: That all substitutions and fidei-commissa are prohibited by law: Wherefore petitioner, not abandoning any of the grounds heretofore taken, assigns the above as additional reasons why the said olographic will should be declared null and void.

The defendant excepted to the supplemental petition as containing a different cause of action from that set forth in the original petition, and inconsistent with it, and which cannot be cumulated with it. He prayed that plaintiff might be compelled to select his ground of action. In case this exception should not be sustained, he answered, denying generally all the allegations in the supplemental petition, and especially that the will of the deceased was made with the intention, and for the purposes, alleged.

F. Grima, a witness for the State, says: He was well acquainted with Judge Martin for many years, and more intimately since the last eighteen years. For the last ten or twelve years he was in the habit of stopping once or twice a week at witness' office, when on his way to and from court. It is to witness' knowledge that Judge Martin has been blind since 1838 or 1839; thinks he was able to read writing in 1838; at the time he made his will he could not Judge Martin often spoke to witness of his relations in Europe, and of. some that were dead. Several days before Judge Martin's departure for France, he told witness he was going to write his will; and the day before he left for Europe he came to witness' office, and told witness that he had written his will, and also told him the contents. Judge Martin never spoke to witness of his heirs in France, except in 1833, when he told him he had written a will, and told him of several dispositions he had made. He stated he had left a portion to a sister then living, and a portion to his brother now living, and the balance to nephews and nieces of his; this was in 1833. The judge spoke to witness several times of making wills and different dispositions. In 1839, he again spoke of doing so, and of leaving all to his brother, who would take his place and stand in his stead towards his relations. The judge was in the habit of sending, from time to time, drafts of 1,000 and 2,000 francs to his old sister, who died in 1840. He has told witness, speaking of his nephews and neices, that if they would consent to come to Louisiana, he would purchase for them a plantation worth \$150,000; but that they must settle here and work for themselves. This was at different periods before and since his return from France. He said that he desired that when he died, his property should be taken care of, and that was the reason he would wish to leave it to his brother; and the only fear which he had was that after his death his property would be sold by

STATE V. MARTIN.

This statement was since he made this will. The only surviving relations of the judge are a brother, two nephews and a neice. heard the judge complain of any of his relations, and has spoken to witness of one of his nephews as a man of merit. From what Judge Martin told witness of purchasing a plantation for his relatives, he should judge he wished them more good than harm. Witness never heard the judge speak of the law of 1842; but witness spoke to the judge of that law, concerning its constitutionality, relative to the succession of Magère. The judge thought the law perfectly constitutional. Witness never heard Judge Martin say that he left the whole of his estate to his brother to evade the tax of ten per cent, but always heard him say it was that his brother might replace him as head of his family, He never heard him say that he had given any directions to his brother relative to his other relations in France. Witness being asked whether he has any knowledge resulting either from conversations he might have had with Judge Martin or his brother, or from other facts he might have been apprised of, which induces him to believe that a portion of that fortune which he left his brother was to go to his other relations now in France, answers: Knows of no fact from which he might deduce that belief; and from the statement made to him by Judge Martin, he cannot infer that any portion of the property left to his brother was directed by him to be given to any person. Witness knows his brother was directed by him to be given to any person. Witness knows that since the death of Judge Martin, and since P. B. Martin has been put in possession of the estate of his brother, he has furnished a list, and put the same in the hands of a broker, to sell a portion of his property; and he has told witness that he had the intention of selling all the property and leaving Louisianna. Witness supposes he will return to France. P. B. Martin is not married. Judge Martin never told witness that he had requested his brother, or written to him, to come to Louisiana. He only appeared to fear his brother might sell the property. Mr. P. B. Martin is a native of France. He has been here twice; the last time he came here in 1836 or 1837. He was formerly a resident of Naples, and was a merchant there; thinks he is a citizen of the United States, but is not positive. Witness has seen Blanche N. Martin. She told him she had come here to take care of her uncle, Judge Martin, at his request; and said he had requested her to come out here, when he was in France. She expressed no disappointment at the will of her deceased uncle, and said she knew the contents before and would respect it.

H. A. Bullard, a witness for the State, says that : He was well acquainted with Judge Martin; that when he went to France in 1844 he was totally blind. He has frequently seen him write, sign writs of error, licenses, and sometimes bank checks. Since 1836, has never seen him write more than to sign his name. Knows that he wrote an opinion in August, 1834, at Baton Rouge, at which time his sight was quite dim, when he wrote further than the paper and on the table; so that when the clerk came to examine the opinion, a part was on paper and a part written on the table. Witness says it was necessary, in all cases where the judge had to sign, to place a pen in his hand, and to direct him where to sign. It was not necessary to hold his hand. He sometimes signed his name He could not tell if he had ink in his pen or not. He could not read what he had written, nor has he read any thing since 1836, or at latest 1838. Being shown the will of Judge Martin, witness says the testator could not have read it; it is written in his hand-writing; believes the testator could have written the will by means of bars to confine the edges of the paper or other mechanical means, or by feeling the edges; but thinks he required assistance to take his pen and get the ink. Witness was present when the will was opened. It was folded in the form of a letter. Thinks that the testator could have folded the will by feeling, but does not know about the sealing. The testator told witness, upon one or two occasions, when they had cases before them growing out of the ten per cent tax, that it was a tax which might easily be evaded. ness never had any conversation with Judge Martin relative to the disposition Has no recollection of Judge Martin's ever having revealed to of his property. him the manner by which the ten per cent tax might be evaded, nor does he believe he had the intention of evading it himself. When he spoke of it, it was as a general question. Judge Martin may have said that the tax might be evaded by testamentary disposition; thinks he spoke of it several times, but it was not in reference to himself, but to cases before the Supreme Court. It was only on those occasions that he spoke of it; he never spoke of it afterwards. believes that he was on good terms with his relations in France.

STATE

A. Morphy, a witness for the State, says, that he was on the bench with Judge Martin. He thinks he has been blind since 1837 or 1838; he was blind in 1839 when witness went on the bench. He could not read any thing. During Judge Martin's last years he had different persons to write his opinions. Witness has only seen him sign his name to writs of error, orders, licences, &c. Thinks on one occasion he wrote an order in Rapides in these words, "Let it it be granted;" but has no distinct recollection; it was two or three words. Witness being next to Judge Martin on the bench, generally directed the judge where to sign his name. Sometimes he placed, or touched, the judge's hand, to direct him, where to sign, and sometimes he only put his finger on the paper to direct him and always gave him a pen supplied with ink. When there were orders &c., to be signed, the judge always directed witness to see that the pen was well supplied with ink. Witness being shown the will of testator the pen was well supplied with ink. Witness being shown the will of testator and asked how many pens full of ink it would take to write it, says he thinks it would take four or five. Witness does not think that Judge Martin could have gone to a table, and taken paper and ink and a pen, and have written a will such as the present, without the assistance of some person. Witness says it would be indispensable for some one to tell him when the ink had run out of the pen, as he was unable himself to discover it, and to show him where he left off, in order that he might be able to commence writing again. In the epinion of witness, without the assistance of a rule, or something placed on the margin of the paper, Judge Martin would not have been able to know where to commence or where to stop. Witness says that Judge Martin told him that he had written the present will with the assistance of a rule, but as to how he was assisted by it, or how he used it, witness is unable to say. Witness has heard Judge Martin speak of his relations in France, since his return in 1844. Previous to his going to France he appeared a little vexed because his relations would not leave France and come and settle in this country, but there was nothing of ill feeling; he mentioned his proposition to buy a plantation if they would come here and settle. Witness has heard Judge Martin speak of the tax, but it was when the question was before them. Witness thinks he mentioned that the law might be evaded. Judge Martin made the remark about the ten per cent tax at a meeting of judges to consult, in cases before them, but whether it was at the time the ten per cent tax was before them, or on some other occasion, or in conversation at those meetings, he is unable to say. Witness says the testator never intimated to him an intention of evading the law; but, some time after the arrival of his brother, he told witness that he had induced his brother to come and reside here, and intended to appoint him his legatee, stating that in that way his estate would not be subjected to the tax. Witness understood from this conversation that Judge Martin intended to make his brother universal legatee, and that he would receive all his property · · that making as such; he could infer nothing else; his brother universal legatee, he would stand in his stead towards his relations in France; but never heard him say he intended to leave any thing to them, nor that his brother would act well towards them. Judge Martin never told witness that he had put his brother under any obligations as to the ulterior disposition of his property. Witness says that the testator could not have read the will after having written it; but the same is written by Judge Martin, and his signature is genuine.

The record shows that it was admitted that the deceased was blind when he went to France and at the time of making his will.

E. Simon, a witness for the State, says that he was on the bench with Judge Martin. Has seen him sign his name since witness was first on the bench. Witness thinks he has seen him write, one, two, or three words; thinks also that he was assisted in putting his hand to the paper; but cannot recollect where or when. Judge Martin required assistance whenever he signed his name to licenses as he always signed first, and it was necessary to place his hand on a line opposite the first seal of the dicense. It was also necessary to fill his pen with ink, and to put the paper, not under his eyes, but under his nose. Witness being asked if Judge Martin could have gone to a table where there was paper, pens, and ink, and have written such a document as the will in question without assistance, answers—he could not. If Judge Martin had paper, ink and pens before him to write, witness thinks it would be necessary

- - - - T

MARTIN.

for some one to fill his pen with ink and give it to him; and when the ink in the pen was exhausted, it would be necessary for some one to replenish it. He thinks it would also be necessary for some one to show him where to write as was formerly done in the Supreme Court; and also to show him where he left off, when the ink in his pen became exhausted. Witness thinks it would be necessary to point the pen to where the line is commenced. He thinks that when he arrived at the margin or end of the line, it would be necessary to point the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the margin or end of the line, it would be necessary to be a rived at the rived at the margin or end of the line. cessary to inform him, that he might stop. Witness being asked if he thinks the will in question was written as above detailed, answers: He thinks so; but that he was not present. Witness has been told several times by the testator that he intended to dispose of his estate in favor of his brother, and that he had appointed witness his executor, in case of the absence or death of his brother. When Judge Martin spoke to witness about his succession, it was previous to his going to France, when he sent for witness to know if he would act as his executor as he had appointed his brother his universal legatee, stating that, in case of absence or death, he had appointed witness his executor. Witness case of absence or death, he had appointed witness his executor. promised him to accept the appointment. Witness heard the testator often speak of the disposition in favor of his brother, saying that his principle was "that a man ought to leave his estate to his nearest relations, and not give any thing to strangers; that amongst his relations he would select those living nearest to him; and that if he had none here, he would still leave his estate to his relations however distant, in preference to strangers." This sentiment Judge Martin expressed to witness several times in conversation. When witness, in April, 1846, was going to Attakapas, Judge Martin applied to him to enquire if there was a plantation for sale, intending to give \$100,000 to two nephews whom he had in France, and whom he expected here. Witness promised him to do so. On witness' return he called to know if witness had made any enquiry about it. Witness answered that there was none for sale there at that time. He then replied, "I am glad of it; my nephews will not come, and they shan't have my money." Witness has often heard Judge Martin complain of the ten per cent tax, and he often told witness that as he could not give any property to his relations who were not here without s. bjecting his estate to that tax, he would leave it all to his brother. One day, in a conversation which witness had with Judge Martin, he mentioned to him that he had a niece here, and asked why he would not leave her any thing. The judge answered that she was well off; was worth \$60,000 francs; and that was enough for a woman. Witness never had any directions from Judge Martin as to how he was to act as his executor. Witness never was told by Judge Martin to whom he intended leaving his estate than his brother.

This witness being re-called, stated further: That he and Judge Martin had many conversations about the succession, amounting to this: That he would leave his estate to his brother, as then it would not be subject to the tax; that this was his main object in calling his brother to this country; but he never told witness any thing that could authorize him to say that his estate would go to any person else. Witness was impressed with the idea, that Judge Martin did not absolutely intend to disinherit his other relations; that as he intended to dispose in favor of his brother in order to avoid the effect of the tax, this was not sufficient to destroy the ordinary order of things; but witness repeats that he knows of no fact that would authorize him to say so. It is only his own impressions, nor did witness ever tell the testator what his (witness') impressions were, as it was none of his business. Witness says that Judge Martin was much pleased when his niece came here, and always appeared to him to feel the affection towards her due from an uncle to a neice. She came here a year ago last December. P. B. Martin, came here about 1837 or 1838,

and has been here ever since.

H. D. Ogden, a witness for the State, deposed that in the latter part of 1841, he was Judge Martin's amanuensis, and remained as such for five or six months; during this time witness saw Judge Martin frequently sign his name, but does not recollect seeing him write any thing more. Whenever he had letters to write, he gave witness the subject matter; witness wrote the letters, and read them to him, and the judge would then sign them. Witness being asked, if pens, paper and ink were placed on a table, whether Judge Martin could go to it and write such a thing as the will exhibited to him, answers—that, without some assistance, does not think he could. His reasons for believing so are that when Judge Martin had to sign his name, witness was obliged to take his hand

STATE

and show him where he was to sign; and where he let it go, he would either sign running up or down, and sometimes he would run off the paper. From the way witness has seen him sign, his writing running sometimes up and sometimes down, he thinks the lines would cross one another, and therefore he could not have written the will without assistance. Witness says he generally gave Judge Martin the pen with ink in it; but supposes that he might have dipped the pen in the ink himself. Does not think, from merely feeling, judge Martin could tell when the ink in his pen was exhausted. Witness says that Judge Martin could not have known where to commence the lines in the will without assistance, or without placing some object on the paper to guide him.

Greiner, a witness for the plaintiff, stated that he was the secretary for the deceased from the fall of 1836 till sometime in 1840, and has often written for When the deceased spoke to witness about his family, he spoke of them kindly. He often spoke of his sister. He gave her \$700 per annum. When the ten per cent tax of 1842 was before the legislature the judge asked witness frequently about what stage it was in, and as to the prospect of its passing, and was apprehensive it would pass. He said it was an unjust law and only known in Louisiana, and appeared to be uneasy about it; he also said it was a very foolish law. Witness is acquainted with the judge's niece. She came here about a year ago. Has heard the judge speak highly of her, and say that he enjoyed life better since her arrival than he had before. The judge appeared to like his neice very much, and seemed to be very attentive to make her comfortable and happy, and enjoy herself. Has also heard the judge speak of his brother, but cannot say he cared more for him than he did for his niece. When Judge Martin removed from St. Phillip street to his late residence, P. B. Martin was very much opposed to the change; they sometimes had high dissensions about it; the brother did not like the change, because it was too far. When Judge Martin returned from France he spoke to witness in very high terms of his relations. He always had a strong regard for his relations, and never heard him say any thing against them, either before or since his return from France.

Moore, a witness for the State, deposed that he has a list of property from defendant to sell. The list was pretty much of the whole property left by the late Judge Martin. Defendant told witness that his intention was to realize the property and to leave the State. This was at the time he proposed to

have the property sold, some five or six weeks since.

Grailhe, a witness for the defendants, deposed that he became acquainted with defendant here in the spring of 1830; met defendant in Kentucky in the summer of 1830. Witness and defendant were together in Lexington, where defendant was studying english. After their return to New Orleans, in the fall of 1830, witness continued to see defendant in this city; and, in the course of a conversation which witness had with Judge Martin at that period, he heard that defendant had been sent to Lexington by Judge Martin in order to acquire a knowledge of the english language so that he might do the judge's business.

Guyol, a witness for the defendant, deposed that he had known the deceased since 1834. That he was his notary. That since Judge Martin's return from France he came to the office with notes written by himself on a sheet of paper, which he handed to witness and requested them to be read. These notes were to complete a judgment began by Mr. Denis, and which witness finished under the dictation of Judge Martin. They were probably about half a sheet of notes, all written by Judge Martin. Witness read them easily, because he was used to the judge's hand writing; cannot recollect of what these notes were, whether authorities or not, as he paid no attention to them; does not recollect how many words there were. There may have been a word in a line, there may have been six lines, or ten. Witness did not count them. Thinks the notes could have been read, but not easily except by a person acquainted with the writing, as letters were sometimes on top of one another, and a letter missing, and words written crookedly. Judge Martin was at witness' office every day nearly, and told witness of the contents of his will long before his death; told him that he had left every thing to his brother, because, he said, he was of the same habits and the same way of thinking as himself, and would do for his relations in France as he himself had done—that he would be a second, "soi-même envers sa famille." That about two months previous to his death he came to witness' office and appeared very uneasy. Witness asked him what was the matter. He said he was troubled; that his brother

would not remain here; that when he would be dead he would sell all his property and sacrifice it, and return to France, and that it worried him a great deal.

Visinier, a book-keeper in the Bank of Louisiana, introduced by the defence, stated that since Judge Martin became blind, three and a half or four years ago, he came to the bank and drew a check. He requested the witness to place the paper on the table in order that he might draw the check. Judge Martin, about that time, gave a receipt for a note which he wished to withdraw from bank, and, as he had not his bank-book with him, he gave a receipt drawn up and signed by himself. About that time the judge drew checks and signed them. When Judge Martin drew the check above alluded to in the bank, witness did not read it to him, nor did the judge request it to be read.

The following interrogatories were propounded to the defendant:

- 1. State the names of the heirs of your late brother F. X. Martin, supposing that he had died intestate.
- State their degree of relationship, parentage, residence and citizenship.
 State what portion of the property of your late brother would have fallen to your share, in case he had made no will.
- State whether your late brother left any children or descendants. If yea, state their name or names, and their country and residence.
- 5. State whether it was not understood between your late brother and yourself, that a portion of the fortune which you were to inherit from him should go to his other heirs, or to some of said heirs.
- 6. State whether you do not consider yourself morally and in duty bound to him to transmit a portion of said fortune to his other heirs, or some of his heirs, or some other persons whom he mentioned to you.
- 7. State whether your late brother has or has not given you any instructions or directions, verbal or written, how to dispose of the property he bequeathed to you, and what were those instructions and directions.
- 8. Was it not his intention, though he may have left to you no positive instructions or directions, that you should transmit, give or remit the property he left you, or part of the same, or a sum of money to his other heirs or some of them, or some other persons? If yea, state the names and the amount.
- 9. State whether it is not your intention to transmit, give or remit, now or at a future time, or at your death, the property he left you, or part of the same, to his other heirs or some of his heirs. If yea, state the names and the amount.

These interrogatories were answered by the defendant as follows:

To 1st interrogatory, he answered: Comme je suis le plus ancien de la famille, ce serait d'abord moi. Je me nomme Paul Barthélemi Martin. Ensuite les représentants de mon frère, Joseph Vincent Martin, qui sont Anélie Martin, Eugène Martin, et Adolphe Martin. Ensuite les représentants de ma sœur, Angélique Martin, décédée veuve Salony, qui sont Alfé Salony et Jules Salony.

To the 2d, he answered: Amélic Martin est la niece de feu François Xavier Martin. Elle est née à Marseilles, et se trouve présentement à la Nouvelle Orléans; son domicile est à Marseilles; Eugène et Adolphe Martin sont les neveux de feu François Xavier Martin; ils sont nès à Marseilles; y sont domiciliés et y résident. Alfé et Jules Salony sont aussi les neveux de feu François Xavier Martin. Ils sont tous les deux nés à Marseilles; ils y sont domiciliés. Alfé réside à Marseilles, et je crois que Jules est dans ce moment ei en voyage en Italie. Je suis né à Marseilles et je réside à la Nouvelle Orléans, et je suis français.

To the 3d, he answered: Je suppose que cela serait reglé par le Code de la Louisiane.

To the 4th, he answered: Mon frère n'a jamais été marié; je n'ai jamais oui dire que mon frère avait des descendants.

To the 5th, he answered: Il n'y a eu aueun entendu entre mon frère et moi à ce sujet. Il m'a laissé son héritier, et c'est à moi à disposer de son bien comme je l'eutendrai.

To the 6th, he answered: Je ne me considère aucun autre devoir que de faire ce que mon cœur me dira. Je prendrai dans mon cœur ce que je ferai un jour, ou ce que je ne ferai pas.

To the 7th, he answered: Mon frère m'a donné la dessus, ni instructions, ni directions aucunes.

STATE U. MARTIN.

To the 8th, he answered: Mon frère ne m'a rien déclaré là dessus—mon frère m'a dit: "Je te fais mon héritier, et de disposer de sa fortune ; que c'était à moi. To the 9th, he answered: Je n'ai la dessus d'autre intention que celle de

disposer de ma fortune selon ma volonté. La dessus je dis que je ne me crois pas obligé de faire dans ce môment ci un testament public. Je ferai mon testament comme je l'entendrai.

The will of the deceased, and all the proceedings connected with the probate thereof and the succession, were offered in evidence by the defendant.

There was a judgment below annulling the will, and declaring the State entitled to the amount claimed. The defendant appealed.

Elmore, Attorney General, for the State. The exceptions were properly dismissed. The first, that the State had no interest in the succession, takes for granted the whole matter in dispute. So long as the will is maintained, it may be true that the State has no interest in the succession; but if the will be annulled, its interest becomes apparent, and the very object of the suit is to get at that interest. The State has the same interest in setting the will aside that any of the heirs have. So long as the will stands they receive nothing from the estate—but the moment it is broken they receive as if no will had been made; the principle is the same, so far as the State is concerned. But the moment the will is broken, that part of the succession going to foreign heirs becomes liable to the tax of ten per cent.

The exception to the supplemental petition insists that the two petitions are inconsistent. The supplemental petition sets forth an additional ground why the will should be annulled. There is no inconsistency between the allegation to be found in the original petition, that the will was void on account of a physical incapacity in the testator at the time of making it, and that in the supplemental petition, that there was a secret understanding between the testator and executor, that the estate should be divided among the heirs without reference to the manner of distribution pointed out in the will itself. Both may be true.

A blind pers n is incapable of making an olographic will. See Duranton, v. 1, p. 161, no. 136. Grenier, v. 1, sec. 5, no. 281, p. 503. Rogron, Commentary on art. 978 Code Nap. Coin-Delisle, on the same art. p. 408. It is admitted that by the spanish law a blind person is incapable of making an olographic will. As to the common law, on this point, see Swinburne on Wills. p. 2, s. 11, p. 166. Jacob's Law Dict. vol. 6, pp. 430. 1 Lovolace on Wills, Law Library, vol. 15, pp. 141-2. Because the Code does not expressly say that a blind man is incapable of making an olographic will, though the whole spirit and reason of the law is against it, it is insisted that this incapacity does not exist. But the Code contains general principles, and was never intended to provide for each particular case, as it may arise. Such a construction is to be given to it, as will make it consistent with reason and itself. It is indispensable that a testator should know what disposition he is making of his estate, when he makes his will. Now, it is impossible that the testator, in this case, could have known the contents of his will. He could not read, and it was never read to him. If so, how could he know what disposition he was making of his estate? The defendant will answer, that it was written by the testator, and the presumption will be, from that fact, that he knew its contents. That would be the presumption where the testator could read-because the law would presume that a testator, before executing his will, after having written it, would read it over before signing, to see if he had written it as he intended. But that presumption ceases when the testator is blind. He thinks his will contains certain dispositions, because certain ideas were in his mind at the time he was writing it—and he thinks that, by means of pen and ink, he has been enabled to transfer to paper the ideas that were passing through his mind at the instant he was writing. But how does he know—how can he know, whether his pen has been a faithful reflector of the operations of his mind? How does he know but that his hand may have refused its office, and, instead of tracing particular words, have substituted other words, altering the sense of the writing, or have omitted words indispensable to convey the meaning. Persons in the possession of sight, and most skilful in the use of the pen, frequently use words not intended, and omit others, by which the meaning is entirely distorted. But in such a case it is competent for them to correct their errors—by the use of the eyes they can detect the omissions and correct them. But with the blind there is no

such power. The evidence supports the decision of the lower court on the point that the will was not entirely written, dated, and signed with his own hand.

The evidence establishes the fact that the testator made his brother his universal heir, for the mere purpose of avoiding the payment of the tax imposed by the stat. of 1842. The will was consequently in fraudem legis, and can have no effect so far as the State is concerned. Mitchell v. Smith. 1 Binney, 119. Davis v. Holbrook, 1 A. R. 176. Booth v. Hodgson, 6 Term R. A09. 2 Hovenden on Frauds, p. 19. Comyn on Contracts, p. 53. Law v. Hodgson, 11 East. 300. Bravo v. Turner, 7 Term Rep. 630. Wheeler v. Russel, 17 Mass. 280. Mitchell v. Smith, 1 Binney, 116. Biddis v. James, 6 Binney, 326. 3 Merivale, 471. Armstrong v. Toler, 11 Wheaton, 258-975. Gravier v. Carraby, 17 La. 125.

E. Musson, on the same side, argued at length the question of the capacity

of a blind person to make an olographic will.

J. F. Pepin, on the same side. I. As regards the interest of the State, it is self-evident. If the will be declared null and void, it receives a large sum of money, otherwinse nothing. If the State has an interest, it has a right to bring suit. C. P. 15. But it is contended that the State has no right to avail itself of the nullity which results from the non-compliance with the formalities required by law in the making of wills. That the nullities complained of are relative, and not radical or absolute. That by absolute nullities, are meant those which can be set up by all persons interested; by relative nullities, those which can only be set up by the persons in whose favor they are established; and that the nullity complained of, is a relative nullity, of which we cannot take advantage. I contend that the nullity complained of is absolute, and such as renders the will absolutely null and void. The formalities required in a will are matters of strict law, and it is null and void if they are not complied with. C. C. 1588, 19, 1543, 1553. Sterling v. Gros, 5 La. 100. Gaude v. Baudoin, 6 La. 722. Levis's Heirs v. His Executors, 5 lb. 387. Stafford v. Villain, 10 La. 319. Hebert's Heirs v. Legatees, 11 La. 361. Brittain v. Richardson, 3 Rob. 79.

We find the same doctrine, both in the roman and the french law. See

Pothier's Pandectes de Justinien, vol. 10, p. 389, book 28, tit. 1, art. 3.

"Si un testament est fait suivant le droit, disent Dioclétien et Maximien, et que l'héritier soit habile à le recevoir, on ne peut pas le rescinder en vertu de nos rescrits. Mais il n'est permis à personne d'en retrancher des formalités qui doivent y être observées. C'est pourquoi les mêmes empereurs disent dans un rescrit: Chacun a la faculté de disposer de ses biens par testament, mais en observant certaines formes ; il n'est pas permis de rien changer à .ces formes prescrites par le droit public. Il en est tellement ainsi que la faveur du prince n'en peut pas dispenser. C'est pourquoi, Valens, Valentinien et Gratien disent dans un rescrit, par rapport au testament fait en faveur du prince, ou par le prince lui-même : L'empereur et l'impératrice eux-mêmes ne pourront instituer que d'apres les règles communes ; et il en sera de même par rapport aux codiciles et aux fideicommis qui seront faits suivant le droit. Et comme d'ont ordonné les anciennes lois, l'empereur et l'impératrice pourront faire des testamens et les rétracter." "Alexandre dit également: 'Suivant plusieurs constitutions, l'empereur ne peut pas revendiquer une succession en vertu d'un testament imparfait : et en effet, bien que la loi ait affranchi le souverain des formalités, rien ne lui convient cependant mieux que d'observer les lois.' A plus forte raison le fisc ne peut pas s'emparer des biens de celui qui voulait laisser sa succession à l'empereur.' Un testament où l'on n'a pas observé les formulités nécessaires est tellement nul que Paul a répondu 'que l'on ne pouvait pas même demander en vertu du fidéicommis exprimé dans un testament qui n'était nullement conforme

As to the old French law, Claude de Ferrière, in his Commentaires des Coutumes de Paris, art. 289, vol. 4, p. 99, des Testaments, Glose cinquième, says: "L'omission de l'une des solemnités requises, cause la nullité d'un testament. Nos coutumes ont intreduit plusiours solemnités requises dans les testaments, pour les rendre valables en sorte que l'omission d'une seule rend les testaments nuls. Ces formalités ent été introduites pour empêcher les auggestions et les fraudes qui se pourraient commettre dans les testaments." No. 30, p. 118: "Les solemnités requises par les coutumes, sont tellement essentielles que par le défaut d'une seule les testamens sont nuls, pour quelque cause et raison que ce soit."

ATE

MARTIN.

STATE V. MARTIK Antoine D'Espeisses, Œuvres Complètes, vol. 2, tit. 1, s. 4, De la Forme du Testament, says: "Non seulement il est requis pour la validité d'un testament, que le testateur ait la faculté de tester, qu'il en ait eu la volonté, et qu'il parachève son testament, mais de plus qu'il l'ait fait en la forme prescrite par les lois. Les lois ont donné une forme certaine, ou des solemnités aux testamens, de la moindre desquelles il n'est pas permis de se départir."

moindre desquelles il n'est pas permis de se départir."

Pothier, Des Donations Testamentaires, chapter 1, says: "Le testament est un acte qui appartient au droit civil, et qui pour être valable doit être fait selon les formes prescrites par les lois"; and see also Pothier, chap. 5, sec. 2. Fur-

gole, Testa. chap. 3, no. 12.

As to the law under the Code Napoléon, (see Duranton, vol. 8, p. 484, 1, 3, sec. 5,) who says: " Si le législateur a permis aux citoyens de régler la dévolution de leurs biens, comme ils l'entendraient, et de faire ainsi en quelque sorte une loi sur leur patrimoine, dont l'exécution n'aurait lieu qu'après leur mort, il a'a voulu du moins sanctionner ce droit qu'autant que ceux qui en useraient, rempliraient ponctuellement les conditions et les formalités qu'il a jugées utiles, indispensables même, pour attester avec certitude leur volonté à cet égard. En conséquence, il a décidé par l'art. 1001 du Code, de la manière la plus absolue et la plus générale, que, 'les formalités aux quelles les divers testaments sont assujétis par les dispositions de la présente section et de la précédente, doivent être observées, à peiue de nullité." See also Merlin, verbo Testament, sec. 2, part 4, art. 2. Coin-Delisle, chap. 5, Des Dispositions Testamentaires. Solon, Traité des Nullités, chap. 9, nos. 426 et 427. Perrin, Traité des Nullités, nos. 118 à 122. Solon nos. 441, 442, says : Un acte radicalement nul, peut être attaqué par ceux même qui n'ont que l'action en nullité relative, ainsi déci lé par une nullité de mariage poursuivie par des collatéraux. Rolland de Vildargues, verbo Nullité, no. 43, says: Une théorie à la fois simple et vraie est celle-ci, toute nullité est absolue, lorsque la loi la prononce sans restriction ni limitation. If it be true then, as is asserted by all these writers, that a will without the formalities required by law, is altogether worthless, how can it be pretended, that the nullity complained of is relative and not absolute, and that the State has no right to avail itself of it?

II. As to the second exception, that the grounds taken by the State in the supplemental petition, cannot be cumulated with those of the original petition. The supplemental petition does not change the nature of the action. It adds new grounds why the will should be declared null and void. The nature of the action is not changed by the supplemental petition. The original grounds are that the formalities required by law in the making of olographic wills, have not been complied with. The supplemental ones, that it is also null and void on the ground that there has been a fidei-commissum. 4 La. 298. 8 N. S. 488. And in both cases, the prayer is the same, to wit: that the will be declared null. Thus, it has been decided that in a suit for the possession of a slave, if plaintiff dies pending the suit, his heirs, in the supplemental petition making themselves parties, may amend by stating new facts, if they conclude with the same prayer as in the original petition. Rochelle v. Alvarez, 8 N. S. 171. It is a general principle, that amendments to the pleadings should be permitted for the furtherance of justice and avoidance of costs, whenever the prayer is the same as in

the original pleadings.

III. I now come to the merits of the case, and will examine the first point.

Can a blind man make an olographic will?

The olographic will is derived from the Romans, as shown in the Novel 4, de Testamentis, of the Emperors Theodosius and Valentinian, "ut quisquis per holographam scripturam supremum maluerit ordinere judicium, habeat liberam facultatem: et si holographa manu testamenta condantur, testes non sunt necessarii." This novel was not long in force, though many of the Romans continued to make olographic wills. Pliny in his Epistle 16, book 2, speaks of it. Justinian, however, in the law, Hac consultissima, established the necessity of witnesses in all kinds of wills, except in the case of a father disposing of his fortune in favor of his children, and thus formally abrogated the use of olographic wills. We see, however, that in many countries the use of olographic wills was continued. The Visigoths, expressly admitted them. Book 2, tit. 5, chap. 15 of their laws. Manu proprià scribat ea que ordinare desiderat: dies quoque et annus habeatur in his evidenter expressus: deinde toto scripture textu conscripto, rursum auctor ipse subscribat."

STATE v. Martin.

In France, it was admitted by the customs of most of the provinces. In the year 1629, by an ordinance of Louis XIII, it was permitted to make olographic wills, in all the kingdom of France. But this ordinance was not enforced by some of the parliaments, and among others the parliament of Paris, and at last came the ordinance of Louis XV, which says, in speaking of olographic wills, art. 20: "Les testaments, codiciles et dispositions à cause de mort, en forme olographe, seront entièrement écrits, datés, et signés de la main de celui ou de celle qui les aura faits." Art. 970 of the Nap. Code is copied therefrom, almost verbatim: "Le testament olographe ne sera point valable, s'il n'est écrit en entier, daté, et signé de la main du testateur; il n'est assujéti à aucune autre forme." Art. 1581 of the Code of this State, is taken from the french Code. "The olographic testament is that which is written by the testator himself. In order to be valid, it must be entirely written, dated and signed by the hand of the testator. It is subject to no other form, and may be made anywhere, even out of the State." Our law is, therefore, as regards olographic wills, the same as the french law, before and after the Nap. Co le.

The most eminent jurisconsults, almost without exception, have, in their commentaries on the ordinances of Louis XIII. and XV, and on the Napoléon Code, taken the same view that we have of this matter. As we have shown, the formalities required in the making of wills are of a strict and essential nature, without which the will is absolutely void. "Une donation entre-vifs, un testament, sont des actes dont tout la valeur est dans la solemnité, et dont toute la solemnité est dans leur forme; si donc en faisant un testament ou une donation entre-vifs, on néglige les formes qui leur sont propres, qu'est-on censé avoir voulu faire? Rien. La loi présume qu'on a rédigé un acte défectueux, pour se dérober à des suggestions importunes, en paraissant y céder; elle présume qu'en faisant semblant de disposer, on n'a réellement voulu faire aucune disposition."

Merlin, verbo Testament, sec. 2.

An olographic will, to be valid, must be entirely written, dated, and signed by the hand of the testator. This kind of will, say the french writers, is greatly to be favored, because it is less subject than the others to frauds and deceptions. This is true in ordinary cases. But is it so when it is a blind man who may make an olographic will? "Ce testament est celui qui mérite la plus grande confiance; c'est le testateur lui-même qui y consigne ses volontés; son étymologie grecque désigne un testament écrit uniquement par le testateur." Grenier, Traité des Donations, no. 226. "Ouvrage du disposant seul (says Vazeille) le testament olographe dans sa simplicité appelle la confiance bien mieux que le testament authentique avec ses formes minutieuses et sévères." Toullier, vol. 5, no. 378 (Paris edition), adds: "C'est la forme des testaments olographes qui est la moins exposée aux surprises, celle qui mérite la plus grande confiance, parce qu'elle est plus particulièrement l'ouvrage du testateur."

See also, Journal du Palais, vol. 1, p. 906, 28 juin 1678, Affaire Demoiselle Blanche de Parant. "La solemnité des testaments olographes est fort simple; c'est leur simplicité qui fait toute leur solemnité; une personne qui veut ainsi tester, écrit elle-même sa volonté, elle n'a pas besoin de tous ces termes scrupuleux de nos coutumes, dicté et nommé, lu et relu, parce qu'elle ne saurait se surprendre elle-même, sa main et son esprit travaillent de concert, elle dicte, elle nomme, elle lit son testament par la même action et au moment qu'elle

'écrit."

Ferrière, Coutumes de Paris, vol. 4, p. 75, sur l'article 289, qui traite du testament olographe, quotes Charondas with approbation, who says: "Les testaments olographes ne sont pas si exposés que les autres espèces de testaments, aux fraudes et suggestions; c'est pourquoi nos coutumes n'ont requis aucune solemnité, autrement il arriverait le plus souvent que de telles dispositions seraient nulles; la raison est que ceux qui les font, veulent les tenir secrètes, et empècher qu'elles ne soient connues de personne. Le célèbre avocat-général au parlement de Paris, Talon, dans son quatre-vingtième plaidoyer, vol. 6, p. 84 de ses œuvres, dit; 'Celui qui fait un testament olographe, doit être certain de ce qu'il entreprend, non seulement dans la qualité des dispositions qu'il renferme, mais aussi dans la forme qu'il lui veut donner.' Le même avocat-général, plaidant une affaire rapportée par Dufrèsne du 30 avril 1625, dit: 'Qu'un testament olographe était un enfant posthume qui ne paraissait jamais qu'après la mort de son père, comme le phœnix, par lequel l'homme revit à soi-même; que dans ce testament nous consignons nos plus importantes pensées que nous n'avons voulu

STATE MARTIN. découvrir à personne.'" See also d'Aguesseau, vol. 3, p. 208, Œuvres Com-

The above observations are strictly correct, and can apply only to him, who, making an olographic will, sees what he writes, and reads it when written. But is it true as to a blind man? He cannot make his will in the olographic form, without the assistance of some person, who may impose upon him. He asks for paper, ink and a pen; a sheet of paper is handed to him; how can he distinguish whether it be black or white, whether it be ink or any other liquid which has been brought, whether his pen makes the proper marks on the paper? He requires the assistance of some one to tell him where to commence, where to stop, and to guide his hand in the writing of the will. And when it is all finished, being unable to read it, he cannot discover whether he has not committed an error, or been misled. Who among us has not often, in writing, put one name or word for another, which is, however, afterwards corrected, when reading the original. Why is it that we always read what we have written, if it is not to revise the same, and see that no mistake has occurred? But can a blind man do so? And when his will is made, how can he know, that it will not be taken from the spot where he has placed it, and an other paper substituted ? Can he with the mere sense of touch discover the deception? These are a few of the reasons which suggest themselves to every mind, and which show that a blind man is really incapable of making a valid will in the olographic form.

We see that according to the roman law, a blind man could make a will but in the nuncupative form. See Pandectes de Justinien, by Pothier, vol. 10, p. 306, lib. 18. "Cæcus testamentum facere potest, quia accire potest adhibitos testes, et audire sibi testimonium perhibentes." Paul. sent. lib. 3. tit. 4, § 4. "Certam autem ac specialem cocis, testandi formam constituit Justinianus.

See also Domat, vol. 2, book 3, tit. 1, s. 1, nos. 12, 13, who says: "Il ya des testaments de diverses sortes, et qui sont distingués, non par l'essentiel de leur nature, qui est l'institution d'héritier commune à tous, mais par les différentes formalités que les lois ont établies pour l'usage des personnes qui veulent disposer de leurs biens, selon que ces formalités peuvent convenir ou à la qualité de la personne, ou aux circonstances de l'état où elle se trouve, comme on le verra par les articles qui suivent. Pour ce qui regarde les personnes des testateurs, on peut faire une première distinction des testamens, que peuvent faire ceux que quelques infirmités rendent incapables de certaines manières dont les autres personnes peuvent tester. Ainsi les aveugles, les sourds, les muets, ne sauraient faire leurs testaments que dans les formes qui peuvent leur convenir." Also same book, sec. 3, des Formes ou Formalités nécessaires dans les Testamens, no. 20. "Quoique les aveugles ne puissent écrire, ni lire, ni voir les personnes qui peuvent être présentes à leur testament, ils ne laissent pas de pouvoir tester, de même que les autres personnes, qui ne savent écrire ni lire ; car ils peuvent expliquer et faire écrire leurs dispositions, et déclarer en présence de sept témoins et d'un notaire, que ce qu'ils ont fait écrire, et qui sera lu en présence des témoins et du notaire, est leur testament, qui aura son effet, étant signé des témoins qui sauront signer, et du notaire. Et s'il y a des témoins qui ne sachent ou ne puissent signer, le notaire en fera mention.'

Let us refer to the spanish law. "El ciego non puede fazer testamento, fueras ende desta manera (1): deue llamar siete testigos, e vn escriuano publico, e delante dellos deue dezir, como quiere fazer su testamento. Otrosi deue nombrar, quales son aquellos que establesce por sus herederos, e que es lo que manda; e el escriuano deue escriuir todas estas cosas delante los testigos, 6 sì eran ante escritas, deuen ser leydas delante dellos; e despues que fueren escritas, e leydas, deue dezir el ciego manifiestamente, como aquel es su testamento. E de si, cada vno de los testigos deue escriuir su nome en aquella carta, si supiere escriuir; e si non, deuelo fazer escriuir a otro. E tambien el escriuano publico que escriuiere la carta, como los testigos, deuen sellar la carta con sus sellos: e si el escriuano publico non se pudiere auer, deuen suer otro que lo escriua, e que sean con el ocho testigos en lugar del escriuano. E esta guarda deue ser fecha en el testamento del ciego, porque non pueda ser fecho ningun

engaño." Partida 6, ley 14, tit. 1, vol. 3, p. 16.

⁽¹⁾ Fueras ende desta manera: Probatur hic, cœcum non posse testari in scriptis, its quod testes et tabellio, nesciant ejus dispositionem: posset enim cœcus, qui testaretur in scriptis, faciliter decipi, et subjici sibi una scriptura pro afia.

"Item adde, quod in testamento cæci requiritur per nostram legem solemnitas quinque testium. Et certe in hoc, nostra lex est valde dubia : an, cum supra locuta sit, tam in testamento in scriptis quam nuncupativo, an in utroque sufficient quinque testes in testamento cæci? Pro cujus perfecta declaratione dico et præsuppono, quod cœcus non potest testari in scriptis: quia cum non possit videre et cognoscere litteras suas vel alienas, posset decipi, et faciliter contra eum committi falsitas : sed tantum potest testari nuncupative, et in tali testamento debent intervenire sequentes solemnitates. Prima, quod non possit testari in scriptis. Et sie nestra lex, quæ simpliciter dicit et disponit, quod in testamento cæci requirantur quinque testes, necessario debet intelligi in testamento nuncupativo, quia in scriptis non potest testari; et licet in aliis personis requirantur quinque vel tres testes, ut supra dictum est, tamen in testamento cæci necessario semper requiruntur quinque, et iste est verus intellectus hujus legis. Sed pulchrum dubium est, an hodie requiratur etiam Tabellio et prædietæ solemnitates, quas supra numeravi vel aliqua earum? Et teneo quod non, cum in nostra lege non ponantur neque requirantur; et si replices, ergo eadem ratione posset testari in scriptis, cum simpliciter et absolute nostra lex loquatur, dicendo, quod in testamento cæci requirantur quinque testes: quia respondeo, quod nullo modo potest testari in scriptis, quia in eo est major ratio prohibitionis quam supra dixi, de jure communi: Item, quia in testamento in scriptis nostra lex requirit septem testes in qualibet persona, etiam si testetur inter filios: ergo in cæco non coaretatur, vel tollitur prædicta solemnitas et numerus testium: unde, cum nostra lex loquatur in testamento nuncupativo et in scriptis, et dicat, quod in testamento cœci requiruntur quinque testes, aperte colligitur loqui tantum in testamento nuncupativo in quo est capax, et non in alio." Gomez, Opera Omni, 3d law of Toro, nos. 51, 52, p, 25.

See also Molina (Madrid edition, 1827), in his commentaires on the law of Toro, vol. 1, p. 74, nos. 69 and 70, who says: "La disposicion que obra en el testamento del ciego, asi por derecho civil como por el real de las partidas, de que no pueda testar por escrito, sino nuncupativamente, y la particularidad que por esta ley se observa tambien en el testamento del ciego, escita la duda de si el que no sabe escribir ni leer podrà testar por escrito, o deberà necesariamente otorgar nuncupativamente su disposicion. El fundamento de esta duda nace de que asi como al ciego para remover toda sospecha de fraude no se le permite otorgar su testamento por escrito, à causa de que por la falta de vista ni podia escribirlo por si, ni leer lo que otro hubiese escrito, y quedaria espuesta a fraudes su disposicion, concurriendo en el que, ni sabe escribir, ni leer el mismo peligro de ser suplantada su disposicion por no poder escribir por si, ni leer lo que otro hubiese escrito, parece segun aquel principio legal que donde se halla igual razon debe regir la misma disposicion de derecho, que el que no sabe escribir ni leer esta impedido de hacer su disposicion por escrito, pues à la verdad la unica diferencia que media entre el ciego y el que no sabe leer ni escribir, es que este puede ver materialmente los testigos; pero esta circunstancia ni aumenta la fé y crédito que se les debe dar à sus dichos, ni disminuye el peligro y sospechas de fraude en el que estendio por escrito su disposicion."

"El ciego no puede hacer sino testamento nuncupativo, y en el otorgamiento de él deben intervenir con precision cinco testigos, y no menos, como lo dice expresamente la ley : la qual corrige en quanto à su número la 14, tit. 1. part 6, que manda sean siete, y un escribano público, para que no sea engañado, ni se le suplante una escritura por otra, lo qual no puede suceder al que tiene vista."

Febrero Adicionado. vol. 1, part 1, ch. 1, § 1, no. 14.

The olographic will was and is well known in the spanish law; it was permitted in certain cases, by a royal Cedula of October 1778, mentioned in note A. in Febrero Adicionado, p. 18, vol. 1, no. 20. Long before that time, the Visigoths who founded a kingdom on the ruins of the Roman empire in Spain and in the south of France, admitted in their laws the olographic will, as has been previously shown. This Code of the Visigoths, which had been compiled by persons well versed in jurisprudence from the Theodosian Code, from the enactments of the later emperors, and other sources, remained in force for some centuries. But when we examine the works of the jurisconsults of Spain, who have written since the Cedula of 1778, we do not find any change in their way of thinking as regards the wills of blind men. 'I hey state, in general terms, that a blind man cannot make a will except in the nuncupative form, showing clearly that the Cedula did not and could not apply to persons who were afSTATE U. MARTIN.

flicted with blindness. The formalities required in the making of olographic wills, were the same under the french law, before and since the Napoléon Code, and we have already seen that they are the same under our own Civil Code.

A majority of the eminent french lawwriters agree in the fact that a blind

man cannot make a valid olographic will.

Ricard, le judicieux et savant Ricard, as Pothier surnames him, says in his Traité des Donations, that a blind man can only make a will in the nuncupative form, by dictating it to his curate or to a notary, and he adds (no. 142): "Quant aux aveugles, le droit leur a permis de disposer, soit qu'ils eussent apporté cette incommodité en naissant, ou qu'elle leur fut depuis survenu par accident, à condition d'observer toutefois certaines formalités particulières, décrites en la loi Hac consultissima." In nos. 1470, 1474, he writes: De la forme des testamens des aveugles: "Le droit Romain a introduit une quatrième espèce de testamens en faveur des aveugles, que la loi appelle testament nuncupatif."

Denizart, one of the great lights of the law, says in his work, Collection de Décisions Nouvelles et de Notions relatives à la Jurisprudence Actuelle, verbo Testament, no. 160. "Celui qui est aveugle ne peut tester en pays de droit écrit que par la voie du testament nuncupatif. Si c'est en pays coutumier, un pareil testament ne peut être fait que pardevant notaires ou curés, en se conformant à l'art. 21 de l'ordonnance de 1735. Cependant, par arrêt, du mardi 29 mai 1770, rendu en la grande chambre au rapport de M. Bèze de Lys, la coura confirmé le testament olographe de la dame Ménage de Pressigny, qui était aveugle, etc." This decision of one of the courts did not change the mind of Denizart, since he commences by laying down the principle, that a blind man can make a will only in the nuncupative form. This single decision cannot hold against the authority of the great names who contend against the rule there laid down.

Lacombe is of the same opinion as Dénizart.

Pothier, Traité des Donations Testamentaires, chap. 1er, after speaking of the different formes of wills in France, of the olographic, mystic and nuncupative, says, in speaking of nuncupative testaments: Art. 4. "Lorsque le testateur est aveugle, il faut appeler un huitième témoin qui signe avec les autres·" Antoine Despeisses, sec. 1, des Personnes qui peuvent faire testament, p. 11 et 12. vol. 1, says: "L'aveugle peut faire un testament; mais parce qu'il y a plus de dangers qu'on ne commette fraude en les testaments des aveugles que de ceux qui ont la vue, on a requis à ce testament un plus grand nombre de témoins." Sallé, in his Esprit d-s Ordonnances de Louis XV. says: "Comme les personnes privées de l'usage de la vue sont plus exposées à être trompées que d'autres, on a toujours ajouté en leur faveur quelques formalités de surcroit."

I proceed to quote the opinions of the modern french commentators on the Code Napoléon. We must bear in mind that art. 1581 of our Code is copied

from art. 970 of the french Code.

Delvincourt, vol. 2, p. 85, note 12, says: "Et comme celui qui ne sait ou ne peut lire ne peut davantage écrire, il ne pourra faire de testament olographe,

et ne pourra donc tester que par acte public."

Grenier, Traité des Donations, vol. 1, p. 427, sec. 3, no. 258, says : "De là il suit qu'un aveugle qui aurait su lire, qui pourrait même écrire ou signer, ne peut point tester sous la forme du testament mystique. Cette observation a été judicieusement faite par Lacombe dans son commentaire de l'article 9, de l'ordonnance de 1735 ; la même décision résulte de ce que dit Kicard, partie 1, no. 1474. En sorte que l'aveugle peut seulement tester sous la forme du testament fait par acte public, à moins qu'avant sa cécité, il n'eut fait un testament olographe, qu'il ne fut pas dans son intention de changer. The same writer, (same vol. no. 281) adds : "J'ai eu occasion de dire dans cette seconde partie, au commencement de la section 3, que l'aveugle ne peut point tester sous la forme mystique, il ne le peut donc que par acte public." "Le caractère du testament olographe, est d'être fait par le testateur seul : or un aveugle, quelqu'habitude qu'il ait pu conserver de l'écriture, pourrait-il bien se flatter d'écrire son testament, de le dater et signer, de manière à ce qu'il n'y eut aucun des inconvéniens que cet état fait naturellement craindre, qu'on prévoit assez sans les détailler, et qui pourraient rendre le testament illisible et nul. Si on suppose qu'il se fasse aider et guider par un tiers, alors la possibilité des insinuations et des surprises ne se présente-t-elle pas à l'esprit? et ne s'élève-t-il pas un doute légitime sur

STATE V. MARTIN

la validité d'un testament fait dans une semblable circonstance? Où est cette garantie, si fortement exigée par la loi, de la certitude des volontés du testateur? Asssi Dénizart, avait-il d'abord posé en principe, qu'un aveugle ne pouvait tester que par testament public fait devant notaire. Il paraît que c'est un annotateur, qui a ajouté de suite la citation de l'arrêt de 1770. Les héritiers soutenaient avec force qu'une personne en état de cécité, n'avait pu faire un testament ologrape; et un arrêt isolé qui semble avoir jugé le contraire, peut-être par des circonstances inconnues (la cécité pouvait n'être pas complète) peut-il fixer les opinions sur un fait sur lequel le sentiment et la raison instruisent suffisamment? La prudence exige donc qu'une personne aveugle, prenne la seule mesure que la loi permette relativement à son état, afin d'assurer l'exécution de ses dernières volontés."

Duranton, vol. 9, no. 134, says: "Et comme ceux qui ne savent ou ne peuvent lire, ne peuvent, pareillement écrire, ils ne peuvent non plus faire un testament olographe." Again. at no. 136: "Celui qui est privé de l'usage de la vue ne pouvant pas lire, il ne peut par conséquent tester en cette forme, ni dans la forme olographe; mais l'affaiblissement de la vue n'est point la cécité, et si le testateur peut lire au moyen d'une loupe, cela suffit, quoiqu'il ne pût lire que lentement, et même avec difficulté. C'est au surplus un point de fait que les tribunaux jugeraient comme tel, d'après les éléments de la cause."

Merlin, Répert. verbo Testament, sect. 2. § 3, art. 3, quotes with approbation, Serres, Institutions du Droit Français, who says: "Les personnes incapables de lire, quand bien même elles auraient appris à former leur seing, doivent être mises au même rang que les aveugles, pouvant être exposées à la mauvaise foi de l'ecrivain et aux mêmes surprises qu'eux; il ne doit leur tre permis par conséquent de faire non plus qu'aux aveugles, qu'un testament public et noncupatif." "Cattalon (liv. 2. chap. 12,) rapporte deux arrêts du parlement de Toulouse, parfaitement conformes à cette doctrine."

Boileux and Poncelet, the latter now a distinguished professor of the law faculty in Paris, in their late work on the french Civil Code, hold the same doctrine. In commenting on art. 979, they say: "En terminant cette section, il n'est pas inutile d'exposer les causes d'incapacités physiques, qui ne permettent de tester que sous certaines formalités ou qui empèchent de tester sous quelque forme que ce soit. L'aveugle ne peut tester que par acte public, il est incapable de faire un testament olographe, puisqu'il ne peut écrire, ni un testament mystique, puisqu'au moment de l'acte de souscription, il ne peut s'assurer

que l'acte présenté, est son testament."

Rogron, in his valuable notes on the french Civil Code, says on art. 977:
"Ou ne peuvent lire. Ils ne pourraient s'assurer si c'est bien leur volonté qui a été consignée par écrit; ces personnes ne peuvent faire de testaments que par

Bergier, who wrote before the Nap. Code, is the only writer of his time mentioned, who thinks that a blind man can make an olographic will. Does his name overbalance the names of Ricard, Lacombe, Denizart, Serres and others? And under the new Code, Vazeille, and perhaps one or two others, think that as blind persons are not expressly excluded, they can make their wills in the olographic form; "mais il faut avouer," says that writer, "que la faculté du testament olographe, par l'aveugle, présente de graves inconvéniens; c'est sûrement par oubli que le législateur ne l'a point interdite." Will this opinion of Vazeille, flanked by one or two writers, outweigh the opinions of such men as Merlin, Duranton, Grenier, Delvincourt, Boileux, Poncelet, Rogron and others?

But it has been said in argument, and this is the only reason given by Vazeille, that inasmuch as the law does not expressly forbid a blind man to make an olographic will, he has a right to do so. I admit the general rule, that incapacities are not to be presumed. But I contend that to all general rules there are exceptions. The spirit of the law must be looked into; the legislator very often deals in generalities. The courts, in their wisdom and discretion, should interpret the law in such a manner as not to make it appear absurd. Hear what judge Martin himself says on that subject. (Bullard's discourse on his life and character.) "I remember that perhaps on more than one occasion, when reminded by counsel of that instruction of the Louisiana Code, which forbids the judge to disregard the words of a law under the pretext of pursuing its spirit, he (judge Martin) replied: certainly never under the pretext of pursuing its spirit, but if, in the sincere desire to ascertain the will of the lawgiver,

STATE

you discover that it would be violated by giving a literal interpretation to the words he has employed to express it, you are bound to give those words a reasonable interpretation, rather than that which corrodes the text and frustrates

I will now show that Vazeille himself is of a different opinion in a case analogous as to the principle. Art. 980 of the french Civil Code, says: "Les témoins appelés pour être présents aux testaments, doiventêtre mâles, majeurs, régnicoles, et jouissant des droits civils." . These qualities, are according to the french Code, the only ones required. A blind man therefore, who is male, majeur, regnicole, et jouissant de ses droits civils, can be a good witness to a will, according to the rule laid down by Vazeille, "que la loi n'interdisant pas le testament olographe aux aveugles, ils peuvent le faire."

But neither does the french law incapacitate, or interdict a blind man from

being a witness to a will. And yet Vazeille, and almost all other writers have agreed on this point, "that a blind man cannot be a good witness to a will." Hear what Coin Delisle, commenting (art. 980) on the french Code, says,

No. 21: "Voilà donc tout ce que contient le Code Civil sur les incapacités absolues? il ne s'est occupé que sons le rapport civil; il n'a rien dit des incapacitésnaturelles que le droit romain rangeait au nombre des incapacités proprement dites, en rejetant du nombre des témoins testamentaires, les aveugles, les sourds, les muets et les insensés; les auteurs admettent, presque tous, ces inca-pacités. Cependant les lois romaines sont abrogées, et il est de principe que les incapacités ne s'étendent pas. Aussi avons-nous dit ailleurs que ce n'étaient pas là de vraies incapacités, mais des impossibilités physiques, et que les ques-tions sur ce genre de difficultés devaient être jugées suivant les circonstances. L'ancien doyen de la faculté de Paris, a dit avec un sens profond : 'Si le défaut physique est tel qu'il ait pu mettre le témoin dans l'impossibilité d'affirmer l'identité de la personne du testateur, ou de s'assurer de la vérité de sesdispositions et de leur conformité aux intentions des disposans, le témoignage doit être rejeté et le testament déclaré nul, si ce témoin était nécessaire pour compléter le nombre exigé par la loi.' Delvincourt, tome 2, note 3 sur la p. 86."

"Une règle (says Duranton) commune aux témoins, soit des testamens, soit par acte public, soit en la forme mystique, c'est qu'ils doivent être mâles, majeurs, sujets du roi, et jouissant des droits civils. Et comme il est necessaire qu'ils voient la personne qui teste, afin de prévenir les fraudes, qu'ils l'entendent aussi dicter ses dispositions, et afin qu'ils puissent rendre témoignage des faits s'ily a lieu, il s'ensuit que l'aveugle, le sourd et le muet, qui ne savent pas écrire, ne

peuvent être témoins aux testamens." Duranton, vol. 9, no. 204.

Toullier, vol. 5, no. 390, says: "La faculté d'être employé comme témoin dans les actes, est un droit civil dont ne peut être privé aucun français, qu'en vertu d'une disposition de la loi, ou d'un jugement rendu contre lui, lorsque d'ailleurs la nature ne lui a pas refusé les qualités nécessaires pour rendre un témoignage raisonnable et certain de ce qu'il a vu et entendu. Les incapacitésdes témoins viennent donc de la nature ou de la loi civile. Le Code ne s'estpoint occupé des incapacités naturelles, et s'en est rapporté sur ce point à la prudence du magistrat, qui n'a point à craindre de s'égarer, en prenant pour guides les jurisconsultes qui ont développé sur cette matière des principes dictés par la raison,"

Grenier, vol. 1, no. 254, says: "Il peut se présenter encore des cas sur lesquels la loi ne s'est point expliquée, et dans lesquels le sort d'un testament pourrait être compromis, à raison de la qualité des témoins qui seraient appelés, quoiqu'ils eussent d'ailleurs les qualités requises par l'article 980, c'est à-dire qu'ils fussent mâles, majeurs, sujets de l'empereur, jouissant des droits civils. Il y a des personnes qui, par leur état physique, doivent être réputées dans l'impossibilité de rien comprendre et de rien attester, telles qu'un interdit, ce qui ne peut avoir lieu actuellement que pour cause d'imbécilité, de démence ou de fureur, un muet, un sourd-muet. On doit en dire autant d'un aveugle, qui, anoiqu'il ait pu entendre pourrait être surpris n'ayant pu voir ce qui se passait."
Merlin, Repertoire, mot Témoin Instrum.: § 2, no. 3, 4. Duranton, no. 104.
Dalloz, ch. 6, sect. 4, art. 5, § 4, no. 6. Poujol, no. 2, sur l'art. 974, contends for the same doctrine. We have said, in our original petition, that François Xavier Martin was physically incapacitated on account of blindness, from making a valid olographic will. There are many other cases in which it has been decided in France, that a

man may possess all the qualities required in art. 980, that is to say, he may be male, majeur, regnicole et jouissant des droits civils, and yet not be a good witness to a testament. Thus, almost all the french commentators agree in saying, that a man who is not acquainted with the language in which an act is written, cannot be a good witness, and yet there is nothing in the french law that disqualifies him on that account. Toullier, vol. 5, no. 393. "Ceux qui n'entendent pas la langue du testateur, sont comparables aux sourds, et ne peuvent être témoins parce qu'ils ne peuvent comprendre ce qu'il dicte." (And in a note of that writer:) "Il est vrai que le Code ne dit point qu'il soit nécessaire que les témoins entendent la langue du testateur, mais la raison le dit, car s'ils ne l'entendent pas, s'ils ne comprennent pas le sens des dernières volontés du testateur, à mesure qu'il les dicte, ils ne peuvent ni attester que le testament a été écrit tel qu'il a été dicté, ni savoir qu'il l'a réellement été, Grenier, vol. 1, no. 225. Merlin, Repertoire, verbo Témoin Instrumentaire. Delvincourt, vol. 2, p. 213. Vazeille on art. 980, no. 26, Coin Delisle, art. 980, no. 26.

vol. 2, p. 213. Vazeille on art. 980, no. 26, Coin Delisle, art. 980, no. 26.

The same question was raised in Louisians, and was decided in the same manner as in France, in the case of Hebert's Heirs v. Hebert's Legatees, 11

L. 361. There it was alleged that a will was null, because one of the witnesses did not understand the language in which it was written. It was contended on behalf of the defendants, that all persons are good witnesses to a will, except those who are expressly excluded by law. The court said: "But it is contended by defendants' counsel that, inasmuch as all persons who are by law incapable of being witnesses to testaments are specially enumerated in art. 1584 of the Louisiana Code, it follows no assarily, that all other persons whatever are competent witnesses for that purpose. In this opinion, we do not

agree with the counsel.

"The legislature have manifested great solicitude on the subject of last wills and testaments, and endeavored, by every possible safeguard, to ensure their faithful execution. They have required that nuncupative wills, by public act, should be attested by three witnesses, and read in their presence to the testator. This wise precaution, and strongest barrier which the law interposes for the protection of the testators, would be vain and nugatory, if the witnesses were incompetent to the trust they were called to fulfil. Language is the vehicle of thought, and if the witnesses could not understand that in which the will was written, it is plain they would be in no better situation than the deaf, who are expressly declared incompetent by the law cited by the counsel. Eadem est ratio, eadem est lex. Louisiana Code, art. 1571." I have mentioned these cases as tending to establish the fact that there are incapacities, which, though not mentioned in the law, are not the less incapacities founded on reason and nature, and it is left in such cases to the prudence and wisdom of the magistrate to decide according to the circumstances.

It has been strongly contended for defendant, that under our Code a blind person could even make a mystic will. Art. 1579, C. C. The french text says: "ceux qui ne savent ou ne peuvent lire;" the english text: "those who know not how, or are not able, to write." The word write, is an unintentional mistake of the person who translated the french into english. This art. 1579 is a literal copy of art. 978 of the Nap. Code. If we wish to go to a higher source we find the same thing in the french ordinance, and in the spanish and roman law. How could a blind man, who, according to them, is able to make a mystic will, be sure that the requirements of art. 1579 have been complied with? How does he know that the paper which he presents to the notary and witnesses, is really his will? "Pour pouvoir faire un testament mystique (says Grenier vol. 1, no. 258,) il ne suffit pas d'avoir su lire; ilfaut encore pouvoir lire. On sent aisément le motif de cette disposition. Celui qui lit peut, en dictant ses dispositions à un scribe, veiller à ce qu'elles soient fidèlement écrites, au lieu que celui qui ne peut lire n'a pas cette faculté, et dès lors la loi n'n aucune garantie que le papier qu'il présente comme contenant ses dernières volontés, les contient en effet." Merlin, Testament Mystique. Pothier, Donations testamentaires—du Testament Mystique. Delvincourt, v. 1. p. 252.

IV. We will now examine whether the testator F. X. Martin intended, in

IV. We will now examine whether the testator F. X. Martin intended, in giving the whole of his fortune to his brother, to disinherit his other heirs, or whether it was not a device to avoid the payment of the tax of ten per cent to the State. It will be contended by the appellant that substitutions, or fidei-commissa prohibited by our laws, can never be implied; they must

STATE V. MARTIN

be expressed in the act itself, or at least must result from it as a necessary Therefore when the charge to receive for and return to another consequence. is not expressed in the act, or does not necessarily result from it, the disposition, even though it should contain a simulated donation, does not render the testament void, provided the real dones be capable of receiving from the donor.

Should we admit the truth of this proposition, it could not apply to the present case, as we contend that a fidei-commissum was made to evade a law allowing ten per cent to the treasury, and that the donees, who are foreigners, could not receive their portion without committing a fraud against the fisc. But far from assenting to such a ductrine, we say that according to art. 1507 of our Code, all kinds of substitutions, or fidei-commissa, are strictly prohibitedit does not matter whether the real donee could receive, or not, directly from the donor. The provisions of our Code are, on that subject, much more rigorous than those of the french Code. Our Supreme Court have in several decisions lately rendered so held, and it is now a matter no longer to be questioned.

In the case of Tournoir v. Tournoir, 12 La. p. 23, the court said: "The law prohibits all fidei-commissa even in favor of persons capable of receiving. The Civil Code provides, that when, to prevent fraud, or from any other motive of public good, the law declares certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, or not to be contrary to the public good." The same principles were re-affirmed in Rachal v. Rachal, 1 Rob. 116. Liautaud v. Bap-

To show the existence of a jidei-commissum, all kinds of proof are admitted, litteral, testimonial and presumptive, especially in a case like this, where it is alleged that a prohibitory law has been violated, and a fraud committed on the fisc. "Presumptions" (says the Code, art. 2267,) "not established by law, are left to the judgment and discretion of the judge, who ought to admit none, but weighty, precise, and consistent presumptions, and only in cases where the law admits testimonial proof, unless the act be attacked on the ground of fraud and deceit." In such cases, all presumptions, even of the lightest kind, are admitted. When a man intends to commit a fraudulent act, or to violate a prohibitory law, he uses precagtions of all kinds not to be discovered; he covers, as with a thick veil, the object he has in view, and all his actions are calculated to induce a contrary belief to what his real intentions are. And it is in order to discover the true intent and meaning of parties, that the lawgiver has permitted all kinds of proof. Without this permission, how easy it would be to commit frauds! And how difficult to prove them, if we were to be held to strict rules of evidence, as in ordinary cases. Cécile v. St. Denis, 4. La. p. 184. "Where fraud is charged, direct and positive evidence is seldom to be obtained. Circumstantial evidence is commonly all that can be had, and every circumstance becomes material, to ferret out the fraud." The whole doctrine on this subject, is fully explained, in these few words. See also, Reels v. Knight, 8 Mart. N. S., p. 268.

It is not even necessary for us, to show that there was an agreement made between the testator and the universal legatee. The intention of the testator, when it appears either by litteral, testimonial or presumptive proof, is sufficient to cause the nullity of the act to be pronounced. This is the opinion of the

most eminent law writers.

Chardon, chap. 2, art. 1, in treating of the interposition des personnes dans les libéralités, nos. 16, 17, 18, 19 and 20, says: "Or, nos auteurs enseignent unanimement, qu'il n'est pas nécessaire de prouver le pacte : qu'il suffit que de fortes présemptions persuadent que telle a été la volonté du donateur en nommant son donataire, et de celui-ci en acceptant le don. Ceux qui prêtent leur nom à ces fidéicommis tacites, dit Domat, p. 524, soit qu'ils s'engagent par écrit ou verbalement, ou en quelque manière que ce soit, s'ils reçoivent à dessein de rendre aux personnes à qui le testateur ne pouvait donner, sont considérees par la loi, comme s'ils dérobaient, etc. Les autres auteurs vont plus loin: ils n'éxigeut que la preuve de l'intention du donateur. Ricard, part. 1, chap. 3, sect. 16, no. 749, ajoute à la théorie les exemples qui la fortifient: "Nous avons des exemples...... auxquels les conjectures du tacite fidéicommis se sont trouvées si violentes, que la cour s'en est contentée, pour déclarer la donation nulle, sans qu'il y eut preuve formelle de la promesse de rendre la chose donnée par le donataire à la personne prohibée. C'est ce qui a été jugé par un arrêt du 5 décembre, 1644, par lequel le testament fait par une jeune demoiselle, pendant l'année de son novicist en religion, au profit du frère de son tuteur, qu'elle n'avait jamais connu, et qui, n'ayant pas d'enfans, avait, pour lui succéder, son frère tuteur, fut déclare nul." Il cite également l'arret du 29 avril 1653, dont nous donnerons les details ci-après, p. 162. Il rappelle même, comme conséquent avec les premiers, un troisième arrêt, du 18 mars 1652, qui a rejeté la demande des héritiers; en faisant observer que ce rejet n'a été prononce, que parce que les conjectures du tacite fidéicommis alléguées par les héritiers de la testatrice, ne se trouvérent pas suffisantes.

Toux autres exemples sont donnés par Furgole, no. 224. "Il y a dans le nouveau journal des Audiences, tom. 5, liv. 8, un arrêt du 17 août 1708, qui décide qu'il suffit qu'il y ait preuve que le mari, en léguant une somme à un tiers, ait eu intention que le legs fût restitué à sa femme incapable de recevoir des libéralités de son mari, suivant l'article 282 de la Coutume de Paris, pour déclarer le legs nul, comme un avantage indirect entre conjoints, quoiqu'il n'y ait point de preuve de la convention du testateur avec le légataire; et par un arrêt du 2 juillet 1708, rapporté au même endroit, chap. 26, il a été jugé que, pour prouver un fidéicommis, ou avantage indirect entre mari et femme, il n'est pas nécessaire qu'il y ait preuve par écrit du fidéicommis, ni même de présomption qu'il y avait convention entre le testateur et le légataire; il suffit

qu'il y ait des présomptions violentes de l'intention du testateur."

"Bourjon, dans son Droit commun de la France, tom. 2, p. 73, art. 10, professe la même doctrine; et cite aussi l'arrêt de 1708, dont les détails répandront quelque lumière sur ce que cette matière neut avoir d'abstrait. Le sieur de Thiersault, conseiller au grand conseil, s'était marié à soixante-onze ans, avec une très jeune demoiselle. Il voulut ajouter aux avantages qu'il lui avait faits par leur contrat de mariage, une rente de 701 fr. sur l'état qui lui avait été reconstitutée en 1700, pour la réduction au denier vingt, d'une rente de 708 fr. qui lui appartenait en propre. Pour cela, il fit un testament, par lequel il se borna à léguer au sieur de Serre, son ami, une pension viagère de 200 fr., et un diamant de 50 pistoles ; puis par un codicile, il lui légua sa rente de 701 fr. au capital de 14,020 fr. ; mais reulement au cas où elle serait contestée à sa femme, déclarant qu'il croyait qu'elle lui appartenait par leur contrat de mariage, tant à cause de la donation de meubles et acquêts qu'il contenait, qu'à cause d'un arrêt du conseil qui déclarait acquêts les rentes provenant de commutation; 'n'entendant, ajoutait-il, ne diminuer en rien les droits de mon épouse, et ne léguant la dite rente audit sieur de Serre qu'au dit cas.' Lors de son inven taire on trouva, dans la liasse de papiers concernant cette rente, un mémoire fort long et écrit en entier de sa main, dans lequel il exposait que Titius avait légué à un de ses amis une rente viagère de 200 fr. et 1,000 fr. ; qu'il lui avait dit en conversation qu'il lui laisserait encore une rente de 700 fr. ; qu'il aurait désiré la léguer à Sempronia, sa femme, si la coutume ne s'y opposait; qu'il l'en laisse le maître et ne l'oblige en rien ; qu'il peut affirmer n'être engagé ni de parole, ni par écrit, d'aucun fidéicommis, son intention étant cependant qu'il la restitue volontairement à Sempronia.

"Ce mémoire contenait ensuite une explication de l'article 282 de la Coutume de Paris, des détails sur la famille et les biens de Titius, et sur le désir qu'il avait eu de laisser à sa femme les moyens de soutenir sa qualité. Le sieur de Serre, avait, en 1705, formé demande contre la veuve, en paiement des deux legs contenus au premier testament, sans faire mention ni du second, ni de la rente de 701 fr.; mais une instance s'étant engagée entre la veuve et les héritiers, réclamant cette rente, il intervint et la revendiqua. Le 15 juillet 1706, une sentence des requêtes du Palais condamna les héritiers à lui payer tous ses legs, même celui de la rente de 701 fr., en affirmant qu'il n'avait aucun dessein de la rendre à la dame de Thiersault, et qu'il n'y avait pas, entre elle et lui, de convention de partager ce legs entr'eux. Le sieur de Serre, malgré que les héritiers se fussent retirés, fut admis au serment et le prêta. Les héritiers ayant appelé au parlement, cette affirmation admise par les juges de première instance, contre des parties qui, loin d'y avoir consenti, s'étaient retirées, fut comptée pour rien, et au fond le legs de la rente fut annulé; parceque, dit l'arrêtiste, le mari, en la léguant, avait eu l'intention qu'elle fût restituée à sa femme, quoiqu'il n'y eût pas de preuve de la convention du testateur avec le légataire.

Rien ne peut être plus conforme aux premières notions du droit, que cette décision. Un légataire ne peut être propriétaire légitime de la chose léguée,

STATE W. MARTIN.



3

que quand la volonté du testateur a été qu'il le devint ; du moment donc qu'il apparaît une volonte contraire, la chose léguée ne peut rester légitimement, ni à celui que le testateur a nommé, parcequ'il n'a pas voulu la lui donner, ni à celui qu'il avait en vue, parceque la loi s'y oppose. Loin que le Code puisse autori-ser un changement de jurisprudence, on peut conclure de la règle écrite dans l'art. 911, qu'il l'a très positivement confirmée. 'Toute disposition au profit de l'incapable sera nulle, soit qu'on la deguise sous la forme d'un contrat oné-reux, soit qu'on la fasse sous le nom de personne interposée.' Ce texte, comme on le voit, n'exige la preuve ni de pacte ni de promesse; mais seulement que le don soit destiné à l'incapable, quoique adressé à un autre. Tel est dans

cette action le point principal qu'il faut éclaireir.

"Il en est un second qui ne doit pas être négligé, et que les auteurs ont sagement prévu. Il peut arriver que pour autoriser le préte-nom à déclarer à la justice qu'il entend garder l'objet donné, il ait été convenu directement, ou par ces voies obliques dont le sieur Thiersault a donné l'idée, entre le donateur et son confident, que celui-ci resterait réellement propriétaire de cet objet, mais en donnerait la valeur à la personne incapable. Il est evident que la fraude serait absolument la même, et que dans ce cas, comme l'enseigne Pothier, dans sou Traité des Donations entre Mari et Femme, no. 98, la chose destinée à l'incapa-

ble devrait être remise aux héritiers du donateur.

"Il peut se faire encore que le donataire nommé le soit sériousement pour une partie, et que le surplus seulement doive être remis par lui à l'incapable ; ce

qui n'en serait pas moins pour cette portion une infraction à la loi. C'est donc à l'éclaircissement de ces faits divers que doit tendre la preuve du fidéi-commis.

Tous les genres de preuves, con premment celle vocale, sont admissibles; nous avons déjà si souvent dit et établi que, quand il sigit de faire connaître à la justice la violation frauduleuse d'une prohibition d'ordre public, cette preuve ne peut pas être refusée, que nous nous serions abstenu d'une démonstration particulière pour l'interposition de personne, si en 1819 on n'avait pas soutenu le contraire, avec beaucoup d'éclat, devant la cour royale de Paris." See also, Merlin, Rép. de Jur. Verbo Fidei-commis tacite, who holds the

same doctrine, and cites the same, and other cases. The provisions of our Code on fidei-commissa, are still more rigorous than those of the french Code. What Chardon therefore says, applies with still greater force to a case arising under own Code, where all kinds of fidei-commissa are prohibited, even in favor

of persons capable of receiving.

It remains then to show, what was the intention of F. X. Martin, in making his brother P. B. Martin his sole heir. But we will go farther, and establish satisfactorily, that the object the testator had in view was well known both to the universel legatee and to the apparently disinherited heirs, and we will also show what were and are the intentions of the said legatee. Interrogatories were propounded to P. B. Martin, the universal legatee. Being asked; whether he does not consider himself morally and in duty bound to his late brother, to transmit a portion of said fortune, to his other heirs or some other persons to him mentioned? He answers: "Je ne me considére aucun autre devoir, que de faire ce que mon cœur me dira. Je prendrai dans mon cœur ce que je ferai un jour, ou ce que je ne ferai pas." And again being asked; Whether it was not his intention to transmit, give or remit, now, or at a future time, or at his death, the property left to him by his brother, or part of the same to his other heirs, or some of his heirs? He says; "Je n'ai là-dessus d'autre intention con colle de discourse de la collection de la c intention que celle de disposer de ma fortune selon ma volonté. Là-dessus je dis que je ne me crois pas obligé de faire, dans ce moment-ci, un testament

ablic. Je feral mon testament comme je l'entendrai."
To the question, whether it is not his intention to transmit, give or remit now, or at a future time to the other heirs? His only reply is, that he will dispose of his fortune as he pleases, and that he is not obliged to make his will. We must therefore take, as confessed, the facts which we sought to discover, and concerning which he refused to answer. Art. 349, C. P. provides that:
"The party interrogated on facts and articles, is bound to answer under oath, and
categorically, each of the questions put to him, unless he cannot do so without
confessing himself guilty of some crime. Except in the above case, if the party interrogated refuse or neglect to answer on oath to all the questions put to
him, the facts concerning which he shall have so refused, or neglected to answer, shall be taken for confessed." This fact is now judicicially admitted and



taken for confessed, that P. B. Martin intends to transmit, give and remit, now, or at a future time, the property left to him by his brother, or part of the same, to the other heirs. We have there the clearest proof of the intention of the universal legates.

Two cases having a good deal of analogy with this, and cited by Chardon, in his Traité de la Fraude, chap, 2, nos. 28, 29 and 30, establish the true principles by which we should be guided, in arriving at a correct decision of the matter.

I give them at length, with the judicious observations of Chardon.

"Deux arrêts solennels du parlement de Paris, des 24 janvier et 11 février 1716, qui out ordonné cette dernière affirmation, et les sentiments uniformes des jurisconsultes qui ont écrit depuis sur cette matière et applaudi à ces décisions, semblaient avoir fixé ce point important de jurisprudence. Mais Morenier, dans son Traité des Donations, ayant émis une opinion tout-a-fait contraire, la question mérite de notre part un examen d'autant plus sérieux, que nous sommes très éloigne de partager son sentiment. Suivant lui, youloir que le donataire affirme que même au moment où il affirme, il n'a pas l'intention de remettre le don à un incapable, c'est se permettre une inquisition odieuse: il ajoute que le donataire qui n'a pas promis de rendre à l'incapable et le déclare, n'est engagé ni par une obligation civile, ni par une obligation naturelle, et que s'il remet la chose donnée à l'incapable, celui-là la tient de lui et non du disposant-

"D'abord, il est difficile d'apercevoir une odieuse inquisition dans les efforts que feraient les magistrats pour connaître la vérité dans une telle conjoncture. D'une part, leur but est louable, puisqu'il ne s'agit que de savoir si une prohibi-tion qui tient à l'ordre public a été enfreinte ; de l'autre, le procédé n'a rien d'inquisitorial, puisque la délation du serment rend celui à qui il est déféré maître de sa cause. En second lieu, ou il affirme qu'il entend conserver, et dans ce eas, la demande qui lui a été faite n'a rien eu d'offensant pour lui; eu il refuse, et ce refus ne permet plus de douter que son intention est de faire la remise du don à l'incapable. Or, nous avons établi, no. 24 et suivans, d'après Domat, Ricard, Furgole, Pothier, et les nombreux arrêts par eux rapportés, qu'en quelque temps que se fasse la remise, ce fait seul prouve suffisamment l'interposition, et il faut en conclure que la disposition dans laquelle est le donataire de la faire, décèle également cette interposition. Effectivement, pour que cette remise déjà faite, ou qui va l'être, ne fût pas reputée la consommation de la fraude, il faudrait qu'on pût la considérer comme une libéralité pure, à laquelle le donataire se serait porté de son mouvement propre, sans aucune autre impulsion, comme on la definit en droit, nullo jure cogente facta : or, cette libéralité pure ne se présume jamais, et doit être prouvée, surtout dans un cas où la fraude est redoutée. La conséquence naturelle de la remise est donc que le douataire a été chargé de la faire, ou au moins qu'il présume que telle a été l'intention du disposant; et il suffit qu'il se détermine à la faire par cette présomption, pour qu'on soit per-suade qu'en la faisant, il ne pense pas à faire un don, mais à acquitter une dette-Il peut se méprendre, dit M. Grenier; les hommes sont assez clairvoyans sur leurs intérêts, pour qu'on ne puisse pas imputer à méprise la crainte de conserver un accroissement de fortune, et le désir de la faire passer dans d'autres mains. C'est, d'ailleurs, une hypothèse qui ne peut pas se vérifier : lorsque celui 'à qui un don est adressé n'ose plus le conserver, et croit, pour l'acquit de sa conscience, devoir le remettre à un autre; qui pourrait faire connaître sa méprise ? le défunt, et il a emporté son secret. Les motifs de M. Grenier, pour faire abandonner cette jurisprudence, sont donc fort legers; et nous croyens en apercevoir de très graves pour la maintenir. Les tribunaux sont les gardiens des prohibitions; et c'est du parti qu'ils prendrent sur le serment qui les concerne, que dépendra le respect ou la dérision de ces prohibitions. Nous le répétons, dans ce genre de fraude, le remède est dans le mal même. Celui à qui le don est confié a été choisi comme homme loyal; s'il a les qualités qui l'ont fait choisir, et qu'il soit pressé de questions autant que les circonstances l'exigeront, la vérité l'emportera, surtout quand pour être fidèle à un dange-reux ami, il faudra s'exposer à être infidèle à la société, à la religion, et à l'honneur. Pour remporter cette victoire, il faut donc que la formule du serment embrasse tous les cas possibles, tels que nous les avons prévus, no. 17; il faut que le donataire soupçonné affirme qu'il n'est pas chargé de remettre la chose donnée à un incapable : qu'il n'a pas l'intention de la lui remettre, ni en nature, ni en équivalent, ni en tout, ni en partie, ni actuellement, ni à l'avenir-

"C'est pour enchaîner ainsi le fidéi-commis sous toutes les formes que la malice

STATE v.



STATE MARTIN ingénieuse des hommes pourrait lui donner, qu'a été imaginée la formule adoptée, en 1716, par le parlement de Paris ; les détails des espèces dans lesquelles sont intervenus ses arrêts, achèveront de justifier sa jurisprudence. La Princesse d'Isenghien avait laissé son immense fortune à l'abbé de Thou, institué par elle son légataire universel ; aucun motif raisonnable n'expliquait cette largesse démesurée envers un abbé; et beaucoup de probabilités désignaient le prince, son mari, comme le véritable objet de sa disposition. Les héritiers de la princesse en demandèrent la nullité. L'avocat général de Lamoignon, pour pénétrer dans tous les plis de la conscience de l'abbé de Thou, proposa de lui faire la délivrance du legs, mais à la charge par lui d'affirmer, 'qu'au moment même de son serment, il n'avait pas intention de remettre le legs à personne Ses concluprohibée, directement ni indirectement, ni en tout, ni en partie.

sions furent adoptées complètement par l'arrêt du 24 janvier 1716. "Le mois suivant, une cause absolument semblable en droit, quoique beaucoup moins importante, se présenta. Charles Seuret, menuisier à Nesle, ayant des enfants de sa fille d'un premier lit, et marié en secondes noces avec Mar-guerite Desmarets, fit, en 1711, son testament; légua 50 fr. seulement à chacun de ses petits enfants, et le surplus de ses biens au sieur Soucanier, chanoine de Nesle. Sur la demande en délivrance de ce dernier, la mère des mineurs soutint que le sieur Soucanier était interposé pour faire parvenir les biens de Seuret à sa seconde femme. Le bailli de Nesle, par une première sentence, ordonna que le sieur Souçanier affirmerait que le legs était sérieux et à son profit, qu'il n'avait fait aucun pacte à ce sujet, ni avec le testateur, ni avec sa veuve; et qu'en acceptant le legs, il n'avait pas eu l'intention de le remettre à la veuve. Le sieur Soucanier affirma qu'il n'avait fait aucun pacte avec le testateur ; que la veuve lui avait dit n'avoir pas connaissance du legs: mais il refusa son serment sur tout le surplus de la formule, en déclarant qu'il était maitre de son bien et pouvait en disposer à son gré. (The precise declaration made by P. B. Mar-Une seconde sentence ordonna qu'il se conformerait à la première, et que, faute de ce faire à l'audience suivante, il serait débouté de sa demande. Disposé à consommer sa fraude à la loi, si son affirmation équivoque pouvait être admise, mais non pas à se parjurer, s'il fallait donner à cette affirmation toute l'étendue exigée, il appela au parlement. Le même avocat général soutint le bien jugé des sentences du bailli de Nesle. S'appercevant même que la for-mule de ce premier juge était moins complète que celle prescrite à l'abbé de Thou, il conclut à ce que le sieur Soucanier fût assujetti au même serment, quoique les parties n'y eussent pas conclu, mais attendu qu'elles étaient mineu-L'arrêt fut également conforme à son réquisitoire; et l'en voulut, disent les auteurs qui rapportent ces arrêts, rendre la jurisprudence uniforme. second arrêt est du 11 février 1716.

"Veut-on une nouvelle preuve des effets salutaires de cette jurisprudence, on la trouvera dans un trait fort honorable pour l'ordre des avocats, que rapporte Bannelier, juriscensulte très estimé du parlement de Bourgogne, dans ses notes sur les Traités de Droit Français, à l'usage de ce Parlement, note 573. Une dame Meignien, de Dijon, ayant deux enfans, un fils et une fille, avait marié sa fille au sieur Guy de Labergemont, conseiller, avec promesse d'égalité entre le frère et la sœur. Par son testament, elle les institua effectivement ses héritiers par égale portion ; mais en léguant à M. Melenet, avocat au parlement de la même ville, une somme de 80,000 fr., à prélever sur sa succession. M. Melenet avait été le conseîl de cette dame, pendant longues années, sans en avoir rien recu, et si le legs eût été modique, dit Bannelier, son con-frère et son ami, il eût pu le croire à lui; mais l'importance de la somme lui donna la persuasion qu'il était destiné au fils de la testatrice, pour rendre vaine la promesse d'égalité. Ne sachant pas, ce sont les expressions de Bannelier, se porter à aucune contravention soit aux lois soit aux contrats, il répudia le legs en entier. Ce trait de délicatesse et de respect pour la loi, console un peu de tous ceux en sens contraire que nous sommes obligé de retracer à chaque pas dans ce traité ; et il est, il faut le reconnaître, la plus ferme critique qu'on puisse faire du système de tolérance de M. Grenier. M. Melenet n'avait fait ni pacte, ni promesse; il ignorait absolument les intentions de la dame Meignien; mais il ne se fit pas d'illusion ; il ne voulut pas prendre le legs pour lui, persuadé que l'intention de la testatrice n' était pas de l'en gratifier ; il ne voulut pas accepter pour le remettre au fils, parce qu'il sentait qu'en faisant cette remise, il n'aurait pas l'esprit de bienveillance et de générosité qui constitue la libéralité, et ne ferait





que se rendre complice de la fraude conçue par la dame Meignien ; il ne craignait pas de se meprendre sur son mouvement de délicatesse, comme M. Grenier le redoute; il ne l'éprouva que pour céder à l'impulsion qu'il en reçut, en bomme d'honneur, ami des lois. Sans chercher à diminuer le mérite de cette action, ne peut-on pas présumer que la sévérité avec laquelle M. Melenet se jugea lui même, ne fût que la conséquence de celle dont le parlement de Paris venait de donner l'exemple quelques années auparavant? Ce qui nous suggère cette réflexion, c'est que Bannelier ne rapporte cette anecdote qu'à l'occasion des deux arrêts de 1716.

"Eufin l'opinion fondée par ces arrêts est devenue, pendant un siècle et plus, la doctrine universelle. M. Grenier ne cite que Furgole et Pothier pour l'avoir enseignée, ce qui pourrait déjà paraître déterminant ; mais il faut y ajouter les deux célèbres avocats généraux, de Lamoignen et Joly de Fleury, sur les con-clusions desquels ces arrêts ont éte rendus ; Bannelier dans sa note 573 ; Roussaud-Lacombe dans sa Jurisprudence Civile, au mot Avantage Indirect, s. 1, no. 2; Dénisart au mot Fidéi-commis; et MM. Camus et Bayard au même mot, dans le nouveau Dénisart. Tous ces auteurs en font une règle élémentaire ; et nous ne connaissons ni un auteur, ni un arrêt qu'on puisse leur opposer. Nous ne craindrons pas de le répéter : si le sentiment de M. Grenier obtenuit la préférence, le procédé de la princesse d'Isenghien, du menuisier de Nesle, et de la dame Meignien deviendrait familier, et les lois prohibitives seraient audacieusement méprisées."

The deceased intended to appoint his brother his universal legatee, to deprive the State of the ten per cent allowed to it by the law of 1842, without however intending to disinherit his other heirs. In 1828, the legislature of Louisiana passed a law similar in all respects to the law of 1842, creating a tax of ten per cent on all sums of money or property, belonging to a succession opened in this State, and going to foreigners not domiciliated in Louisiana. Soon after this law was passed, Judge Martin sent for his brether P. B. Martin, for the express purpose of evading that law, as he often declared to his late colleagues on the bench, Judges Morphy and Simon. His brother, P. B. Martin, left France in accordance with his instructions, and came to this country, previously to the year We discover this fact in the testimony of Grailhe, who says, that he became acquainted with P. B. Martin at the commencement of the year 1830. The statute of 1828 was repealed in 1830; and soon afterwards, we find that P. B. Martin, being no longer wanted to accomplish the object Judge Martin had in view, returned to his native country. But in 1836, the same law was again revived (see Acts of 1836, p. 146), and we again find P. B. Martin, the defendant, returning to this country at the request of his brother, in 1836 or 1837 (Grima's testimony). This law of 1836 was declared, in May, 1838, by the Supreme Court, not obligatory, it not having received the approbation of the governor. Clayton's Heirs v. Attorney General, 12 La. 359. Judge Morphy says that Judge Martin told him, some time after the arrival of his brother in this conutry, that he had induced his brother to come and reside here, and intended to appoint him his universal legatee, stating that, in this way, his estate would not be subject to the tax; and that he has often heard judge Martin complain of the ten per cent tax; he often told him, that as he could not give any property to his relatives, who were not here, without subjecting his estate to this tax, he would leave it all to his brother. Judge Simon also tells us, that he and Judge Martin had many conversations about his succession; when Judge Martin said, that he would leave his estate to his brother, as then it would not be subject to the tax, and that was his main object in calling his brother to this country. If it be true that Judge Martin really intended to leave the whole of his fortune to his brother, P. B. Martin, why the great uneasiness he manifested about the passage of the law of 1842? Greiner says, that when the tax of 1842 was before the legislature, Judge Martin asked him frequently about it, and as to the prospect of its passing, and was apprehensive it would pass. He said that it was an unjust law, only known in Louisiana, and appeared to be uneasy about it. He also said that it was a very foolish law. Again, we hear him on several occasions, stating that the law of 1842 might be easily evaded, by testamentary dispositions. (See testimony of Bullard, Morphy, and Simon.) And in what way has he sought to evade that law? By testamentary dis; esition! Judge Martin was very fond of all his relatives; he always spoke highly and favorably of them. Greiner says that Judge Martin had a strong regard for

STATE MARTIN.

his relatives, and never heard him say any thing against them. Curry says that Judge Martin always spoke kindly of his family. Judge Bullard believes that he was on good terms, with his relatives in France. Can we then reasonably suppose that a man, who always appeared so very fond of his relatives, at the very moment too of going to meet them in his native country, should have really had the intention of disinheriting them? Can it be believed, that he then intended to disinherit his nephews and nieces, for whom he had a great regard and affection. This will was made on the eve of his departure for France. When Judge Mazin returned, he often spoke in high terms of his relatives; they had travelled with him. And yet he did not change his will! Can any one believe, that it was because his relatives did not come to this country, that he disinherited them? This has been contended for by the counsel for the defendant. But, if this be true, how is it that he made no distinction between them, and his niece, A. B. Martin, who left country, friends and every thing dear to her, to come here and take care of her uncle in his old age.

Grima, for the appellant. Mazureau, on the same side. "Celui qui amasse une grande fortune, sème des procès qui ger n'eront après sa mort." Cette sentence d'un philosophe indien, si je ne me trompe, n'a jamais empêché certains hommes dans aucun pays du monde civilisé, ancien ou nouveau, d'accumuler, pour ains dire, tous les jours de leur vie, des richesses dont ils ne savaient jouir qu'à leur manière en les contemplant. Mais l'expérience a souvent prouvé qu'elle était vraiment

juste ; et le procês actuel en est un exemple.

François Xavier Martin, artisan de sa propre fortune, arrivé dans sa jeunesse. aux Etats-Unis, était un de ces hommes comme on n'en voit peut-être pas beaucoup aujourd'hui, pour qui l'étude, un travail opiniâtre, et l'exercice constant de la faculté pensante, étaient autant de besoins de première nécessité. Deux passions semblaient le dominer : celle de la célébrité comme savant et profond juriste, et celle des richesses. Sa vie extérieure était, en quelque sorte, celle d'un philosophe revenu du toutes les vanités mondaines. Et, dans son intérieur, le plus souvent seul avec lui-même, il développait avec une sagesse toute particulière, les ressources que lui créait son propre gênie, soit pour étendre sa réputation comme légiste et magistrat, soit pour augmenter le trésor qu'il avait amassé par son travail et son économie. Il fut trente aus juge de la Cour Suprème de notre Etat, et il en était le président lorsque l'organisation judiciaire voulue par notre constitution nouvelle le fit descendre de son siège. Trente ans, son oreille fut caressé des témoignages les plus flatteurs d'une très haute considération, et comme savant et comme juge intègre et incorruptible. Il est descendu dans la tombe, escorté par un nombreux convoi, composé de ce que uotre cité renferme de plus respectable. Mais, en rendant sa dépouille mortelle à la terre, notre mère commune, il a laissé un testament par lequel il a disposé, en faveur de son frère, d'une fortune de prês de quatre cents mille piastres! Et ce juge, ce président de notre Cour Suprème, célèbre par ses capacités intellectuelles, par une judiciaire distinguée ; par des lumieres d'un ordre supérieur ; qui a pupendant trente ans, durant les neuf ou dix dernières desquelles il avait perdu-l'usage de la vue, rédiger, rendre et prononcer des décisions, des sentences que beaucoup de gene considéraient comme autant d'oracles, n'a pas pu échapper à la sévérité de la sentence du philosophe indien! Sa mort a donné naissance à un procès, et dans ce procès, fait au nom de l'Etat, il est représenté comme ayant été physiquement incapable de faire un testament olographe ; et on en demande l'annulation! Une pétition supplémentaire est présentée, dans laquelle on reconnaît manifestement que cette prétendue incapacité n'était que l'effet d'une imagination échauffée par l'envie d'obtenir au moins quelque lambeau de son opulente succession; et dans laquelle, voulant arriver plus sarement à ce but, on l'accuse de n'avoir fait par son testament qu'un fidéi-commis prohibé par notre Code.

I. Le premier pas dans ce procès a donc été la présentation de la pétition, introduisant l'action en nullité du testament olographe. Deux allégations sont faites dans cette pétition. L'une, qui est la seule base de l'action, porte que le testa-ment dont il s'agit est nul et ne peut produire aucun effet, attendu que, lorsqu'il a été fait, François Xavier Martin était physiquement incapable de le faire, étant aveugle. La seconde que sa succession passe à des héritiers domicillés hors de cet Etat et de tout Etat et Territoire des Etats-Unis.

Hé bien! sa succession ne pouvait passer à ceux que l'on dit ses héritiers domi-

ciliés hors des Etats-Unis. qu'autant que le testament, instituant un légataire universel, serait annulé. Alors et alors seulement ces héritiers succédaient ab intestat au défunt ; jusque là ils n'avaient rien à prétendre, ils n'étaient rien. Je ne prétends cependant pas dire que ces étrangers, étaient sans qualité pour agir. Mais eux seuls avaient une action—c'est du moins ce que je crois pouvoir démontrer. J'y procéderai dans un moment. En attendant je reprends la pétition que l'Etat a présentée, ou qu'on a présentée en son nom; et je me demande comment les organes de l'Etat ont pu demander l'annulation du testament, sur le seul fondement de l'incapacité physique à sa date. N'était-ce pas agir directement et principalement dans l'intérêt des prétendus héritiers étrangers, et leur ouvrir la voie afin de les rendre habiles à mettre la main sur la riche succession du testateur, et de la transporter c ez eux, hors de notre jurisdiction, après l'avoir convertie en piastres? L'Etat de la Louisiane avait-il intérêt à ce que cela se fit ? Et remarquons-le bien; c'était l'Etat que ses organes employaient pour faire tous les frais de cette singulière entreprise, auprofit de citoyens ou sujets d'une nation, amie il est vrai, mais étrangère. Ce n'est pas tout : conçoit-on que l'avocat général et ses collègues aient poursuivi, contre Paul B. Martin, et l'annulation du testament, se fondant sur l'incapacité physique alléguée par oux, et le payement des \$39,608? Employerai je la forme dubitative pour poser et résoudre une question qui est, peut-être, plus sérieuse qu'elle ne me semble l'être, et que voici : Le testament étant annulé, comme on le demandait, n'en résultait-il pas que Paul B. Martin, qui n'était quelque chose que par lui, n'était plus rien, aussitôt la nullité prononcée ? l'avocat général veuille prendre la peine de décider cette petite question, je lui en serai vraiment obligé. En attendant je dirai que, sauf meilleur avis, il me paraît on ne peut plus raisonnable de résoudre cette question par l'affirmative. Si cette conséquence est juste et irréfutable, nous dira-t-on comment Paul B. Martin pouvait être condamné au payement des \$39,608 demandées? Avec quoi aurait-il dû les payer? Avec les biens ou fonds de la succession? Mais le testament étant nul, il n'avait aucun droit de disposer, ni de ces biens, ni d'aucune partie de ces biens, pour payer cette réclamation ou aucune autre.

L'Etat n'avait aucune action, aucun droit de demander l'annulation du testament, sur le fondement de la cécité allèguée. Tant que le testament n'était pas annulé, l'Etat n'avait rien à réclamer coutre qui que ce fût; car ce ne pouvait être qu'après la nullité prononcée, que la succession s'ouvrait en faveur d'héritiers étrangers, et ce ab intestat; même après la nullité prononcée, l'appelant cessant d'avoir qualité, puisqu'il n'est rien qu'autant que ce testament soit maintenu, l'Etat n'aurait pas pu lui demander le payement de la taxe, à moins qu'il n'eût été nomme curateur ou administrateur de la succession ab intestat; et à plus forte raison. avant cette nullité déclarée, par jugement en dernier ressort, l'appelant ne pouvait ni être poursuivi, ni se défendre, sur le chef de cette demande de payement. Nous référons la cour à Merlin, Répertoire, Verbo Nullité, sec. 2 et 3. Toullier, vol. 7, no. 553, jusqu'à 564. 6 Mart. N. S. 362

à 365. 3 Ib. N. S. 458 à 461.

En général et à très peu d'exceptions près, il n'y a de vraies nullités, absolues ou relatives, que celles qui résultent de la disposition de la loi, soit qu'elle prohibe un acte, soit qu'elle prescrive impérativement une formalité sans laquelle l'acte est imparfait. Cela me conduit à faire remarquer: 1° qu'il n'existe chez nous aucune loi qui défende à un aveugle de faire, de dater, de signer, de sa propre main un testament; 2° que, dans sa pétition, l'Etat n'allègue point que le Juge Martin, aveugle, était frappé d'une incapacité légale de faire son testament dans cette forme, c'est à dire olographe; 3° que, quand même une loi lui aurait interdit la faculté de disposer dans cette forme, il aurait fallu que l'Etat eût un intérêt né, un intérêt actuel, échu, pour en demander la nullité: et certes rien de tel n'existait, tant que les prétendus héritiers ne jugeaient pas convenable de demander à justifier de leurs qualités et de leurs droits, et surtout, tant qu'ils ne réclamaient pas, en ces qualités et en vertu de leurs droits reconuus, la nullité du testament. En vain aurait-ou voulu, si la prohibition ou l'interdiction de tester dans la forme olographe, edt existé, avancer ou prétendre que le testament fait contre la prohibition ou interdiction était comme s'il n'eut jamais été fait. On aurait bien pu, d'après le sentiment de Toullier, considérer ce testament comme infecté d'une nullité absolue; mais ce n'aurait été qu'une de ces nullités absolues établies pour le seul intérêt des particliers; et, conséquemment, rien ne pouvait autoriser l'Etat à faire prononcer cette nullité. La

STATE P.

'raison la voici: c'est que nul n'est héritier s'il ne veut l'être, et que, par son action, s'il oût triomphé, l'Etat aurait fait déclarer héritiers, des personnes qui, par les motifs les plus respectables, auraient pu ne pas vouloir prendre cette qualité, au détriment de celle favorisée par le Au surplus, aucune incapacité légale, rien autre chose qu'une incapacité physique, n'était allégué par la pétition : et ce que j'ai dit plus haut à ce sujet suffit, je peuse, pour me dispenser de répéter, que l'Etat agissait sans droit aucun, d'action ou autrement. Mais je ne puis laisser passer une reflex : ion dont je suis frappé, sans la communiquer à la cour. Le testament, je le répéte, avait été ouvert et prouve ; le légataire universel avait fait inventaire, et était en possession. Que signifiait donc l'allégation contenue dans la pétition présentée après, de l'incapacité physique dont était frappé le testateur de faire un testament olographe ? Que signifiait-elle, si ne n'est une accusation de faux quant au testament lui même, et de prejure, quant aux témoins qui, sous leur serment, avaient attesté que ce testament était entièrement écrit, daté et signé de la main du Juge Martin? Elle ne signifiait que cela et rien de plus ; car s'il était à, la date de ce testament, physiquement incapable de l'écrire, le dater, et le signer, il n'y avait pas à balancer; il fallant conclure de suite que le testament présenté était l'œuvre d'un faussaire, d'un contrefacteur, et le serment des témoins qui ont juré que ce testament était de la main du défunt, un parjure. L'avocat général, s'il était convaincu de l'incapacité physique par lui alléguée, avait, j'en conviens, un devoir à remplir envers l'Etat. Ce devoir était, non pas de demander à l'appelant \$39,608 41 c., mais bien de chercher quel était le faussaire, le contrefacteur, et de le mettre, ainsi que les témoins parjures, en ac-

II. Voyons maintenant la pétition supplémentaire que l'on a présentée au

nom de l'Etat. Elle, ou la pétition originale, devait être rejetée.

Ainsi que la conr peut le voir, en lisant cette assez curieuse production, le défunt François Xavier Martin n'est plus représenté comme frappé d'une incapacité physique de faire un cestament olographe; on lui reproche, littéralement et avec une clarté d'expression peu commune, non plus d'avoir été aveugle; mais d'avoir, par son testament olographe, légué tout son bien à son frère, Paul Barthélémi Martin, résidant à la Nouvelle-Orléans, après s'être bien entendu avec celui-ci, afin que tout son bien, ou partie de son bien, passat à ses autres héritiers, tous étrangers et résidant en France, pour être partagé comme s'il n'eût été fait aucune disposition mortis causà. Et l'on ajoute que cela s'est ainsi fait contre la loi et l'ordre public, et avec l'intention de violer la loi de 1842.

Les conseils ou organes de l'Etat voudraient-ils bien prendre la peine de nous expliquer, comment l'homme qui était physiquement incapable de faire un testament olographe, a cependant légué, par son testament olographe, tout son bien à son frère? En attendant, je prendrai la liberté de dire que, sur l'exception qui fut proposée en tems convenable, la cour de district aurait dû rejeter de suite la pétition supplémentaire. Mais la cour de district a jugé à propos de

rejeter cette exception comme elle a aussi rejeté la première.

III. L'aveugle François Xaxier Martin, a-t-il fait lui-même, a-t'il écrit, daté, et signé, de sa propre main, le testament olographe déposé à la cour de district

après son décès? Examinons d'abord cette question de fait.

Un des légistes qui figurent dans ce procès, du côté du demandeur, a prétendu que le testament olographe était, de sa nature, un testament secrèt; je sais qu'un ou deux des nombreux commentateurs du Code Napoléon en ont dit autant. Rien n'est plus hazardé, pour ne pas dire rien n'est plus faux, que cette proposition. Nous ne connaissons, sous l'heureux empire de notre nouveau et de notre premier Code Civil, et nous ne connaissions, à la Louisiane, avant que la manie de codifier ne nous saisit, qu'une seule espèce de testament qui, de sa nature, soit ou fut secret; n'en déplaise aux docteurs qui disent le contraire, c'est, comme c'était, le testament mystique. Sous la loi espagnole ce testament, qu'on appelait testament in scriptis, avait lieu, ou se faisait, quand le testateur voulait tester en secrèt de manière qu'on ne sût pas son contenu, "en poridad, que non sepan ninguno de los testigos lo que es escrito en él." Loi 2, titre ler, Partida 6. Sous nos Codes, et notamment sous le nouveau, il est intitulé: "Testament mystique ou secret, autrement appelé fermé." Code, art. 1577. Et ce dernier nom, qu'on me permette de le dire, est évidémment pris de l'espagnol; car les juristes les plus renommés ne l'appelaient pas autrement. Febrero l'appelle "testamento. cerrado (ce qui, en français signifie fermé) que en latin se llama, in scriptis. Escrituras, parte la. tomo lo, capit. 1, § 19, no.

212." page 176, édition de 1797. Aucun autre que le testament dont je parle ne fut jaimis et n'est point à présent, ni de sa nature ni autrement, un testament secrèt.

STATE O. MARTIN.

Me dira-t-on que le testament olographe était inconnu des Espagnols, et cherchera-t-on à argumenter de là qu'on ne peut pas dire que de sa nature aussi il n'était pas secrèt? Le testament olographe, était et est très connu de la loi espagnole. Par une cédule royale du 24 Octobre 1778, tous ceux qui ne sont justiciables que des tribunaux militaires (fuero de guerra), et ce ne sont pas les militaires seuls qui sont dans ce cas, mais bien d'autres personnes selon leurs emplois ou missions, (destinos) pouvaient faire eux-mêmes, de leur propre main, leurs testamens. Ces testamens faits dans un moment de danger imminent, comme dans un combat, n'avaient pas besoin de la présence d'aucun témoin, et ils étaient valides pourvu qu'on prouvat qu'ils étaient écrits par le testateur. Depuis 1778, et en vertu de la cédule dont je viens de parler, les testamens de cette espèce ont été dispensés de toute autre forme, ils ont pû être écrits sur papier non timbré, et, pourvu qu'ils fussent écrits et signés de la main du testateur, cela suffisait pour leur validité. Voyez Febrero, Escrituras, parte la. capit. 1. § 1. no. 15, page 26 de l'édition susdite. Or, on conviendra je présume quedispenser d'une formalité, génante quelque fois, n'est pas restreindre une faculté existante. Si je dis que je n'exige plus tout ce que j'exigenis autrefois, on ne peut point me reprocher d'avoir commandé de faire comme si je n'avais pas changé de disposition. Or quand le législateur a dit: Je vous dispense de la formalité des témoins, il ne serait pas logique de conclure que, sous peine de nullité, il fant user de la dispensation, et ne pas écrire son testament devant temoins. "Non solent que abundant vitiare scripturas."

Si l'on ne savait que les plus grands esprits s'égarent, se trompent quelque fois, sans qu'on ait le droit d'en manifester tout haut son étonnement, on pourrait assurément témoigner une grande surprise, en entendant un légiste prétendre qu'un testament olographe est de sa nature un testament secrèt, lorsqu'on a lu l'article 1581 de notre Code, qui dit : "Le testament olographe est celui qui est écrit par le testateur luimême. Il faut pour qu'I soit valide, qu'il soit écrit entier, daté, et signé, de la main du testateur lui-même. Il n'est assujetti à aucunne autre forme." Car cela signifie clairement, bonnement, et sans plus de finesse que, si un autre que le testateur en écrit une partie, et le signe, ou le date, ce n'est plus un testament olographe. Mais cela ne peut jamais vouloir dire que lorsqu'il est réelement écrit en entier, daté, et signé, par le testateur, s'il y est ajouté quelqu'autre forme, cette autre forme le viciera, le fera annuler. Si l'on en doutait il suffirait, pour s'en bien assurer, de lire l'article 1583, que l'on me dispensera j'espere d'écrire ici. De ce que je viens de dire, il suit tout naturellement, que je puis, aveugle ou non, faire mon testament olographe si bon me semble, devant un nombre quelconque de témoins, le leur lire ou faire lire, prendre même leurs conseils, les suivre et les faire tous signer après moi, au nombre de sept même. Cela n'empêchera pas mon testament d'être tout écrit, daté, et signé, de ma propre main ; cela ne l'empêchera pas d'être olographe.

Après avoir parlé d'un arrêt d'un parlement qui en 17/9 déclara valide le testament olographe d'une personne aveugle. et nous avoir dit que cet arrêt "can throw no light on our case," le juge de la cour inférieure nous dit: "The commentators are divided on the subject and leave us to recur to our law, the text of which does not declare null an elographic will made by a blind man."

Delà il était assez sensé de présumer que l'État allait être débouté sur la première de ses allégations au moins. Pas dutout: Le jugement continue: "But that very text of our laws says: "In order to be valid it (the elographic will) must be entirely written, dated and signed by the hand of the testator." Et portant delà il nous dit: "The testimony shows that neither according to the letter or to the spirit of the law, the testator in this case could, at the date of that document, have entirely written, dated and signed his elographic will with his own hand."

Je m'arrête ici un moment et je dis: Oh! Honorable Seconde Cour de District, la question soumise à votre sagesse, était moins de savoir si d'après les dires de témoins entendus, il pouvait écrire en entier son testament, le dater, et le signer; que de savoir si en effet il l'a écrit en entier, daté, et signé de sa propre main? Croyez vous, que c'est remplir suffisamment votre mandat que de prononcer avec n'importe quels témoignages de gens plus ou moins instruits, plus ou moins réfléchis, ou plus ou moins légers, ou

STATE V.

plus on moins judicieux, qui vous diraient qu'un aveugle ne peut pas écrire, ou qu'il ne le pouvait pas quand il a fait son testament, à moins que, par exemple, on ne l'assît à une table, qu'on n'y mît devant lui du papier,qu'on ne lui mit à la main une plume chargée d'encre, qu'on ne lui posât la main sur le papier à l'endroit où il faut commencer, qu'on ne rechargeat sa plume d'encre quand il est nécessaire de le faire, qu'on ne lui remît ensuite cette plume à la main. qu'on ne dirigeat cette main à l'endroit où il fallait reprendre pour continuer d'écrire, qu'on ne l'avertit de revenir à gauche quand sa plume s'écartait de la page, et que là encore on n'y dirigeat sa main ; croyez vous, dis-je, qu'il soit logique de conclure de la que ce n'est pas lui qui a pu écrire en eutier, dater et signer son testament de sa propre main? N'est-il donc pas excessivement clair qu'avec ces secours il peut fort bien, l'aveugle qui sait écrire, écrire en entier, dater et signer son testament? Est-ce que l'avengle qui ne se conduit dans les rues qu'à l'aide de son domestique, sur l'épaule duquel il appuie sa main, ne marche pas? ne parcourt pas lui-même en entier la distance qu'il y a de son point de départ à son point d'arrivée? Selon vos idées, ô Honorable Cour Inférieure, l'homme dont la main tremblerait trop pour signer, sans qu'on la lui tint, ne signerait donc pas lui-même, si on la lui tenait quand il signe? Sans me donner la peine de fouiller dans les commentateurs du Code Napoléon, je trouve dans les auteurs qui ont écrit sur nos anciennes lois, et auxquels malheureusement, je crois, on n'a pas assez emprunté; dans Febrero, par exemple, des contrats "Ecrituras," chapitre ler., sec. 19, no. 214, page 178, édition de 1797; "Esta legal forma, y solemnidad como derecho mas nuevo que el de las Partidas és la que se observa: de suerte que si el testador no sabe, ó no puede escribir à lo menos llevandole, ó gobernandole aluguno la mano tremula (pues en este ultimo caso puedo harcerlo à presencia del escribano y testigos sin que por esto se vicie ni anule, y asi se practica) debe firmar por él uno de los testigos, &c." Remarquons bien que là Febrero traite du testament mystique, tel que l'a établi une loi de Toro qui est la 2c, tit. 4, liv. 5, de la Recopilacion : et que cette loi de Toro, exige que le testateur signe, quand il peut signer, l'acte de suscription avec les temoins, auxquels il doit, ainsi qu'au notaire, présenter son testament signe par lui, s'il sait et peut écrire, ou, sinon, écrit par toute autre personne de sa confiance; en leur disant: "Este es mi testamento, ruego os que escribais en el vuestres nombres.". Avec les notions que paraît avoir la cour de district sur ces matières, il est très probable qu'elle déclarerait nul un testament mystique, fait sous notre propre Code, s'il lui était prouvé que la signature que doit y apposer sur l'acte de suscription le testateur, n'y a été apposée qu'à l'aide d'une autre personne qui lui tenait la main ei la guidait. Ne dirait-elle pas cette cour : c'est le testateur luimeme qui doit signer; la signature que le Code exige de lui doit etre toute entière de lui-meme, de lui seul; or il n'a pas signé luimême, il n'a pas signé lui seul ; sa main tremblante ne le lui permettait pas ; il était physiquement frappé de l'incapacité d'écrire à moins qu'on ne l'aidât ; donc ce qu'on appelle son testament n'est pas écrit, daté et signé selon la lettre et l'esprit du Code ; donc son testament est nul?

Il convient d'autant plus d'adopter et suivre ce qu'enseigne Febrero, que ce qui est preserit dans notre Code pour le testament mystique, n'est que ce qui était preserit pour ce testament dans notre ancienne loi espagnole sur laquelle il écrit. Et j'ajoute qu'il n'est aucune de nos lois qui, en exigeant ce qu'elles exigent, soit pour le testament mystique, soit pour le testament olographe, indique ou prescrive que, pour écrire ou signer, on sera tenu de prendre soi-même la plume, de la plonger dans l'enerier pour avoir de l'enere, d'employer tel ou tel instrument, de faire usage de tel ou tel fluide ou matière pour le faire, sous

peine de nullité.

La cour inférieure nous a parlé de l'esprit de la loi relativement au testament olographe; je relis cette loi : voici ses termes : "Il faut, pour qu'il soit valable, qu'il soit écrit en entier, deté et signé de la main du testateur lui-meme."

Rien n'est plus explicite à mon gré que ce texte. Or, je suppose qu'un particulier, sachant et possédant l'art mécanique d'écrire, de former les lettres, et de les joindre et les lier, dans une perfection admirable, se mette dans la tête d'écrire son testament olographe ; mais, qu'ignorant l'orthographe il demande, à quel-qu'un qui se trouve auprès de lui, comment s'écrivent les mots dont il veut se servir ; la personne présente le lui dit ; et il écrit correctement, et il date et signe, sans faire aucune faute. Il meurt ; son testament est prèsenté à l'homologation; des amis aussi peu savans que lui, mais qui l'ont vu écrire et signer ceut fois,

STATE V. MARTIN

qui connaissent son écriture aussi bien que la leur propre, viennent à la cour, et sous leur serment, déclarent, ce qui est bien vrai, que ce testament, corps, date et signature, est tout entier de son écriture. Le testament est homologué. Ce testament est ensuite attaqué; son annulation est demandée, sur une allégation qu'à l'époque où le défunt parait avoir fait ce testament, il était incapable de le faire, c'est à dire de l'écrire tel qu'il est écrit. Des témeins sent cités; ils comparaissent; le testament leur est montré; ils reconnaissent très bien les caractères; ils pensent et disent bien que c'est de la main du testateur; mais ils ajoutent, ce qui est encore vrai, que la veille même de la date du testament, il ne savait, ni un mot de grammaire, ni un seul mot d'erthographe; et ils décharent, en leur âme et conscience, qu'il n'a pu le faire tout seul, qu'il n'a pas pu luimême l'écrire tel qu'il est écrit, daté et signé—qu'ila fallu pour cela que quelqu'un, plus habile que lui, l'écrivit d'abord, et qu'ensuite il le copiât; enfin que, sans une telle aide, un tel guide, il était incapable d'en venir à bout.

Veilà une hypothèse dans laquelle il faut cenvenir qu'un homme qu'a une vue parfaite, resemble passablement à un aveugle; n'est-ce pas être intellectuellement aveugle que de ne pas savoir l'orthographe usuelle des mots? celui-là est-il bien ûr, peut-il l'être, qu'il n'exprime pas une idée pour une autre? Etbien! vient, d'abord, un praticien, appelé avocat, légiste, qui neus dit: "Le testament olographe est de sa nature secret; or celui-ci n'est pas secret, puis-qu'avant sa naissance même il était connu de la personne qui l'a écrit pour que le testateur le copiât; donc il est nul." Ensuite on entend la cour qui, doctement, déclare que, d'après les témoignages, il est impossible que le testateur aitécrit le testament qu'on dit être de lui, puisque ce testament est correctement orthographié, et que la preuve constate qu'à la date de cet acte important, le testateur était tout à fait incapable d'orthographier deux mots; et elle casse le testament, comme n'étant pas conforme à ce qu'il lui plait d'appeler la lêtre ce l'esprit du Code—comme n'étant pas écrit, mais seulement copié, par le testaur.

Autre hypothèse; on sait que le testament olographe, pour être valide, doit être écrit en entier, daté et signé de la main du testateur lui-même. On a vu à la Nouvelle-Orléans, il y a quelques années, un jeune homme de la race Anglo-Saxonne, qui n'avait ni bras ni mains. Il découpait d'une menière parfaite avec ses pieds toutes sortes de fleurs et de desseins; il ouvrait une montre et la montait; il chargeait une arme à feu et la tirait; il cerivait une lettre, la ployait, et la cachetait. Supposons qu'il eût eu la fantaisie de faire, d'écrire, de aigner, de dater son testament; et qu'il fut mort après. La cour de district auraitelle cassé son testament? Je n'ose le croire; cependant son attachement à la lettre de la loi, lui en aurait fait un devoir; car le testament, pour être valide, devait être écrit en entier, daté et signé de la main du testateur lui-même, et malheureusement, par l'effet irrémédiable d'une bien cruelle incapacité physique, le testateur n'a pu l'écrire que du pied.

" Pitoyables jouets de notre vanité

"Faisons au moins l'aveu de notre infirmité!"

Arrêtons-nous; et, surtout, gardons nous, en nous appuyant sur des principes que nous entendons mal, que nous appliquerions de travers, de tenir d'une manière toujours inflexible à la règle qui veut que " quand les termes de la loi sont clairs et exempts d'ambiguité, on ne s'écarte pus de la lettre sous le pretexte d'en pénétrer l'esprit;" car la lettre, dans l'hypothese présentée icigcomme dans les précédentes, ferait commettre une grande absurdité, une énorme injustice, une iniquité révoltante ; elle tuerait. Jamais un homme bien organisé, sous le rapport intellectuel, ne doit admettre que l'intention du législateur ait été, ou soit susceptible de faire donner à sa loi des effets aussi affreux. Inclinons-nous, respectueusement, devant cette sage loi Romaine qui, vraiment, consacre un principe d'une vérité éternelle; "Scire leges non est hoc verba earum tenere, sed vim ac potestatem." Que veut le législateur en disant que "le testament olographe, pour être valide, doit être écrit en entier, daté, et signé de la main du testateur lui-même ?" Il veut bien clairement et bien explicitement que l'on respecte, que l'on exécute, un testament olographe; mais, comme, pour être olographe, un testament doit être écrit par le testateur et non par une autre personne, il exige que ce soit bien le testateur qui écrive, date et signe lui-même, et non pas un étranger ou un autre individu. Il ne dit point au testateur: fais y attention; tu ne dois écrire que tes propres idées, soit qu'elles te viennent tout d'un coup, soit que tu les aies muries. Il ne lui dit point: ne prends conséil de



MARTIN.

qui ce soit; ne communique tes volontés à personne ; ne charge personne de te les rédiger convenablement pour les copier ensuite. Non; il de dit rien de semblable; et pourvu que l'acte produit à l'homologation soit un testament écrit, daté, et signé par le testateur lui-même, quel que soit le membre dont il se sera servi pour l'écrire, c'est tout ce qu'il lui faut ; il n'en demande pas davantage ; il est satisfait; sa volonté régulatrice est obéie.

IV. Je demande la permission de faire quelques observations sur la prétention élevée à la cour inférieure, et qu'on renouvellera peut être ici, de faire casser le testament qui nous occupe, sur le fendement, excessivement fragile, je crois, que, légalement parlant, un aveugle ne peut pas faire un testament olographe.

Je rappellerai, en commençant, que, ni dans la pétition originale, ni dans celle supplémentaire, on ne trouve aucune allégation d'incapacité légale; et cependant il a plu la cour de district d'examiner cette question, comme si elle avait été

soulevée par les actes de la procédure ! J'examinerai donc. et je discuterai la question d'incapacité légale, selon les lois françaises qu'invoquent les commentateurs que l'on a cités à la cour inférieure. En expliquant l'article 978 du Code français qui porte : "ceux qui ne savent, ou ne peuvent, hre ne pourront faire de dispositions dans la forme mystique," M. Duranton nous dit, (tome 9, page 159, no. 134): " Et comme ceux qui ne savent ou ne peuvent hre, ne peuvent pareillement ecrire, ils ne peuvent pas non plus faire un testament olographe." Il ajoute (page 60, no. 136) celffi qui est prive de l'usage de la vue ne pouvant pas lire, ne peut par con-

séquent tester en la forme mystique, ni en la forme olographe."

Partant de cette epinion ou décision, bien tranchante comme on le voit, et qui, en vérité, pourrait bien finir par n'être pas d'un très grand poids dans notre affaire, on nous saisit au corps; on nous enferme hardiment dans les limites étroites d'un petit sorite, d'où l'on se flatte que nous ne pourrons pas sortir. On nous dit : "Pour faire un testament mystique, il faute être en état de lire; pour lire, il faut regarder; pour regarder, il faut voir; or l'aveugle ne voit pas : donc il ne peut pas regarder; il ne peut pas regarder, donc il ne peut pas lire: il ne peut pas lire, donc il ne peut pas faire un testament mystique: il ne peut pas faire un testament mystique, denc il ne peut pas faire un testament olographe. Duranton l'a dit, donc le testament de François Xavier Martin est nul. Jadis, en France, quand en invoquait le grand nom de Dumoulin, présidens, conseillers, avocats, dans les parlemens, se découvraient et s'inclinaient en témoignage de vénération. Le temps où l'on en fera de même chez nous, quand on citera Duranton, viendra peut-être: en attendant, et sans vouloir me soustraire au tribut d'admiration si légitimement dû à ses œuvres immortelles, on me permettra, j'espère, de m'inscrire en faux contre cette proposition de son cru, que "ceux qui ne peuvent lire, ne peuvent écrire." Cette proposition peut être vraie, et je n'en doute point, à l'égard de personnes qui n'ent jamais su lire ; mais elle est certainement fausse, quant à celles qui ayant su lire et écrire parfaitement, ont eu le malheur, dans un âge avancé, de perdre la vue, de devenir aveugles. Avant de le prouver, ce qui ne sera pas difficile, je pense, oserai-je demander à Monsieur Duranton, pourquoi "ceux qui sont privés de la vue ne peuvent pas, en France, tester dans la forme mystique? Il me répondra desuite, et sans hésiter, j'imagine : c'est parce que l'article 978 du Code Napoléon le dit bien clairement, quoique en d'antres termes.

Maintenant, comment se peut-on permettre, n'ayant sous les yeux que cet article 978, d'en conclure que celui qui ne sait, ou ne peut lire, ne peut pas faire un testament olographe? Comment? La raison en est de suite donnée par Mr. Duranton: " comme ceux qui ne savent ou ne peuvent lire, ne peuvent pareiltement écrire, ils ne peuvent pas non plus faire un testament olographe. Celui qui est privé de la vué ne pouvant pas lire ne peut, par conséquent, tester en la forme mystique, ni dans la forme olographe." Où a-t'il trouvé cela le docteur Duranton ? est-ce dans son Code Napoléon ? Oni, quant à la forme mystique. Non, quant à la forme olographe. Car l'article 970 de ce Code ne porte que ceci: "Le testament olographe ne sera point valable, s'il n'est écrit en entier, daté, et signé de la main du testateur: il n'est assujetti à aucune autre forme." Nous voyons donc ici: 1°. Que la formalité de lire le testament olographe, n'est pas prescrite. 2°. Que c'est, dans son propre fonds, ou en se rendant l'écho de, Dieu sait qui, que M. Duranton a trouvé, et a bien voulu enseigner que, "celui qui ne peut pas lire ne peut pas faire un testament olographe." 3 °. Que, s'il nous l'enseigne, c'est parce que lui, professeur de droit et membre de

la légion d'honneur, croit que quiconque ne peut pas lire, ne peut pas

STATE U. MARTIN

Comment un professeur de droit français peut-il bien faire cette erreur? Il me serait difficile de le concévoir. Si M. Duranton était ici je pourrais lui dire "Daignez voir le testament olographe qu'a certainement bien écrit, daté, et signé de sa main, le défunt François Xavier Martin, aveugle, qui, depuis plusieurs années, ne pouvait plus lire dutout; et j'ai trop bonne opinion de vous pour m'imaginer que vous -n'écouterez pas la voix de votre raison, qui, éclairée par le témoignage de vos sens, vous dira qu'un aveugle peut écrire, quoiqu'il ne peut rien lire dutout." Et si ce grand homme refusait de se rendre; s'il exigesit, avant de céder, qu'on lui montrât un aveugle écrivant; je lui dirais: O sceptique! approchez! posez-moi, sur les yeux, tel bandeau que vous jugerez assez épais pour empêcher tout rayon de lumière d'y avoir accès. Je m'engage à écrire en votre présence, un testament tel que la loi de votre pays—tel que celle du mien, veut qu'il soit pour être valable.

L'aveugle, en France, ne peut pas faire un testament mystique; rien n'est plus positif, d'après les termes de l'article 978. Mais lorsque, je vois, ce que M. Duranton ne peut pas voir mieux, mais peut voir aussi bien. que moi, que l'article 970 du même Code, dit: "le testament olographe ne sera point valable, s'il n'est écrit en entier, daté, et signé de la main du testateur": et qu'it ajoute de suite: "il n'est assujetti à aucune autre forme"—je ne puis m'empêcher de laisser parler ma raison, qui me dit tout haut, "l'aveugle qui peut écrire peut faire, en France même, un testament olographe."

Grenier, dans son "Traité des Donations, des Testamens," &c., velume 1er. partie 2e., chap. 1er., sec. 5, ne. 281, page 285, 4e. édition, nous dit; "J'ai eu occasion de dire dans cette seconde partie, au commencement de la section 3, que l'aveugle ne peut point tester sous la forme mystique; il ne le peut donc que par acte public."

Si, comme on l'a vu, l'aveugle ne peut pas tester, en France, sons la forme mystique, ce n'est que parce que l'article 978 du Code Napoléon ne veut pas que ceux qui ne peuvent pas lire fassent leurs testamens dans cette forme. Mais, eu résulte-t-il qu'ils ne peuvent tester que par acte public ? c'est ce dont il est permis de doûter; car il n'est assurément pas logique d'en conclure que les aveugles ne peuvent pas tester sous la forme olographe. M. Grenier semble lui-même n'être pas très sûr de la justesse de sa conclusion; car il continue, et, au troisième alinéa plus loin, il veut bien nous dire: "M. Bergier, dans une note sur Ricard, des Donations, pages 32 et 33, a pensé que rien n'empêchait qu'on ne déclarât valable le testament olographe qu'un aveugle arati pufaire même dans son état de cécité. Il invoque un arrêt du 29 Mai 1770, rapporté par Denisart, au mot testament, no. 160, qui a ordonné l'exécution du testament olographe de la dame Ménage de Pressigny, qui était aveugle, au moment où elle l'avait écrit, daté, et signé."

M. Grenier ne se permet pas de condamner ce que dit Bergier. Il se borne à dire: "Cette opinion n'est pas sans difficulté." "Le caractère du testament olographe (continue-t-il) est d'être fait par le testateur seul." Sans doute, si, par ces paroles, veus entendez que c'est lui et non pas son voisin qui doit l'écrire, le dater, et le signer; mais si vous voulez dire que, pour faire un testament olographe, le testateur doit s'isoler, se séquestrer, se tenir bors de la vue de toute autre personne que lui-même, je m'inseris en faux; car dès que mon testamènt est écrit en entier, daté et signé de ma propre main, la loi est satisfaite; et il lui importe fort peu que je l'aie écrit, soit retiré dans mon cabinet; soit dans un salon, au milieu de nombreux visiteurs qui se disposaient à recevoir mes derniers adieux; soit assis sur le seuil de ma porte, à la vue de tous les passans. "Or. un aveugle, quelqu'habitude qu'il ait pu conserver de l'ècriture (ajoute-t-il) pourrait-il bien se flatter d'écrire son testament, de le dater et signer, de manière à ce qu'il n'y eût aucun des inconvéniens que cet état fait naturellement craindre, qu'on prévoit assez sans les détailler, et qui pourraient rendre le testament illisible et nul." Le problème à résoudre n'est pas de savoir s'il y à quelqu'inconvénient à ce qu'un aveugle écrive lui-même son propre testament, mais seulement de savoir si la loi veut ou ne veut pas, lui permet ou lui défend de le faire.

loi veut ou ne veut pas, lui permet ou lui défend de le faire.

"Si on suppose (ajoute M. Grenier) qu'il se fasse aider et guider par un tiers, alors la possibilité des insinuations et des surprises ne se présente-t-elle pas à l'esprit? et ne s'élève-t-il pas un doute légitime sur la validite d'un testament fait dans une semblable circonstance?" Ne supposez pas, mais, prouvez

STATE

qu'il a été aidé et guidé, non seulement pour tremper de nouveau sa plume dans l'encrier, quand il, le fallait ; non seulement pour recommencer au point ou il s'était arrêté pour cela ; car il n'y a rien là que de purement méchanique ; mais qu'il a été aidé et guidé par la volonté d'autrui, quant à la manière de disposer de son bien ; et alors vous pourrez raisonnablement et légalement douter que son testament contienne bren ses propres volontés; mais à moins de cela, ne nous parlez pas de la possibilité des insinuations et des surprises. Car si, étant alléguées, elles n'étaient pas prouvées avoir ces caractères, aucun doute légitime, aucun doute raisonnable même, ne pourrait, dans l'esprit d'un juge sage, s'élever sur la validité du testament. L'auteur termine ce paragraphe par ces mots: "Où est cette garantie, si fortement exigée par la loi, de la certitude des volontés du testateur ?" La garantie exigée par la loi de la certitude de la volonté du testateur, qui a préféré à une autre la forme olographe, se trouve tout entière dans le testament lui-même, quand il est écrit en entier, daté, et signé de la main du testateur. La loi chez vous n'en exige pas d'avan-Cette certitude ne cesse, et ne peut cesser, que lorsqu'il est allégué et prouvé que le testament n'est que l'effet de l'erreur, de la crainte, ou de la vio-lence, ou du dol ou de la fraude.

A l'alinéa qui suit immédiatement M. Grenier, que l'on serait tenté de croire persuade qu'il a, sinon détruit, du moins singultèrement affaibli, l'effet que pouvait produire l'arrêt du 29 mai 1770, nous dit : "Aussi Dénizart avait-il d'abord pose en principe qu'un aveugle ne pouvait tester que par testament public fait devant notaire." Cela manque un peu d'exactitude. Dénisart n'avait point, et n'a point, posé d'abord en principe qu'un avengle ne pouvait tester que par acte public devant notaire. Voici, mot à mot ce qu'il a dit: "Celui qui est avengle ne peut tester, en pays de droit écrit, que par la voie du testament nuncupatif ; sur quoi voyez l'article 7 de l'ordonnance de 1735, et testament nuncupatif. Si c'est en pays coutumier, un pareil testament ne peut être fait que pardevant no-taires, ou curés en se conformant à l'article 25 de l'ordonnance de 1735."—Voilà ce qu'il a dit : et il y a, je crois du moins, entre cela et ce que dit M. Grenier, une différence assez sensible. Poser en principe, n'est point invoquer une règle tracée par la volonte législative. La volonte législative reconnait un principe et le consaere, mais ne le crée point. Elle crée, elle établit, elle prescrit des règles, elle les fait observer, et voilà tout. Dans les pays de droit écrit, la loi romaine prévalait, et depuis Justinien, qui avait réduit le testament olographe à n'être employé valablement que dans les testamens de pères de famille, disposant de leurs biens entre leurs enfans, il n'y avait plus que le testament public notarié: Dans les pays coutumiers, l'ordonnance de 1735, article 7, le dit expressement : le testament de l'aveugle doit être fait dans la forme nuncupative. Je rèpéte donc que c'est d'après des règles tracés par les lois, qu'a parlé Dénisart; et qu'il·n'a point lui posé en principe, ce qu'il a dit du testament de l'aveu-gle. J'observerai en outre, que l'arrêt du 29 mai 1770, que l'on trouve cité dans Dénisart, contrairement aux règles suivies en pays de droit écrit, et dans les pays coutumiers soumis à l'ordonnance de 1735, a posé en principe que l'aveugle qui peut écrire peut valablement tester dans la forme olographe. Et certes rien' n'est plus conforme aux lumières du sens commun, dont s'écarte bien évidemment toute disposition ou règle arbitraire ou positive, qui priverait un aveugle de la faculté de faire ce que l'homme qui a l'usage de la vue ne pourrait pas mieux faire que lui : savoir, disposer par testament olographe.

Mais écoutons M. Grenier jusqu'au bout. Il continue : "Il parait que c'est un annotateur qui a ajouté de suite la citation de l'arrêt de 1770."—Où cela parait-il ? il serait difficile de le dire. Mais que ce soit un annotateur qui ait ajouté cette citation, ou Dénizart lui-même qui l'ait faite, l'arrêt n'en est pas moins là, et il n'est pas aisé d'écarter l'obstacle qu'il oppose à toute prétentionde déshériter légalement l'avougle qui sait écrire, qui peut écrire, et qui écrit, du droit qui lui est garanti par l'article 902 du Code Napoléon, qui porte: "Toules personnes pouvent disposer et recevoir, soit par donation entre-vifs, soit par testament, excepté celles que la loi en déclare incapables." M. Grenier semble, pourtant vouloir atténuer le coup que lui porte cet arrêt, en nous disant : "Les héritiers soutenaient avec force qu'une personne en état de cécité n'avait pu faire un testament olographe; et un arrêt isolé qui semble avoir jugé le contraire, peut-être par des circonstances inconnues (la cécité pouvait n'être pas complète) peut-il-fixer les opinions sur un fait sur le quel le sentiment et la raison instruisent suffisamment?"-Il y surait eu, peut-être, un peu plus de bonne foi, à rapporter en son entier la citation prétendue ajoutée par un annotateur, qu'à prendre la peine assez inutile, selon moi, de parler de la sorte. Là voici dans son intégrité cette citation, vraiment malencontreuse pour tous

ceux qui s'efforcent de faire dire à la loi plus qu'elle ne dit :

"Cependant, par arrêt du mardi 29 mai 1770, rendu en la Grand-Chambre, au rapport de M. Beze de Lys, la cour a confirmé le testament olographe de la Dame Ménage de Pressigny qui était aveugle (qui était aveugle, c'est positif,) au tems auquel elle l'avait écrit, signé et daté. Ses héritiers attaquèrent de nullité son testament qui ne contenait que des legs pieux et des rentes viagères faites à ses domestiques. On pense bien que le moyen des héritiers était qu'un aveugle ne pouvant écrire, cela emportait la nullité d'un testament olographe. Mais M. Gouvé qui défendait le Sieur Garnier, exécuteur testamentaire, répondait que la testatrice avait pu écrire, puisqu'elle avait écrit, quoiqu'elle fût aveugle; ab actu ad posse valet consequentia; et il était prouvé que le testament et les codiciles étaient bien effectivement l'ouvrage de sa main et les traits de son écriture. Enfin M. Gouvé établit dans le mémoire imprimé dans cette instance, qu'on ne pouvait conclure, de ce que la loi Romaine, 8 cod. Qui testamfacere possunt, et l'ordonnance de 1735 n'avaient parlé que des testamens nuncupatifs et mystiques, elles eussent limitativement assujetti les aveugles à se servir de l'une ou l'autre de ces deux formes."

Que deviennent, en face de cette citation, la supposition des circonstances

inconques, et la probabilité que la cécité ne fut pas complète?

Venons à nos propres lois.

V. Est-il vrai que, dans l'Etat de la Louisiane, à la date du testament de feu François Xavier Martin, la loi interdisait à l'aveugle qui sait et peut écrire, et

qui écrit, la faculté de faire un testament olographe?

Dans l'examen de cette question je remonterai aux lois qui nous régissaient avant la naissance de notre Code actuel. Je ne remonterai point, cependant, jusqu'aux lois romaines, qui, furent abrogées en Espagne dès le 7me. siècle de notre ère, par une loi du roi Chindasvindo, qui est la 9me. tit. 1er. lib. 2, De las leges de los Visogodos.—Abrogées de nouveau par la loi 8, tit. 1er. lib. 2, del Fuero Juxgo: puis, successivement, par la loi 15, tit. 1er. Part. 1a. et par la loi 6, tit. 4, Part 3, qui défendirent expressément, que les lois romaines fussent observées; et, depuis lors, elles n'ont jamais été remises en force. On sera peut-être étonné de ce que je viens de dire à ce sujet, quand on se rappelera avoir lu dans pluiseurs traités justement appréciés sur les contrats et même sur les testamens et donations, de nombreuses citations faites par les juristes Espangnols, des principes du droit romain; mais l'étonnement cessera dès qu'on saura que l'abrogation n'a jamais pu porter et n'a porté en effet que sur ce qui était de droit positif ou arbitraire, établi ou prescrit par la puissance législative; et que, dans toutes les possessions soumises à la couronne d'Espagne, tout ce qui, dans le droit romain, était principe, ou précepte tiré du droit de la nature et des gens, était respecté et considéré comme inviolable : car, si, comme je l'ai dit plus haut, les lois créent et prescrivent des règles, et ne créent pas des principes, (les principes existant par eux-mêmes,) les lois ne peuvent pas abroger les principes: Ils sont éternels comme la justice.—Vide en tête de la Instituta civil y real de Joseph Berni, la Carta de Dn. Gregorio Mayam y Siscar, page 25 et précédentes

La loi 14, tit. 1er. Partida 6, porte en termes exprès. que l'aveugle ne peut faire de testamens que dans la forme nuncupative en présence d'un notaire et de sept témoins. Cette loi était en force lorsqu'en 1808 la législature du Territoire d'Orléans nous donna le Code appelé "Digeste de la loi Civile, &c." Ce Code ne statua rien à l'égard du testament de l'aveugle spécialement, et l'on pourrait infèrer de ses dispositions que l'aveugle pouvait tester même dans la forme mystique, car tout ce qui, là, est exigé de lui, pour ce testament, est qu'il l'écrive, ou le fasse écrire; qu'il le signe, s'il sait signer; qu'il le close et le cachette, ou le fasse clore et cachetêr; qu'ensuite il déclare au notaire et aux témoins que le contenu en ce papier clos est son testament, écrit par lui-même, ou par un autre, et signé ou non signé de lui; enfin qu'il signe l'acte de suscription, s'il sait signer. Voyez art. 99, page 229, Code de 1808. Quoiqu'il en soit, en 1825, la sagesse codificatrice, mit au monde notre Code actuel, dont voici les dispositions textuelles qui ont déjà été citées en partie:

"Article 1456. Toutes personnes peuvent disposer ou recevoir par donation entre-vifs, ou par cause de mort, excepté celles que la loi en déclare expressément incapables."

STATE W. MARTIN. STATE

Je pourrais m'arrêter ici et sommer l'Etat demandeur, l'Etat qui lui-même a fait cette loi, de me trouver dans tout le Code, qui est son ouvrage, un endroit qui déclare que l'aveugle est expressément déclaré incapable de disposer par testament. Mais, m'objectera-t-on : on ne vous dit pas qu'il est incapable de tester ; on soutient seulement qu'il ne peut pas le faire dans la forme olographe. vous entends; mais je vous réponds qu'il me suffit de voir qu'il peut tester, pour avoir le droit d'exiger de vous de me montrer, dans votre Code, que cette faculté est restreinte, quant à lui, à telle ou telle forme; et je crois pouvoir m'engager, comme je le fais dès ce moment, à prouver qu'il a le droit de tester dans la forme de testament public notairié, dans la forme de testament mystique, et dans la forme olographe.

Commençons par nous rappeler qu'en supposant que la loi des Partidas relative à l'aveugle pût coexister avec notre Code actuel, elle était abrogée depuis seize années quand le Juge Martin a fait son testament; d'où il faut conclure que cette ancienne loi est nécessairement sans influence sur ce testament. Cela posé, je passe à l'accomplissement de mon engagement.

1er. L'aveugle peut tester par testament nuncupatif notarié. Cela va sans contestation.

2. Il peut tester par testament mystique.

C'est ce que l'on conteste : Voyons donc ce que porte notre Code à ce sujet. Article 1577. "Le testament mystique ou secret, autrement appelé testament fermé, se fait dans la forme suivante : Le testateur doit signer ses dispositions, soit qu'il les ait écrites lui-même, soit qu'il les ait fait écrire par un autre." "Le papier qui contiendra ses dispositions, ou le papier qui leur servira d'enveloppe, devra être clos et scellé; le testateur le présentera ainsi clos et scellé, au notaire et à sept témoins, ou il le fera clore et sceller en leur présence; ensuite il déclarera au notaire en présence des témoins, que le contenu en ce papier est bien son testament, écrit par lui, ou par un autre par ses ordres, et signé de lui testateur; le notaire dressera aussitôt l'acte de suscription, qui sera écrit sur ce papier ou sur la feuille qui lui sert d'enveloppe, et cet acte sera signé tant par le testateur que par le notaire."

Quiconque sait lire le français voit et comprend fort aisément, qu'il n'est rien dans cet important article, qui indique au testateur, ou à qui que ce soit. qu'il a quelque chose à lire, soit au notaire, soit aux témoins ; rien que lui en fasse un devoir. On voit de même, que le notaire, qui doit dresser l'acte de suscription, n'est pas non plus obligé de lire quoique ce soit, pas même cet acte, soit aux témoins, soit au testateur. Ainsi, pourvu que le testateur, tout aveugle qu'il est, signe ses dispositions testamentaires, écrites par lui ou par une autre personne; que le papier contenant ses dispositions soit clos et scellé; qu'il le présente, ainsi clos et scellé au notaire et à sept témoins, ou qu'il le fasse clore et sceller en leur présence; qu'ensuite il leur déclare que le contenu en ce papier est son testament écrit par lui, ou par un autre par ses ordres, et signé de lui, testateur; pourvu enfin qu'il signe l'acte de suscription quand le notaire l'a écrit, la loi est satisfaite : elle n'exige rien de plus que cela de lui.

Dira-t-on qu'un aveugle ne peut pas faire tout cela! c'est une question de capacité physique que l'on soulève alors, et ici nous traitons de la capacité légale. Au surplus je dis qu'un avengle peut fort bien écrire; je dis qu'il peut ployer, fermer, clore, cacheter un papier écrit par lui, ou par une autre personne. Mais revenons à la question d'incapacité légale; sans perdre de vue cepeudant, que l'aveugle qui sentira qu'il ne peut pas faire ce que notre article 1577 exige, attachera assez d'importance à faire un testament d'une exécution facile, pour ne pas commettre l'imprudence d'entreprendre rien au dessus de ses forces. On m'arrêtera peut-être, en me citant d'un air de triomphe l'arti-

cle 1579 qui porte :

"Ceux qui ne savent ou ne peuvent lire, et ceux qui ne savent ou ne peuvent signer, ne peuvent faire de dispositions dans la forme du testament mystique." Je confesse que cet article (sur lequel je pourrais faire les mêmes remarques que j'ai faites sur l'article 978 du Code français, anquel il a emprunté une partie de

ce qu'il dit,) présente tout d'abord quelque ressource au système embrassé par les commentateurs Duranton et autres, et à nos adversaires qui se sont faits leurs échos; mais je ne crois pas trop présumer de mes forces en pensant que cette ressource est de bien peu de valeur ou d'importance. Si, dans la rédaction d'un certain nombre d'articles, nos codificateurs se sont montrés copistes, on ne saurait certainement point comment contester que, dans celui-ci, ils se sont

montrés, au moins, un peu originaux; et, sans le respect dont je suis pénétré pour leur mémoire, je ne sais pas trop si je ne dirais pas que cet article est tont

fait absurde.

Un aveugle se présente, ayant à la la main son testament, qu'il a bien soigneusement pris, tenu et gardé, depuis le moment où il l'a écrit, ou fait écrire par son ami, homme digne de tout sa confiance ; et il dit au notaire et aux sept té-moins, en le leur remettant, clos et scellé ; "Le contenu en ce papier est mon testament, signé de moi. Notaire, écrivez l'acte de suscription." Vous plaisantez mon ami ; vous ne pouvez pas lire car vous êtes aveugle ; ainsi vous ne pouvez pas faire un testament mystique. C'est vous qui voulez rire, j'imagine ; si je ne peux pas lire, je peux signer dumoins: si vous en doutez, je vais signer devant vous; or, la dernière partie de votre article 1579, que l'on m'a lue, vent bien que je sois privé de la faculté de faire un testament mystique, si je ne peux pas signer ; mais, si je peux signer, il est clair qu'il me donne cette faculté; car, si celui qui ne peut écrire ne peut pas tester dans cette forme, celui qui le peut, ne peut pas manquer d'être admis à le faire valablement. Réfléchissez donc, je vous prie, que votre article 1577 ne me charge point de lire, soit ce que j'ai fait, soit ce qu'a fait mon ami par mon ordre.

Faisons bien attention ici à ce qui est statué par les arts. 1570, 71, 72, 73, et 74 pour le testament nuncupatif sous signature privée ; Là une lecture est expressément exigée de la part du testateur, comme formalité essentielle; mais, à l'egard du testament mystique, il n'y a rien de semblable : non, rien n'a besoin d'être lu. soit par le testateur, soit par le notaire lui-même. Dites que je ne puis pas fair cun testament nuncupatif sous signature privée, je n'aurai rien à

répliquer: mais ne dites pas que je ne puis pas en faire un mystique.

On me réprondra: c'est la loi; il faut s'y soumettre. Je ne l'avouerai pas comme je l'ai avoué quant à l'article 978 du Code français. Eh! pourquoi me demandera-t-on? C'est parce que le véritable texte de votre Code est le texte anglais; ainsi le voulait la constitution sous l'empire de laquelle le Juge Martin a testé; et ce texte ne contient pas l'absurdité que renferme ce que vous appelez le texte français. - Mais toutes nos lois sont bitextes; - devaient-elles l'être! - Je le nie. Quand cette constitution vous a dit que vos lois seraient dans la langue de la constitution des Etats-Unis, elle n'a point dit qu'elles pourraient l'être aussi dans la langue du Code français; - mais elle ne l'a pas défendu !- Inclusio unius est exclusio alterius; voilà ma réponse. Je prende donc notre texte anglais, de l'article 579, et je lis : "Those who know not how, or are not able to write, and those who know not how or are not able to sign their names, cannot make dispositions in the form of a mystic will," Maintenant, soit que je combine cet article 1579 avec l'article 1577, écrit en anglais, soit que je le combine avec ce même article écrit en français, je vois que l'article 1579 est une conséquence qui découle tout naturellement de l'article 1577. En effet, par cet article 1577, je puis faire mon testament moi-même, mais pour cela il faut que je puisse écrire : je puis le faire par une autre personne, et pour cela il n'est pas nécessaire que j'écrive, il suffit que je puisse le signer de ma maine (sign my name.) Le texte anglais se lie avec ce qui le précède; le texte français ne se lie pas; l'un est dicté par le bon sens, l'autre est une absurdité. J'en conclus donc que, rigorousement et constitutionellement parlant, l'aveugle qui peut écrire, celui qui ne peut que signer son nom, peuvent faire un testament mystique.

3. L'aveugle qui peut écrire peut faire un testament olographe. Inutile, je pense, de répéter ici ce que j'ai dit, sur le testament olographe, dans mes observations critiques sur les passages cités de Messieurs Duranton et Grenier à la cour inférieure. Je me bornerai à rappeler la disposition de notre

Code, telle qu'elle est contenue dans l'article 1581. La voici encore.

"Le testament olographe est celui qui est écrit par le testateur lui-même. Il faut pour qu'il soit valable, qu'il soit ecrit entier, daté et signé de la main du testateur lui-même. Il n'est assujetti à aucune autre forme, et peut être fuit en tous tems, mème hors de l'Etat."

Ce texte qui est aussi intelligible que concis, est parfaitement d'accord avec le texte anglais qui se trouve en regard avec lui dans le Code. Il n'est susceptible d'aucun commentaire. Il n'est nécessaire d'aucune interprétation pour le comprendre. La prétendue incapacité légale, n'est qu'un ridicule songe-creux, à moins qu'on ne trouve dans les lois qui existaient à la date du testament olographe du Juge Martin, une disposition qui exclue expressement l'aveugle qui peut écrire, dater et signer de sa propre main,

MARTIN.

STATE P.

de la faculté de faire un testoment de cette espèce. Où est elle cette disposition! nulle part. Mais a-t-on dit à la cour inferieure, et, peut être dira-t-on ici, les aveugles sont, par l'article 1584, absolument incapables d'être témoins dans les testamens. Rien n'est plus vrai. Mais qu'inférer de la ? Un esprit non prévenu dirait de suite: déclarer un aveugle incapable d'être témoin dans les testamens, n'est pas déclarer cet aveugle incapable de faire un testament. tinuerait et ne pourrait s'empêcher de se demander: ne sait-on pas, ou ne peuton pas faire, la différence entre un témoin et un testateur? Le testateur peut bien assurément tester quoiqu'il n'y voie pas, quoiqu'il soit aveugle, car, s'il ne peut pas écrire son testament, il peut le faire écrire, le dicter : et pour cela il n'a pas besoin d'y voir : mais le témoin-comment pourra-t-il dire. 10. qu'il a vu le notaire écrire et signer ; 2° . que les témoins dont les signatures sont apposées au testament sont indentiquement les mêmes personnes qui sont dites y avoir été présentes ; 3 °. que fout le testament a été confectionné, achevé, etc., sans divertir à aucun autre acte ; 4 °. que toutes les signatures qui se trouvent au testament sont bien les mêmes qui y ont été écrites en sa présence; 5 ° . que, pendant que le notaire écrivait, pas un seul témoins n'est sorti et n'est rentré plus tard; 60. que tous ont, ainsi que lui, signé ensemble? &c. &c. Quoi! ces réflexions n'ont pas frappé les organes des prétentions de l'Etat! Mais ces Messieurs ne voient donc pas que, pour que leur logique ne fît pas un peu rire aux dépens de leur sagacité, ils devraient non pas se contenter d'avancer, avec cette disposition à la main, que l'aveugle ne peut pas faire un testament olographe, mais bien qu'il ne peut faire de dispositions testamentaires sous aucune forme? Je veux bien, pour ma part, leur passer d'assimiler un testateur à un témoin instrumentaire, mais j'y mets une condition qui, je crois, est fort juste: assimilez tant que vous voudrez, mais que votre assimilation soit entière. dites, si vous en sentez la force : un avengle ne peut être témoin à aucun testament; done un aveugle ne peut faire aucun testament. Puis l'on prononcera sans rire, si l'on peut.

En m'excusant autant qu'il et en moi de le faire, d'avoir honoré cette question de mes remarques—question vraiment oiseuse, puisqu'il n'y avait dans la procédure aucune allégation d'incapacité légale, je passe à l'examen de la ques-

tion de simulation ; et voici comment je la pose :

VI. Est-il vrai que l'institution de légalaire universel, faite par le testament olographe de F. X. Martin, en faveur de son frère Paul Bmi. Martin, n'est qu'une simulation; qu'on réalité, et en vertu de convention arrêtée, du vivant du testateur, entre lui et son frère, il doit, par rapport à ses héritiers du sang, être considéré comme s'il fût mort sans avoir testé; et sa succession être partagée entre eux tous selon leurs degrés respectifs de parenté avec lui? que le testateur n'a eu recours à cette simulation que dans la vue illicite de frustrer l'Etat de la Louisiane de la taxe de dix pour cent, imposée par la loi sur toute succession échéant dans le dit Etat, à des aubains non résidens soit de cet Etat, soit de tout autre Etat ou territoire de l'Union? La cour sait aussi bien que moi que l'article 349 de notre Code de Procédure, fait à la partie interrogée sur faits et articles un devoir d'y répondre, sous serment et cathégoriquement, sous peine de voir tenus pour confessés les faits sur les quels elle aura refusé ou négligé de répondre. Elle sait aussi que, dans un esprit d'équité, de justice naturelle, l'article 354 du même Code, veut que les réponses des l'interrogé fassent preuve, sans pourtant exclure la preuve contraire; mais quelle ne puisse être contredite que par le serment de deux témoins, ou d'un seul témoin corroboré de circonstances graves; ou par une preuve littérale. Ces deux dispositions sous les yeux, l'on doit, ce me semble, conclure que l'allégation de simulation, faite dans la pétition supplémentaire, était réduite au néant par les réponses du défendeur; et l'on doit, conséquemment, résoudre la question que faisait naître cette allégation, et que j'ai posée plus haut, par une négative tranchante; à moins que deux témoins, ou au moins un témoin seul, soutenu de circonstances graves, ou une preuve littérale, n'aient donné aux ré-ponses assermentées du défendeur un démenti clair, non équivoque, formel.

Il s'agit donc maintenant de chercher, dans les pièces au procès, dans le dossier, si cette exigence de la loi a été satisfaite—si le démenti a été donné, comme il est prescrit qu'il soit donné, pour nous empècher de proclamer tout haut que l'allégation était fausse, ou du moins tout à fait contraire à la vérité.—Je n'hèsite point à dire, dès ce moment, que, quelle que pointilleuse attention que l'on veuille porter, à recueillir, épelucher, disséquer chaque phrase, chaque pa-

role sortie de la bouche des témoins que les organes de l'Etat ont jugé à propos de produire, dans l'espoir de justifier la grave accusation renfermée dans leur allégation, on n'y trouvera rien sur quoi l'on puisse asseoir un jugement qui leur soit favorable. Serait-ce dans le témoignage de M. Grima que l'on se flatterait de trouver une base à cette étrange accusation? Eh! pourrais-je dire à nos adversaires: songez donc que ce témoin vous a appris, que le Juge Martin voulait que la fortune, qu'il avait amassée ici, par son travail et son économie, y restat; que c'est dans cette vue qu'il avait institué son frère son légataire universel; mais qu'il craignait qu'après son décès, ses biens ne fussent vendus par ce frère. Cette partie du témoignage de M. Grima ne repousse-t-elle pas du pied et de la main l'idée d'un dessein illicite de faire passer les biens du testateur à ses héritiers étrangers, dans la vue de frustrer l'Etat de sa taxe ?—Mais il aimait, et affectionnait tendrement ces mêmes individus!-Sans contredit; et certes il voulait leur faire beaucoup de bien: vous en avez la preuve encore dans le témoignage de M. Grima; mais il voulait que ses neveux vinssent se fixer, s'établir ici, y demeurer, y travailler; et, à cette condition, il leur aurait acheté une habitation de la valeur de \$150,000. Prenez-y bien garde; c'est le testateur lui-même qui vous le dit par l'organe de M. Grima; c'est lui que vous avez aiusi rendu témoin dans cette cause; témoin contra producentem, il est vrai, mais témoin que vous avez choisi, élu, que dis-je? exhumé, pour venir ici déposer dela turpitude dont vous n'avez pas hésité à le dire coupable. Si vous eussiez pu réussir à faire passer par la bouche de M. Grima, un aveu, une conversation. une confidence du défunt qui fût susceptible de vous aider à soutenir votre systeme d'attaque, vous ne manqueriez pas de nous dire; et ce d'une voix triomphante: "nous avons la confession du coupable! Avouez donc que ce prétenducoupable s'élève contre vous du fond de la tombe, où vous l'auriez dû respecter peut-être; et, par la voix de M. Grima, confond, pulvérise, anéantit votre accusation.

Mais me dira-t-on peut-être, M. Grima nous apprend aussi, que Paul B. Martin a offert de vendre, veut vendre les biens à lui laisses par le défunt, et partir pour France! Et quelle conséquence en pourrait-on en tirer qui dé-posât en faveur du demandeur? Le Sieur Paul B. Martin est français: n'estil pas naturel qu'il désire aller jouir de sa belle fortune sous le doux climat de la Provence, son pays natal? Que prouve la disposition de vendre où il est? rien, si ce n'est que le Juge Martin avait raison de craindre, comme il le disait à M. Grima, qu'après son décès, son frère ne vendît tous les biens qu'il lui laissait ici? Mais cela prouve-t-il, que dis je? cela donne-t-il lieu à une presomption de notre part, que le testateur et son légataire se fussent entendus comme on l'a allégué, afin de frustrer l'Etat de sa taxe ? L'esprit le plus injustement prévenu n'oserait le dire. La réponse de ce légataire, que, très délibérément, les organes des prétentions de l'Etat demandeur, ont eux mêmes rendu témoin dans cette cause, est là : oui, elle est là cette réponse qui leur dit bien clairement, sans équivoque, sans ambiguité, que jamais rien de semblable n'a été entendu entre lui et son frère ; que son frère lui a dit : " Je t'ai fait mon héritier ; dispose de mafortune; c'est à toi." Or, ce ne sont pas des présomptions tirées par nos préventions aveugles eu intéressées qui peuvent être opposées à une réponse aussi cathégorique, aussi foudroyante pour le système accusateur que je combats ; ce sont deux témoins qui dementent cette réponse ; c'est au moins un seul témoin, témoin non suspect, (cela va s'en dire,) soutenu de circonstances graves, ou une preuve littérale, qui contredise cette réponse, que la loi exige. Où sont les deux témoins? où est le témoin unique, accompagné de ces circonstances? où est la preuve littérale, qui disentici le contraire de ce qui est déclaré sous la religion-du serment, par Paul B. Martin, dans ses réponses aux interrogatoires qui lui-

ent été proposés? Nulle part.

Il ne reste même pas à l'Etat ou à ses organes, la chétive ressource de direque les réponses du défendeur ont été étudiéés, car je le dis, et ils ne peuvent pas le nier, c'est ex abrupto, à l'audience, sans qu'il en eût aucun avis préalable, que ces interrogatoires on été présentés; et c'est là, sur le champ, qu'il a répondu à chacun, au fur et à mesure qu'on les les lui a lus.

Voyons le témoignage donne par le Juge Simon. Aux questions qui lui sont faites de la part de l'Etat. il dit, le 25 Février: "J'ai souvent entendu le juge (Martin) parler de la disposition en faveur de son frère: il disait que son principe était qu'un homme devait laisser son bien à ses plus proches parens, et de ne rien laisser à des étrangers. Qu'entre ces parens il choisirait

STATE MARTIN. ceux qui demeureraient le plus près de lui, et que, s'il n'en avait aucun ici, il leur laisserait encore son bien à quelque distance qu'ils fussent, de préféence à

Une pause d'un moment ici. Ces sentimens du Juge Martin sont, peut-être, difficiles à concevoir pour les personnes qui, en brisant les liens politiques qui les attachaient à la terre natale, brisent également tous leurs liens de famille. Mais, si le gouvernement de ma patrie m'oblige, par ses actes tyranniques, par ses lots arbitraires ennemies de toute liberté rationnelle, de tout principe d'équité, ou de de justice, à le fuir, à me faire ailleurs et loin de lui, une patrie qui me fasse jouir, à l'ombre de ses lois sages et protectrices. de tous les avantages qui font le bonheur de l'homme digne d'être libre, la nature n'en conservera pas moins sur moi toute sa douce et puissante influence en faveur de mes parens; car ils ne sont pas complices du despotisme qui m'a induit à m'expatrier; ils en sont euxmêmes les victimes ; et je dois les plaindre de n'avoir pas eu, soit le courage, soit les moyens de suivre mon exemple; parce que je les aime, et qu'il ne dépend pas plus de moi de les aimer, qu'il ne dépend d'eux de tressaillir de joie quand je leur prouve par ma correspondance que je ne les ai pas oubliés; qu'éloigné des lieux qu'ils habitent, ils me sont toujours présens par la pensée.-Or, se fondera-t-on sur ces sentimens du Juge Martin que je n'ai fait qu'essayer de développer, pour assaillir sa mémoire? pour l'accuser d'avoir voulu, par amour pour ses parens aubains, se rendre coupable d'une détestable fraude? Si on le faisait, rien ne serait plus vain, plus puérile même, que de se flatter d'être écouté favorablement.

Ne divisez pas sa pensée : vous n'en avez pas le droit : elle est toute entière dans ce que vient de dire le Juge Simon, qui n'est en cela que l'écho du Juge Prenez la donc entière comme elle est, et dites nous, messieurs les organes des prétentions de l'Etat, dites nous, si son testament n'est pas parfaitement d'accord avec cette pensée. Il l'est bien certainement ; et il n'y a ni subtilité, ni tour d'adresse, ni sophisme habile ou ingénieux, qui puisse pencher un homme aussi honnête que sensé à en douter un seul instant. Voilà donc, jusqu'ici, encore un témoin qui, au lieu de contredire les réponses du dé-

fendeur, vient et leur donne une nouvelle force! Poursuivone! "J'ai (dit ce témoin) souvent entendu le Juge Martin se plaindre de la taxe de dix pour cent; et il m'a souvent dit que, comme il ne pouvait rien douner à ses parens absens, sans faire subir cette taxe à sa succession, il laisserait tout à son frère." Encore une pause, et lisons la loi qui établit

cette taxe: la voici.

Section 4. Tout individu non domicilié dans cet Etat, et qui n'est pas citoyen d'un autre Etat ou Territoire de l'Union, auquel écherra à titre d'héritage, de legs ou de donation, la totalité ou une partie de la succession d'une personne décédée dans cet Etat ou ailleurs, paiera une taxe de dix pour cent sur le montant

de toutes sommes d'argent ou sur la valeur, &c.

J'ignore s'il s'est trouvé un bien grand nombre d'individus qui ayant des amis ou des parens hors des Etats-Unis, et non-citoyens d'aucun des Etats ou Territoires de la République, en faveur des quels ils auraient eu quelque penchant à faire quelques dispositions testamentaires, aient appris avec joie l'existence de cette loi bursale; mais je ne serais point surpris d'apprendre qu'un nombre bien plus grand s'en soit plaint ou en ait murmuré: car rien ne me semble plus naturel. Nous semmes, en général, les meilleurs gens du monde, et notre patriotisme est à toute épreuve, à nos intérêts près cependant. Mais, pour dire toute ma pensée, je ne saurais flétrir d'aucun reproche l'homme qui ayant payé constamment et avec toute la ponctualité désirable, sur ses biens, à mesure qu'il les acquerait du fruit de son labeur, taxe d'Etat, taxe de paroisse, tax de ville, &c., fronce un peu le sourcil et laisse échapper quelques paroles expressives de son mécontentement, en songeant qu'outre ces tributs passablement onnéreux, il faudra s'il veut laisser vingt mille piastres à son frère qui est né en France, et qui n'est jamais sorti de Bordeaux, par exemple, que ces vingt mille piastres qui lui appartiennent bien, se rédeisent à dix-huit mille. Sera-t-il raisonnable de le blamer, s'il se récrie, en disant: mais ce que mon frère me donnerait, par réciprocité d'affections, s'il décédait avant moi, ne supporterait point une réduction semblable, au profit du trésor de France. Eh! je le crois sans paine, et bieu d'autres personnes le croiront avec moi de très bonne foi, François Xavier Martin, qui, il faut qu'on le sache bien, tenait à la matière en raison compensée des peines qu'il s'était données pendant soixante ans pour acquérir sa fortune, a du





STATE W.

mu murer, se plaindre tout haut de cette loi, par la quelle l'Etat se fesait l'héritier forcé de la dixèime partie de ce qu'il avait tant travaillé pour gagner, s'il osait céder à ces sentimens de fa nature qui devaient le porter à laisser en mourant, sa succession à ses parens aubains domiciliés en France. Mais, en se plaignant a-t-il dit; En dépit de cette loi arbitraire je ferai passer mes biens, ma succession, en France, et l'Etat n'aura pas les dix pour cent qu'il veut s'approprier sur les fruits de mes travaux, de mes économies, de mes privations de soixante longues années! Il n'a rien dit de tel. Il a dit, je laisserai le tout à mon frère—à mon frère qui n'habite pas la France, qui est ici, qui demeure avec moi, qui depuis plusieurs années gère mes affaires en vertu de ma procuration. Voyez pour ces faits le témoignage de M. Guyol et celui de Greiner.

Observons bien que ce u'est point une seule fois que le défunt a dit à son collègue Simon qu'il laisserait tout son bien au défendeur. Ce témoin dépose qu'il le lui a dit en différentes circonstances. Il déclare aussi qu'après le testament fait, le Juge Martin l'avait envoyé chercher pour s'informer si lui, témoin, voudrait agir comme son exécuteur testamentaire, lui disant qu'il avait fait son frère son légataire universel, et que, pour le cas d'absence ou de mort de celui-ci, il avait nommé le témoin son exécuteur testamentaire. Observez bien encore que ce témoin a déclaré au testateur, qu'il cousentait à être son exécuteur testamentaire dans les cas prévus; mais qu'il n'u jamais reçu de lui aucune direction quant à sa manière d'agir en cette qualité; et que le testateur, ne lui a jamais parlé d'aucune autre personne que son frère à qui dût aller sa succession. Réunissez toutes ces circonstances et, assurément, il sera impossible de rien y trouver qui contredise les réponses du défendeur aux interrogatoires sur faits et

articles. Elles les corroborent en effet dans toutes leurs parties.

Et qu'on me dise s'il tombe sous le sens que le testateur, ayant prévu le cas de la mort de son frère et ayant pourvu, pour ce cas, à le remplacer par M. Simon, comme exécuteur testamentaire, ne lui aurait pas dit : en cas de prédécés de mon frère, vous voudrez bieu agir de telle ou telle manière? Il ne lui dit rien à ce sujet. Or quel aurait été le résultat si, le légataire mourant avant le testateur, et ne pouvant recueillir sa succession, ni la transmettre conséquemment, M. Simon eût été appelé à agir ? N'est-il pas d'une évidence irrésistible que la succession du juge passait sans obstacle à ses collatéraux de France? Ou donc était le dessein de frauder l'Etat de sa taxe? Et si le Juge Martin, prévoyant le cas du p. édécès de son frère, eût voulu, par une institution simulée, frustrer l'Etat de sa taxe, croit-on qu'il lui aurait été impossible de trouver un bienveillant qui se fût prêté à figurer comme son légataire universel, moyennant une commission de deux ou trois pour cent, afin de bien asswer, dans ce cas, l'exécution des prétendues intentions illicites qu'on a la charité toute chrétienne de lui prêter? Au lieu de tout cela, le testateur agit d'une manière conforme à ses principes. Il laisse sa fortune à son plus proche parent ; il la lui laisse parce qu'il est ici suprès de lui, avec lui : et, après ce parent, advienne que pourra. Voilà l'unique conclusion raisonnable à la quelle on puisse arriver. Voilà la vérité. Ainsi point de fraude présumable même. Il laisse son bien à son frère, parce qu'il a l'espoir qu'il ne le vendra pas, qu'il ne le sacrifiera pas: il le lui laisse, parce qu'il a confiance dans l'avenir de son pays adoptif; parce qu'il sait que la prospérité toujours croissante de ce pays ne peut que donner un accroissement de valeur aux immeubles qu'il hisse à sa mort; il le lui laisse, parce qu'il sait bien que son frère n'est pas un évaporé, un dilapidateur, et que, célibataire comme lui, mais mortel comme lui, sa succession ira tout naturellement à leurs neveux et nièces de France, un peu plus tard il est vrai mais, un peu plus considérable qu'à présent. Il a cet espoir, ce désir, et c'est pourquoi il craint que ce frère, usant de son droit, ne s'empresse de vendre, de réaliser, de sacrifier ses propriétés pour aller jouir plus vite.—Revenons au témoignage de M. Simon. Il déclare que ; "Lui et le Juge Martin ont eu plusieurs conversations, au sujet de sa succession, qui se résument en ceci : qu'il laisserait son bien à son frère, parce qu'ulors il ne serait pas sujet à la taxe; que tel avait été son principal objet en le faisant venir dans ce pays-ci. Mais que le juge ne lui a jamais rien dit qui puisse l'autoriser à dire, que son bien irait a aucune autre A une question de l'avocat-général, il repond : " Qu'il ne sait aucun autre fait que ceux qu'il a déjà déclarés; mais qu'il avait été pénétré de l'idée que le Juge Martin n'avait pas absolument l'intention de déshériter ses parens; et les raisons qu'il avait pour cela étaient que, comme il voulait disposer en faveur de son frère, pour éviter la taxe, cela n'était pas suffisant pour détruire

STATE MARTIN.

l'ordre ordinaire des choses." Il ajoute : "Mais je répète encore que je ne connais aucun fait qui puisse m'autoriser à le dire; ce sont seulement mes impressions à moi. Je n'ai même jamais communiqué mes impressions au testateur; car ce n'était pas de mes affaires."-M. Simon termine sa di position, en nous apprenant "que feu François Xavier Martin, était très content de voir arriver sa niece ici, et qu'il paraissait avoir pour elle l'affection que doit avoir un oncle pour sa nièce," &c -Or, je dois ne pas omettre qu'à la fin de son timoignage, M. Simon avait déclaré que : " Un jour, dans une conversation entre lui et le défunt juge, il lui avait demandé pourquoi il ne laissait rien à cette nièce, et que le juge avait répondu : elle a soixante mille francs, et c'est assez pour une femme."

Comme on ne peut guère écrire aussi vite qu'on lit, il faut que je confesse qu'il me tardait d'avoir transcrit tout ce qui, dans ce témoignage, peut avoir trait directement, ou indirectement, à la question qui nous occupe; et c'est à ce point que j'allais passer sous silence un fait qui n'est pas sans importance, et qu'a relaté M. Simon; le voici: "Lorsqu'en 1846, je partais pour les Attakapas, le juge Martin me chargea de m'enquérir s'il y avait là, à vendre, une habitation; ayant, disait-il, l'intention de donner cent mille piastres à deux neveux qu'il avait en France et qu'il attendait ici. Je lui promis de le faire. A mon arrivée, il vint me demander si j'avais fait quelque recherche; je lui repondis qu'il n'y en avait point à vendre alors ; il me répliqua : j'en suis charmé ; mes neveux ne veulent pas venir ; ils n'auront pas mou argent." J'ose à peine me permettre de demander ici, s'il est possible qu'aucune personne se flatte de tirer quoique ce soit de ce long témoignage qui contredise aucune des réponses du défendeur aux interrogatoires sur faits et articles qui lui ont été posés : car je ne puis vraiment point me le persuader. Rien dans ce témoignage ne sontieut l'allégation accusatrice du demandeur. Jusqu'ici nous devons dire, au contraire, que le testateur ne voulait point qu'aucune partie de sa succession allât, après sa mort à des parens aubains domiciliés hors des Etats ou Territoires de l'Union. que j'en ai fait la remarque, il voulait que le bien qu'il avait amassé restât ici dans sa patrie adoptive, autant qu'il était en lui de l'y faire rester ; il aimait, sans doute, ses neveux; mais il voulait qu'ils vinssent jouir de ses bienfaits à la Louisiane; il voulait qu'ils s'y fixassent, qu'ils s'y établissent, qu'ils y travaillassent avec ce qu'il leur donnerait; mais dès qu'il est informé qu'ils ne veulent pas venir : j'en suis charmé, dit-il, ils n'auront pas mon argent .- ll avait pour sa nièce l'affection naturelle d'un oncle ; il ne veut rien faire pour elle, et pourquoi! c'est parce qu'elle a soixante mille francs, et que c'est assez pour une femme.

En voilà assez, j'ose le dire avec confiance, pour laver le testateur de l'imputation odieuse qu'on avait eu le courage de faire à sa mémoire. morts, disait Cromwell, ne se vengent pas; mais je d.s que les morts peuvent parler et confondre leurs injustes accusateurs, quand ceux-ci osent troubler leurs cendres, les évoquer des régions éternelles, et les interroger. Ce procès qui, je l'espère, ne sera pas une leçon perdue pour tout de monde, en est la

preuve.

Je passe à un autre témoin, produit, comme les précédens, par le demandeur; au Juge Alonzo Morphy. Et ici, je prie la cour de m'éviter la peine de l'ex-aminer, de le commenter, de le critiquer, de l'expliquer. Ce témoin ne sait rien, ne dit rien qui puisse être d'aucune influence sur la décision de notre question; et si l'on veut le lire avec quelqu'attention et se rappeler ce que j'ai dit sur plusieurs endroits des témoignages de Messieurs Grima et Simon, on sera convaincu que je ne ferais ici qu'une fastidieuse répétition de ce que l'on a dijà lu. Reste un témoin entendu aussi de côté de l'Etat, M. Greiner.

"Le juge (dit M. Greiner) paraissait uneasy, inquiet, pendant que la loi de 1842, était en discussion." On le croira sans peine ; car il pouvait fort bien, en 1842, avoir la pensée de laisser une grande partie de son bien à ses parens absens, et cette loi le contrariait d'autant plus, si elle passait, qu'elle faisait l'Etat héritier d'un dixième de ce qu'il leur destinait ; ce qui, en réalité, augmentait le nombre de ses héritiers, et diminuait d'un dixième ce que, sans elle, ils auraient eu; mais, s'en suit-il, qu'il ait viole cette loi, qu'il ait fait un testament simulé, frauduleux, pour affranchir ses parens absens de la taxe? Répondez qu'on pourrait se l'imaginer; mais songez que l'on peut aussi, en respectant et les lois de la morale et celles de la logique, vous dire que ce ne serait ni charitable ni concl. aut, et que tres logiquement il serait permis de présumer le contraire.
"Le Juge Martin a dit que la loi pouvait être aisément éludée"; oui, et il a dit

STATE F. MARTIN

en cela une vérité palpable; s'en suit-il qu'il ait testé frauduleusement pour l'éluder : non, car il n'avait qu'à faire venir ici un de ses parens, qu'à l'y faire resider aupres de lui ; et, en lui laissant tout son bien, il le soustraiait à la taxe, mais il ne violait point la loi qui l'établissait ; car cette loi n'imposait la taxe que sur les successions, ou parts de successions, échéant à des aubains résidant en pays étrangers. Il est deux manières d'éluder cette loi ; l'une très licite et autorisée par elle, l'autre fort repréhensible, et qu'elle condamne. Celle licite consiste, comme je viens de le dire, à faire venir auprès de soi, ses parens etrangers, à les y retenir, jusqu'au moment où l'on pourra disposer en leur faveur, et à leur donner son bien, par testament, quand le tems de le faire sera venu. L'autre, celle illicite, ou au moins très illégale, consiste à faire d'un mannequin son héritier apparent, après avoir obtenu de lui la promesse de transmettre au véritable héritier ce qu'on lui confie. Il n'y a rien dans la première qui répugne à la loi ; au contraire, la loi l'autorise. Dans la secorde, on court le risque de s'en rapporter à un fripon qui garde tout ; et il suffit d'y réfléchir pour n'y pas avoir recours, si l'on ne veut pas frauder en pure perte. - Quand on voit deux manières, l'une honnête et licite, l'autre frauduleuse, de se soustraire à une taxe, à un impôt, à un tribut, à une charge; c'est s'écarter de tout principe moral, que deprononcer sans preuve et sur de vagues soupçons, que c'est la manière illicite et frauduleuse que l'on a choisie. "On ne doit jamais juger sans preuve, ni présumer qu'un homme sage ait fait une action indigne de sa conduite ordinaire, ni qu'une personne ait manqué à son devoir. Domat, Lois Civiles, liv. 3, tit. 6, sec. 4, no. 7.

Tout ce que ce témoin a déclaré sous son serment peut-être admis sans aucune défiance, sans aucune observation; tout cela peut-être vrai sans que qui ce soit au monde, à moins qu'il ne soit frappé d'aliénation mentale, puisse prétendre, tout haut, ni tout bas, que les réponses du défendeur aux interroga-toires sur faits et articles qu'on a jugé cenvenable de lui proposer, en reçoivent la plus légère atteinte. Ces réponses restent intactes: elles étaient invulné-publes, car elles étaient vraies. Ainsi il m'est permis, je pense, de dire tout haut ici, sans craindre d'être démenti par le jugement de la cour, que l'imputation de simulation, l'allégation de fraude, sur laquelle on a fondé une demande en nullité du testament olographe du Juge Martin, est tout à fait erronnée; et que, conséquemment, ce testament doit sortir son plein et entier effet. comment en pourrais-je douter? On a démandé que ce testament fut déclaré nu! sur le fondement d'une incapacité physique ; et ce fondement a disparu devant la vérité. Au sceptique insensé qui niait le mouvement, il dut être suffisant qu'on répondit par l'action de marcher; comme il aurait suffi qu'on lui dit : Malheureux! que fais-tu quand tu parles? ne remues tu pas ta langue? De même ici, l'allégation d'incapacité était et a été confondue par la preuve d'un fait encore plus simple, savoir, que le testament était bien réellment écrit, daté, signé de la main du testateur lui-même.—Et, ce qu'il y a de remarquable, c'est que c'est le demandeur, auteur de cette allégation, qui a bien voulu le prouver par ses propres témoins. Pressé que l'on étnit par la conviction acquise, avant toute preuve, que l'incapacité physique n'était q'une risible chimère, on a tenté d'y suppléer par une allégation plus grave, qui, outre l'effet de faire mettre le testament au néant, devait produire celui de flétrir a jamais la mémoire du testateur comme coupable d'une fraude insigne; on a avancé qu'il avait fait son testament dans l'intention réfléchie, froidement délibérée, de voler à l'Etat près de \$40,000, pour en enrichir, en violation d'une loi précise, des collatéraux, non citoyens des Etats ou Territoires de l'Union, habitant le sol d'une nation étrangère! Et, tel était l'esprit de vertige qui animait les moteurs de ce procès que, ne pouvant s'apercevoir que cette allégation détruisait la première, ils ont persisté à demander l'annulation qui formait l'objet de tous deur vœux, en maintenant (sans abandonner, disaient-ils) l'incapacité physique.

Or cette seconde allégation qu'est-elle devenue? elle a eu le sort de l'autre; et ce sont encore les zelès organes des prétentions de l'Etat, qui ont pris le soin de la tuer, et par les témoignages qu'eux-mèmes ils ont fait entendre, et par la bouche du testateur qu'ils diffamaient; et par les déclarations assermentées faites par le défendeur—par le défendeur qu'ils ont fait juge dans sa propre cause, en lui proposant des interrogatoires sur faits et articles.

Le Gardeur, on the same side. I. The judge below pronounced the will null and void, because substitutions and fidei-commissa are prohibited by our laws. The judge labors under a very erroneous impression of what fidei-com-

STATE . MARTIN.

missa and substitutions are. What is the substitution or fidei-commissum pro-hibited by our laws? It is a disposition either unter-vivos or mortis causa, by which the donce or instituted heir is bound to preserve, and return to another, the thing donated. That disposition can never be implied; it must be expressed in the act, or at least it must result from it as a necessary consequence. does the law discountenance and prohibit substitutions and fidei-commissa? Because they either change the legal order of succession, or tie up for a length of time in the hands of individuals property which is thus placed out of the reach of commerce. Therefore, when the charge to preserve for and return to another is not expressed in the act, or does not necessarily result from it, the disposition, even though it should contain a simulated donation, does not render the testament void, provided the real dones be capable of receiving from the donor. The law says that no man shall do indirectly what he is not permitted to do directly, and I hold the converse of this proposition to be equally true, to wit, that a man has an unquestionable right to do indirectly what the law permits him to do directly. See Toullier vol. 5, nos. 21, 24, 25, 27, 28, 30. Villargues, verbo Substitution, nos. 2, 3, 4, 9, 10, 14. Merlin, Répertoire de Jurisprudence, vo. Substitution, sec. VIII, no. 2; sec. X, § 1, no. 1. "Questions de Droit," vo., Substitution Fidéi-Commissaire, § IV, p. 29; § VI, p. 46; § XIII p. 84. It may, then, safely be stated that the jurisprudence of France is positive that, such substitutions and fidei-commissa only as impose the charge of preserving and returning a thing to a third person, are to be considered as prohibited by law; and that those dispositions alone can have the effect of avoiding a testament or donation.

Let us now see what the rule is under the jurisprudence of this State. In the case of Mathurin v. Livaudais, 5 Mart. N. S. p. 302, the Supreme Court spoke as follows: "Our Code, it is true, declares that substitutions and fidei-commissa are abolished. But the object of this change in our jurisprudence was, as it is well known, to prevent property from being tied up for a length of time in the hands of individuals, and placed out of the react of commerce. The framers of our Code, certainly never contemplated to abolish naked trusts uncoupled with an interest, which were to be executed immediately. If they had, they would not have specially provided in a subsequent part of the work for testamentary executors, described their duties, and recognised the validity of their acts. The obligation imposed on the legatee by the will of the testator in this case, cannot be distinguished from that of an executor, except in the name; and it is the duty of the court to look to things, rather than to the words." See also the case of Milne's Heirs v. Milne's Executors, 17 La. p. 57. In another case, that of Duplessis v. Kennedy, 6 La. p. 246, we find the following language: "This court has already decided in more than one case, that whonever it necessarily results from the language of the instrument, that a substitution was intended, its entire nullity must be pronounced. That it is of the essence of a substitution, that the original dones should be bound by the terms of the donation, to preserve the property given for, and to transmit it to, another person or class of persons, which persons are appointed to take after the original dones, ordine successivo, and in derogation of the legal order of succession."

But it will perhaps be contended that the mere charge to return, uncoupled with that of preserving the thing donated, annuls the disposition, and reference will be had to the case of Tournoir v. Tournoir, 12 La. 22, and that of Rachal v. Rachal, 1 Rob. 115, in which it was held by the late Supreme Court that "the law prohibits all fidei-commissa, even those in favor of persons capable of receiving, and although the donee is not bound to preserve but simply to return." These cases are in contradiction with the decisions above quoted, in which it was distinctly held "that in abolishing substitutions and fidei-commissa, the law did not mean to prohibit naked trusts, uncoupled with an interest, which are to be executed immediately." They are incompatible with, and repugnant to, the very letter of our law. Article 1507 of the Louisiana

Code reads thus:

"Les substitutions et les fidei-commis sont prohibés. Toute disposition, par la quelle le donataire, l'héritier ou le légataire est chargé de conserver et de rendre à un tiers, est pulle, même à l'égard du donntaire, de l'héritier institaté, ou du légataire."

It is an elementary principle, in the interpretation of statutes, that a law

BVATE U.

should be considered as a whole; that effect should be given to every part of it, and that the words of restriction found in a law should be extended to each and every portion of it. Under this principle, it is plain that the second paragraph of the article above quoted applies to fidei-commissa as well as to substitutions, and that consequently such dispositions only, be their names what they may, as impose the charge to preserve for, and return to, a third person, are pro-hibited by our laws. True it is, the expressions in the english text-are that "every disposition by which the donee is charged to preserve for or to return a thing, to a third person, is null;" but article 1507 was reprinted in the new Code from art. 40, p. 217, of the old Code, and it is well settled that under such circumstances, effect must be given to both texts. Durnford v. Clark's Estate, 3 La. 202. Merlin, in his "Repertoire de Jurisprudence, verbo Fidéi-commis" and Villargues, "eodem verbo," make a distinction between a "fidéi-commis and a "fidéi-commis tacite." The former is synonimous with, and means "substitution fidéi-commissaire." This distinction strengthens the construction we have just put on article 1507, which speaks of "fidei-commis," but not of "fidéi-commistacite." Besides; Merlin, whose correctness cannot be questioned. in speaking of fidei-commissa, says: "Une autre condition essentielle pour établir un fidéi-commis est que les termes dont on se sert pour l'exprimer emportent l'ordre successif ou le trait de tems, c'est à dire qu'ils n'appellent le substitué qu'en second ordre et après que l'instituté ou donataire immédiat aura recueilli." Répertoire, verbo, Substitution fidéi-commissaire, section 8, n. 3. This author again says: "Il y a, en effet, fidéi-commis toutes les fois qu'il existe une disposition par la quelle les deux gratifiés sont appelés à recueillir successivement et non concurremment. Questions de Droit, verbo Substitution fidéicommissaire § 6, p. 46." Thus clearly showing that he made no difference between a fidei-commissum and a substitution; and thereby accounting for the distinction which he establishes between a "fidéi-commis" and a "fidéicommis tacite," the former being a "substitution fidéi-commissaire," and the latter a naked trust, without term, condition or delay. But should it be contended, in the very teeth of the distinction thus made by Merlin and Villargues, that the word fidéi-commis as used in art. 1507, means "fidéi-commis tacite, let us see whether, in that broad signification, the word would also cover disguised donations made to persons capable of receiving.

Merlin, in his "Répertoire," verbo, Fidéi-commis tacite, no. 2, says: "Ces sortes de fidéi-commis ne se font ordinairement que pour avantager indirectement quelque personne prohibée, comme le mari ou la femme dans les cas ou ils ne peuvent s'avantager, ou pour donner à des batards (adultérins ou incestueux) au delà de leurs alimens." Villargues, verbo Fidéi-commis tacite, remarks: "Toute disposition au profit d'un incapable sera nulle, soit qu'on la déguise sous la forme d'un contrat onéreux, soit qu'on la fasse sous le nom de personnes interposées." C. N. 911. Louisiana Code, art. 1478. "C'est ici qu'est le siège de la matière. Nous retrouvons dans la disposition que la loi annule le fidéi-commis tacite, ou secret, qui était réprouvé par les lois romaines; même but de la part de celui qui dispose, comme identité de vues de la part du législateur, pour annuler la disposition. " Voilà ce que les lois appelèrent fidéi-commis tacite ou secret. Et cette sorte de disposition

était annulée comme fait en fraude de la loi."

Thus, had the words "fidei-commis tacite" been inserted in article 1507 of the Louisiana Code, they would not have applied to dispositions made to persons capable of receiving.

sons capable of receiving.

II. Was the deceased physically incapacitated on account of blindness, from making an olographic will?

It is contended that secrecy is of the essence of an olographic testament; whence the inference is drawn that any assistance given to the testator is fatal, and that, consequently, the olographic will is void, because the testimony shows that the testator would have been unable to make it, had not some assistance been extended to him. The proposition from which this inference is drawn, is palpably erroneous; for there is nothing, either in the spirit or in the letter of our laws, which can authorize the assertion that an olographic testament is essentially a secret one. Indeed, secrecy is of the essence of no kind of testament known to our laws. A testator may, if he think proper, keep his last dispositions secret; but he is not bound to do so, nay, not even when he selects the form of a mystic or secret testament, as even then he can require the as-

STATE

sistance of a stranger and have the testament written by the latter. Civ. Code art. 1577. But, is it true that every assistance in the making out of an olo-graphic will, annuls that will? I think not. A testament must be the solo and exclusive work of the testator's will. Hence, if it was shown that, through fraud, violence or error, a testament did not contain the testator's will, it should be declared null. The opposite party have shown that there can have been no fraud, violence, or suggestion practised upon the testator, and that no error could have existed on his part. All their witnesses concur in saying that, before making his testament, the deceased declared that his intention was to leave the whole of his estate to the defendant, and, since it was made, that he had carried his intentions into effect! So that, by the plaintiff's own showing, not a doubt can be reasonably entertained as to the fact, that the elographic testament under consideration contains the testator's last will and dispositions. How, then, can that instrument be declared null, simply because some physical or external assistance may have, or has actually, been extended to the testator, when it is shown that it was entirely written, dated and signed by him, and that it is a faithful repository of his last will and intentions ! Toullier, in his 5th vol. no. 347, holds as follows: "Le testament ne doit émaner que de la volonté du testateur ; il faut qu'il soit l'acte propre, l'acte personnel du testateur. Celui-ci peut néanmoins s'aider des lumières d'un conseil, la loi ne ie lui défend pas; muis sa volonté ne peut jamais être supplée par le ministère d'autrui, ni subordonnée à celle d'une autre personne. Si le jurisconsulte peut donner ses avis au testateur, ce n'est que sur la forme et nen sur le fonds du testament ; ce n'est que pour prêter aux pensées du testateur le secours nécessaire des expressions propres ou légitimes. Ainsi le testament ne serait pas nul, quand on en trouversit le modèle écrit de la main d'un conseil ou même du légataire ; il suffit que le testateur l'ait adopté, et se le soit readu propre, soit en l'écrivant, s'il s'agit d'un testament olographe, soit en le dictant, s'il s'agit d'un testament public, soit en le présentant aux témoins, s'il s'agit d'un testament mystique."
This shows incontestibly, that assistance may be afforded to a testator, prowided that assistance does not operate upon the substance of the testament, which must and should always be the work of his own free will.

The restament itself shows that the deceased was not physically incapacitated from making it. Let us see how far the opposite party has succeeded in showing that, under our laws, a blind man has no right to make an olographic testament, when he can do it. The counsel rely first on art. 1579 of the Civil Code, which provides that "those who know not how, or are not able, to write, and those who know not how, or are not able to sign their names, cannot make dispositions in the form of the mystic will." This is not contested. Indeed the very definition of the olographic testament, shows conclusively that no man has a right to make such a testament unless he can write and sign, as the diographic will is that "which is entirely written, dated and signed by the hand of the testator." Now, the fact that the deceased could write and sign, is not denied; at all events, it is clearly established by the testament itself, which is proven to be entirely written, dated and signed by him. What effect, then, this article can have on the question before the court, I am at a loss to conceive, unless the learned counsel should contend that the positive enactment of the legislature in the english text of art. 1579 must yield and give way to the french text, which inhibits from making a mystic testament those who cannot read, whereas the english text, disqualifies those alone who cannot write. But granting that due effect should be given to the french text, although the article itself was not reprinted from the ald Code, (see pages 226, 228, 230, 232,) what would the consequence be? Unquestionably this: that a blind man could nake no dispositions in the form of a mystic will, because he is unable to read. But that does not show that a blind man cannot make an olographic testament. Incapacities are stricti juris, and cannot be extended decasu in casum, nor de persona in personam. This is well settled. Therefore the law which disqualifies a man from making a mystic testament because he cannot read, does not thereby incapacitate him from making an olographic will. Art. 1579 contemplates mystic testaments only, and has no application to this case.

The counsel next array against us a host of commentators: Duranton, vol. 9, no. 139. Delvincourt, vol. 2, note 12, p. 309. Boileux, on art. 979 of the Napoléon Code. Rogron, on the same article, and on arts. 977 and 978. Domat, des Testamens, titre 1, sec. 3, § 20. Merlin, verbo Testament. Coin Delisle,

V.

ou art. 980, and Greiner on Donations, vol. 2, no. 258 and 281. There is not a syllable in Merlin tending to establish what is contended for by the opposite party; and the only reasonable inference that could be drawn from the silence of this learned and distinguished author, would be that, in his opinion, a blind man has an unquestionable right to make an olographic will. Incapacities are stricti juris; and as there is no express provision of law prohibiting a blind man from making an olographic testament, and this is attempted by inference only, it is rational to suppose that, had Merlin thought that that incapacity could be established by inference, he would have so stated in his profound and interesting commentary on last wills and testaments. The passage quoted from Coin-Delisle can have no bearing upon this case. He says that a blind man cannot be a witness to a testament, akhough not disqualified by the Napoléon-This may be true. But our Code says in positive terms, that persons insane, deaf, dumb, or blind, are absolutely incapable of being witnesses to tes-Art. 1584. But admitting that a blind man should be declared incapuble of being a witness, even though no express provision to that effect had been inserted in our Code, could it be inferred that a blind man is incapable of making an olographic will, because he is not capable of being a witness to a testament? This would be a non sequitur. A blind man who is not so by birth, can write. And as any man who can write, can also make an olographic testament unless incapacitated therefrom by an express provision of law, the consequence is that, under the general rule of law, a blind man can make an olographic rule, unless deprived of that right by an exception to that rule. But the object of the lawgiver in requiring that public testaments should be made in presence of witnesses was, unquestionably, to guard against the fraudulent practices which might otherwise be resorted to. How could the witness know that there was no substitution of persons, unless he could see the testator, and thus acquire the proof that he was not imposed upon. The object of the law might then be defeated were persons who are blind permitted to act as witnesses to testaments, because they are physically incapable of ascertaining the truth of the external acts of others. All the remaining commentators quoted by the opposite party unite, save one, in saying that a blind man cannot make an olographic testament, because he cannot write; and this shows that they had in contemplation those persons only who are blind by birth. Far, then, from supporting the position taken by our adversaries, these commentators are clearly in our favor, because their opinion is grounded upon the sole fact that a blind man is physically incapacitated of writing, and is therefore pregnant with the affirmative that a blind man who can write can make an olographic will. Cessante causa, cessat effectus.

After alluding to a decision reported in Dénisart, by which the olographic testament of a blind person was held to be valid, Grenier, vol. 2, p. 281, says: "Cette opinion n'est pas sans difficulté. Le caractère du testament olographe est d'être fait par le testateur seul: or, un aveugle, quelqu'habitude qu'il uit pu conserver de l'écriture, pourrait-il bien se flatter d'écrire son testament, de le dater et signer, de manière à ce qu'il n'y eût aucun des inconveniens que cet état fait naturellement craindre, qu'on prévoit assez sans les détailler et qui pourraient rendre le testament illisible et nul. Si on suppose qu'il se fasse aider et guider par un tiers, alors la possibilité des insinuations et des surprises ne se présente-t-elle pas à l'esprit? Et ne s'élève-t-il pas un doute légitime sur la validité d'un testament fait dans une semblable circonstance? Où est cette garantie, si fortement exigée par la loi, de la certtiude des volontés du testateur l' Thus Grenier no where says that the law prohibits a blind man, who can write, from making an olographic testament. He simply states that the question is not free from difficulty, and that it would be more prudent for a blind man to make a nuncupative testament by public act. The advice may be good. As to the arguments against the dangers of permitting a blind man to dispose mortis causa by an olographic will, they might be entitled to some weight were they pressed upon the lawgiver, but they certainly can be of no influence upon the mind of a judge who is called upon to apply the law, not as it should be, but as What are the extraordinary dangers pointed out by the author? says that the testament might be illegible; that, if aided and assisted by a third person, the testator might fall a victim to insinuations and deceits; that the will of the testator might be uncertain. If there is no possibility of reading the testament-if frauds and deceits have been practised upon the testator-if his

STATE F.

will cannot be ascertained—surely, for these reasons, or for any of them, the testament must be declared null; but the nullity would not be pronounced on account of the testator's blindness.

Our Code provides that "all persons may dispose or receive by donation intervivos or mortis causa, except such as the law expressly declares incapable." Art. 1456. It then divides testaments into three classes, nuncupative, mystic, and olographic (art. 1567); and provides that in order to be valid, an olographic testament must be entirely written, dated, and signed by the hand of the testator, but is subject to no other form. Art. 1581. That Judge Martin had a right to dispose of his property by a donation mortis causa, is not to be disputed; that a blind man is by no express provision of the Code declared incapable of making an olographic testament, cannot be denied; that the testament under consideration is entirely written, dated and signed by the hand of the testator, must be admitted, as it is abundantly proven by the testimony; that there is no proof, and not even a suggestion, of fraud, or mistake, on this branch of the case, clearly results from the original petition and the proofs adduced by the plaintiffs them-selves. But it will perhaps be contended that, although a blind man is not ex-pressly, yet he may be impliedly, incapacitated from making an elographic testament. This may be true. Indeed, any man is incapable of making an olographic testament, who is unable to fulfil the formalities without which no such testament can exist. Thus a man who cannot write, is incapable of making an olographic testament, because that testament must be written by the testator. If therefore a man, who cannot write, has the misfortune of being blind, he is incapable of making an olographic testament, not because he is blind, but because he cannot write. Coin-Delisle, in commenting upon article 978 of the Napoléon Code, says (at page 408, no. 4): "La loi ne déclare pas spécialement l'aveugle incapable du testament mystique : et la nullité n'est prononcée en ce cas que par une conséquence directe de l'art. 978, qui interdit cette forme à ceux qui ne peuvent lire. Neus pencherions donc pour la validité d'un testament mys-tique dont un aveugle doué d'une instruction suffisante, aurait imprimé ou fait imprimer les dispositions en caractère saillans, et qu'il aurait su et pu lire par le toucher." In this opinion Coin-Delisle has the concurrence of Marcade, who says (vol. 4, p. 48): "M. Coin-Delisle dens un autre passage va bien plus loin que nous et présente une doctrine qui doit paraître plus douteuse, quand il admet la validité du testament qu'un aveugle aurait fait imprimer en caractèrés saillans, et qu'il aurait pu lire par le toucher. Nous partageons cependant son opinion." Our laws do not declare a blind man incapable of making an elegraphic testament. If unable to write, his incapacity to make such a testament would result from the express provisions of art. 1581, which provide that that testament is not valid, if not written by the testator. Therefore a blind man who can write, is neither expressly nor impliedly incapable, under our laws, of making an olographic testament.

Toullier in his "Droit Civil F'rançais," 5th vol. no. 477, in fine, says: "Sous l'empire du Code, toute personne qui sait écrire peut faire un testament olographe, excepte celles que la loi en déclare incapables. Or, il n'y a sur ce point aucune incapacité contre les muets; ils peuvent donc, comme toute autre per-

sonne, faire un testament olographe."

Marcadé, vol. 4, p. 7, no. 2, ¶ 3, says: "Du moment que le testament est écrit en entier de la main du testateur, la prescription de la loi est accomplie et l'acte est valable, de quelque manière et sur quelque substance qu'il soit écrit. Du moment que cet acte contient des dispositions de dernière volonté, c'est donc un testament; et du moment que ce testament est ecrit en entier, daté et signé de la main du testateur, c'est donc un testament olographe valable." And farther, at page 13, no. 5: "Une fois que le testament est écrit, daté, et signé de la main du testateur, il est parfaitement valable; car il n'est assujetti à aucune autre forme."

Coin-Delisle, in commenting upon the Napolion Code, p. 332, no. 7, says: "Il n'était point inutile d'établir plusieurs espèces de testamens; la forme olographe est, par la nature des choses, interdite à ceux qui ne savent pas ecrire; la forme mystique à ceux qui ne peuvent pas lire; le testament public aux personnes qui ne peuvent pas parler. La diversité des formes répond donc à la diversité des besoins. Ainsi le sourd-muet fera valablement un testament olographe, à moins qu'il n'ait pas l'intelligence de ce qu'il écrit; l'aveugle, qui est rarement assez habile pour faire un testament olographe, et à qui il est défen-

du de prendre la forme mystique (and this shows that he is not prohibited from making an olographic will, but, on the contrary, has an unquestionable right to select that form when assez habile,) a pour ressource le testament public. Celui qui ne peut pas parler et qui ne pourrait écrire un long testament, fera connaître ses dernières volontés par un testament mystique. La loi ne touche en rien à la capacité sur ce point; elle exige seulement l'accomplissement de certaines formes, aux quelles une maladie, une infirmité, ou le défaut d'instruction, font obstacle."

Villargues, Dictionnaire du Notariat, vo. Aveugle, no. 5, says: "Remarquez qu'on devrait en général décider autrement (the court of Pau had pronounced the nullity of a sous-seing privé, signed, but not written, by a blind man,) si l'aveugle avait lui-même écrit l'acte, quoiqu'alors la surprise soit encore possible; mais du moins cette circonstance devrait être prouvée." No. 6. "Un aveugle peut-il tester? Il ne le peut pas dans la forme mystique; mais il le peut par acte devant notaire, et rigoureusement aussi dans la forme olo-

graphe."

Vazeille, Donations and Testaments, art. 978, p. 498, says: "M. Grenier, suivant Ricard et Lacombe, a décidé que l'aveugle était incapable non seulement du testament mystique, mais même du simple testament olographe. M. Bergier, annotateur de Ricard, a pensé que le testament olographe qu'un aveugle aurait pu écrire, dater et signer, pourrait être valable: et il cite un arrêt de 1700 qui, en effet, a rejeté la demande en nullité du testament olographe fait par la dame de Pressigny en état de cécité. Cette note fait dire à M. Grenier que la chose n'est pas sans difficulté. Il ne peut y avoir de difficulté que pour la vérification de l'écriture, si elle est contestée; car la loi n'interdit pas le testament olographe aux aveugles. Ceux qui peuvent écrire, malgré leur infirmité, ont certainement le droit de tracer eux-mêmes leurs dernières volontés, quoiqu'ils ne puissent pas les lire. Ils ne sont exclus que du testament mystique par l'art. 978."

See also the extract from Dénisart, vol. 4, p. 715, cited by M. Mazurcau,

ante pp. 698-699.

A question, not identical with the one now under consideration, but which has considerable analogy with it, has been recently decided by this court. In the case of the Union Bank v. Morgan, ante p. 418, it was contended that certain endorsements given by one of the defendants were null and void, because he was blind, and that a letter of attorney which had been signed by him before a notary public, but not in presence of three witnesses, as required by the Code, was not good as an authentic act, and still less as one sous seing privé. But it was decided differently. Neither fraud nor error had been alleged or proven, and this court placed the case upon the broad ground that all persons have the capacity of contracting, except those whose incapacity is specially declared by law. In that case the court went further than Villargues, who simply holds that the sous seing prive of a blind man is valid when signed and written by him. It disregarded the decision of the court of Pau, which had pronounced the nullity of a sous seing prive signed, but not written, by a blind man, upon the ground that it was impossible for him to ascertain the truth of what he had been called upon to sign. The decision in Morgan's case is correct, because frand and error are never presumed; and that court must be ignorant of the first principles of law, which would supply an incapacity not created by the legislator, on the apprehension of a mere possibility of fraud being practised upou, or error being committed by, the person thus illegally deprived of his rights. Therefore, in matters of contract, the case of the Union Bank v. Briggs decides that, when no fraud or error is proven, the contract sous seing privé of a blind man is good and valid, because the law does not declare him incapable of contracting. The court is now called upon to decide what the rule must be in matters of donations mortis causa. If this court has ruled that a sous seing privé signed, although not written by a blind man, is valid in law, it must rule that an olographic testament entirely written, dated, and signed by a blind man, is equally valid in law. Indeed, the case of Morgan is a stronger one than the present; for it is impossible that a blind man can know by himself the contents of a paper written by another, which he is called upon to sign. But in the case of an olographic testament, no such impossibility can exist, as a testament of that description is nothing but a sous seing prive not only signed but entirely written by the party himself. Besides, in this case, no fraud or error is alleged.

STATE V. MARTIN. III. The agreement to defraud the State being disproved, has it a right topray for the nullity of the will upon the technical ground that it is irregular in point of form?

This question brings us at once to the merits of the exception to the original petition. Admitting, for argument sake, that the testament is irregular in point of form, the State has no right to avail itself of the nullity which may result from

that irregularity.

Nullities are either absolute or relative. By absolute nullities are meant those which can be set up by all persons interested; by relative nullities, those which can only be set up by the persons in whose favor they are established. Merlin, Répertoire de Jurisprudence, vo. Nullité, § 2, no. 1. Zachariæ, Droit Civil-Français, vol. 1, p. 69. Under what head of nullity does the objection to Judge Martin's testament fall? Villargues, vo. Testament, no. 547, says: "La nullité qui résulte, par rapport à un testament, d'un vice de forme, n'est pas absolue; elle n'est que rélative, ou, en d'autres termes, elle n'est que relative à l'héritier Biret, in his treatise on Nullities, vol. 1. p. 42, remarks: " Dans l'ancienne jurisprudence on reconnaissait aussi cette règle que la volonté tacite ou expresse d'une partie intéressée faisait disparaître les effets de la nullité rela-Un testament nul, soit dans sa forme, soit par défaut de capacité dans le testateur, est valide par l'exécution qu'en fait volontairement, et én connaissance de cause, l'héritier dont il blesse les droits." Merlin, in his Répertoire vo. Nullité, § 3, no. 12, says: "Du principe que les nullités respectives sont couvertes par le consentement des parties intéressées, il résulte qu'un testament nul, soit dans la forme, soit par défaut de capacité dans le testateur, est valide par l'exécution qu'en fait l'héritiér dont il blesse les droits." These quotations show that nullities in a testament, growing out of a defect of form, or a want of capacity in the testator, are not absolute but relative, and therefore cannot be set upby all persons interested, but by those only to whom the succession would devolve should the testament be annulled.

Admitting that the State has an interest in seeing the testament annulled, it certainly has no right to pray for its avoidance on the mere allegation of airelative nullity, which none can set up but those whom the law would have called to the succession, had no testament been made. As was observed by Judge Porter in the case of Spencer v. Grimball, 6 Mart. N. S. 364: "Invito beneficium non datur, is as well the maxim of law as it is of common sense; and if the party who is empowered to set aside a contract, does not choose to do it, no other can." The nullity of the will, admitting it to be irregular, either in point of form or through the incapacity of the testator, being relative only, could not be prayed for by the State, whose petition ought to have been dismissed on the exception. Bonne v. Powers, 3 Mart. N. S. 461. Fletcher v. Cavelier, 2 La. 271. Toullier, vol. 7, nos. 554, 564.

Dunod, as reported by Toullier, vol. 7, p. 729, says that every act, the nullities of which are relative only, produces a natural obligation, and Grenier seems to concur in that opinion. After holding that the heir who has paid out the legacies cannot claim them back on the ground that the testament is null, he says, vol. 2, p. 422: "Il a pu vouloir exécuter le testament malgré la nullité, soit parce qu'ainsi que l'observe Chabrol, les formalités n'ont pour objet que d'assurer la vérité du testament, et que l'héritier, qui a bien voulu executer un testament nul, est censé s'être rendu certain par d'autres moyens de la volonté du testateur, soit parceque, malgré la nullité il subsite une sorte d'obligation naturelle, qu'il doit être libre à l'héritier d'accomplir." This opinion is in harmony with reason and morality. It is founded on our own laws, which provide that those obligations are natural which the law has rendered invalid for the want of certain forms or for some reason of general policy, but which are not in themselves immoral or unjust; and that there is a natural obligation upon the heirs to execute the donations or other dispositions which the former owner has made, but which are defective for want of form only. C. Code, art. 1750. It is true that natural obligations cannot be enforced by action. Code, art. 1752. But it is equally true that when a party has voluntarily fulfilled a natural obligation, he has no right to revoke his performance of it. Pothier on Obligations, no. 195. The conclusion is irresistible that the party who is bound by a natural obligation cannot be compelled to consider and treat it as null and void, and that, consequently, no third persons can set up a nullity which the party directly interested is, in foro conscientia, bound to respect, and cannot be compelled to set up. How, then, can the State of Louisiana, whose laws make it the duty of the relations of the deceased in France not to disturb his will, since its nullity, if any there be, arises out of a defect of form only, herself pray that that will be annulled, the performance of which, by her own laws, constitutes a natural obligation upon those relations?

STATE E. MARTIN

But whether the heirs be morally bound, or not, to leave the testament undisturbed, it must be conceded that the nullities by which the testament could be vitiated, are relative, and can only be set up by the heirs themselves. Even their creditors would have no right to avail themselves of those nullities. Such, at least, is the opinion of Toullier, which, although not concurred in by all the french commentators, must be adopted by our courts, as no provisions similar to those of art. 1167 of the Napoléon Code are to be found in any of our Codes. Toullier 7, no. 564. Court of Cassation, Bonnecarère v. Soulié, June 11, 1828.

The judgment of the court was pronounced by

Rost, J. This case presents two novel questions. 1. Could François Xavier Martin, after he became blind, make any dispositions mortis causá, in the olographic form? 2. If he could, was the institution of the defendant as his universal legatee, a simulated disposition, made for the purpose of evading the fiscal regulations of the act of 1842, imposing a tax of ten per cent on the value of all the property inherited in Louisiana by foreigners not domiciliated here, and with the secret intention that the disposition should inure, for the whole, or for a part, to the benefit of the foreign relatives of the testator?

We will first notice the question of capacity.

I. In the case of Gibson v. Foster, lately determined (ante p. 503), after a thorough investigation of the law in relation to nullities, we said: "That, where defects of form only were alleged, we disclaimed all power to extend nullities to cases neither expressly provided for by the lawgiver, nor coming within the legal intendment of art. 12 of the Civil Code, as fixed by the jurisprudence from which it is derived." In the case of the Union Bank of Louisiana v. Morgan, ante p. 418, we held that the blind are not declared by law incapable of contracting, and that, as a general rule, all persons have that capacity, except those whose incapacity it expressly declared. We thought on those occasions, that incapacities and defects of form are stricti juris; that they cannot be extended from one person to the other, or from one case to the other, and that where the law is silent, courts of justice seldom have authority to invoke considerations of supposed public policy for the purpose of defeating private rights. We are well satisfied with these views and decisions. They settle the jurisprudence of the State on the important subject of nullities.

We are called upon to decree the nullity of a solemn act of last will, neither declared to be null, nor expressly prohibited, by law. The nullity alleged is purely one of form, as it is conceded that the testator, notwithstanding his blindness, might lawfully have made a nuncupative will. It is not, in legal intendment, an absolute nullity, since it may be cured by lapse of time, or by voluntary execution or ratification on the part of the heirs at law, and, if enforced, leaves them under a natural obligation to execute the will. Civil Code, arts. 3507, 1751. 7 Toullier, nos. 554 to 565. It is not asked by the foreign heirs, on the ground that the defendant is a person interposed. One of them has judicially recognised the validity of the will, and the others are silent. The nullity is sued for on behalf of the fisc, exclusively for fiscal purposes, on the assumption that its capacity to maintain the action is the same as that of the heirs.

We will examine the questions presented, on that hypothesis, premising here, that all the authorities cited in argument have reference to cases in which the heirs are parties.

STATE U. MARTIN. Art. 1456 of the Civil Code provides that, all persons may dispose, or receive, by donation inter vivos or mortis causa, except such as the law declares especially incapable. The Code further provides that an olographic testament, in order to be valid, must be entirely written, dated, and signed, by the hand of the testator, but is subject to no other formality. The will in this case was made in that form, and was admitted to probate on the sworn declarations of Messrs. Simon, Bullard, and Morphy, the colleagues of the testator on the bench of the late Supreme Court, that it was, in the words of the law, entirely written, dated, and signed by him, they having often seen him write and sign his name. All the formalities required for the validity of olographic wills were strictly complied with. It is therefore incumbent upon the plaintift to show affirmatively, that the nullity necessarily results from some legal provision in relation to olographic wills, or from the context of our legislation in relation to testaments generally, and the capacity of testators.

It is alleged that the testator must have had assistance of some kind, as it is in proof that he could not have written his will without it, and that the will was not, therefore, entirely written, dated, and signed by himself. He told one of the witnesses that he had written it with the assistance of a rule. We have no doubt it was so. The assistance of a rule, after he became blind, was not greater than that of a pair of spectacles would have been, while he could still see. A testator may avail himself of mechanical and other assistance in the making of his will, provided that assistance does not operate upon the substance of the testament. It is not pretended that it did in this instance. 5 Toullier, no. 47.

It is urged that, blind persons are expressly prohibited from making wills in the mystic form, and that if a will made in that form, and entirely written, dated, and signed by a blind testator, should be rejected as a mystic will, it is absurd to suppose that it could be established in the olographic form. There is nothing absurd in this. By an express provision of the Code, a will, not valid in the form intended, must be maintained, if it fulfills the requisites of either of the other forms. Civil Code, art. 1583. 12 Rob. 35. 6 Mart. N. S. 263.

The analogy drawn from the jurisprudence of France, that the incapacity of the blind to make an olographic will exists though not expressly declared, because the incapacity of blind persons to be witnesses to wills is admitted to exist there though not expressly declared, if it have any force with us makes against the pretensions of the plaintiff. By art. 1584 of the Code, the incapacity of blind persons to be witnesses to wills is expressly declared; but their incapacity to make an olographic will is nowhere to be found.

It is contended that the testator could not read what he had written, and had no means of ascertaining whether his intentions were correctly set down; and that the will does not, by itself, make the proof required, that the dispositions it purports to contain emanate from the testator and embody all his intentions. The law does not require proof that the testator read his olographic will, after writing it; and the fact that he did not, is not a cause of nullity. Moreover the representatives of the fisc forget that they have made two pleas, which are not entirely consistent with each other. For the purpose of terminating this litigation we have overlooked the irregularity of the pleadings; but they cannot take advantage of it, to deny, under the first plea, the fact of all others which they have taken most pains to prove under the second, that the will is in all respects such as the testator intended. The evidence adduced in support of one

branch of the case must necessarily have the effect to which it is entitled on the other; and the plaintiff is precluded from alleging that the intentions of the testator are left in doubt.

STATE V. MARTIS.

A vast number of authorities have been adduced. Those drawn from the spanish commentators, rest upon an express disposition of the Partidas, and can be of no assistance to us. None of the french authorities cited, expressly say that a blind man who can write cannot make an olographic will. Grenier, who goes farther than any other, argues the question as one of inconvenience and danger to the testator. The will, he says, may not be legible; frauds and deceits may be practised on the testator. These arguments would apply with equal force to testaments made in any form, and do not seem to question the right of the testator to resort to the olographic will. Duranton, vol. 9, no. 139. Delvincourt, vol. 2, note 12, p. 309. Beileux, Com. on art. 699 of Code Nap. Rogron, on arts. 977, 978, 979 C. N. Domat, des Testamens, titre 1, sec. 3, § 20. Merlin, Testament. Grenier, Donations, vol. 2, nes. 258, 281. Ricard, Traité des Donations, nos. 142, 1470, 1474. Dénizart, Collection, Testament, no. 160. Pothier, Traité des Donations Testamentaires, ch. 1, art. 4. Partida 6, l. 14, tit. 1. Gomez, Opera Omnia; 3 l. Toro, nos. 51, 52, p. 25. Molina, on the laws of Toro, nos. 69, 70, Madrid edition. Febrero Addicionado, vol. 1, part 1, chap. 1, no. 14.

The authorities cited by the defendant's counsel, on the other hand, unequivocally hold that, when a man can write, he is not incapacitated on account of blindness from making an olographic testament. Coin-Delisle's Commentaries on the Napoléon Code, p. 408, no. 4. Marcadé, vol. 4, p. 48, and page 7, no. 2; page 13, no. 5; page 332, no. 7. Vilarde, Dict. du Notariat, verbo, Aveugle. Vazeille, on Donations and Testamente, 498,

It is a singular fact that the researches of the able and diligent counsel who have taken part in the argument of this case, have only enabled them to find in the annals of jurisprudence the single precedent mentioned by Dénizart. The heirs of Madame de Pressigny, attacked an elographic will made by her after she became blind, on the ground taken by most of the authorities cited at bar, that a blind person, not being able to write, could not make testamentary dispositions in that form. But the executor maintained that the testatrix could write, although blind, because it was in proof that she had written, and that ab actual posse valet consequentia. It was further contended by him that, the provisions of the roman law and of the french ordinance of 1735, in relation to wills, having exclusive reference to nuncupative and mystic wills, had not limitatively subjected the blind to one or the other of those two forms. Dénizart, loco citato. The capacity was recognized and the will maintained.

The commentators, who combat this opinion, say that it was probably rendered upon peculiar and unknown circumstances, and this, we apprehend, is the key to the principle upon which the question turns. Coin-Delisle, in a passage cited by the appellee, says: "Il est de principe que les incapacités ne s'étendent pas. Aussi avons-nous dit ailleurs que les incapacités naturelles n'étaient pas de vraies incapacités, mais des impossibilités physiques, et que les questions sur ce genere de difficultés devaient être jugées suivant les circonstances." In England, a similar rule at this day prevails. Lovelase on Wills, nos. 264, 265, 15 Law Library.

In this view of the law we concur. Natural incapacities are not questions of law, but matters en pais, depending upon the peculiar circumstances of each case. Most of the commentators relied on by the appellees either say, or in-

STATE .

timate, that a blind man cannot make an olographic will, because he cannot write; but as no one doubts that the late able presiding judge of the Supreme Court of this State could write, that reason does not create an incapacity as to him. Should the conflicting authorities adduced have left us in doubt, that of the testator himself would have had great and deserved weight with us. But we are clearly of the opinion that the incapacity alleged is not established by law, nor to be implied from its provisions, and that it is a mere question of fact. The court of the first instance came to the same conclusion, but considered the physical impossibility established by the notorious helplessness of the testator. Public notoriety cannot outweigh, in our minds, the testimony of the three unimpeachable witnesses upon which the will was admitted to probate, and the uncontradicted evidence adduced on behalf of the plaintiff, that this instrument was in all respects as intended by the testator.

II. The other ground of nullity alleged by the appellee's counsel, whether called a tacit fidei-commissum, or by any other name, presents a question of fraud; and we agree with them that they are not limited in their proof to the rules of evidence applicable to ordinary cases; nor is it indispensable for them, under the rule of the civil law, to establish a pact between the testator and the defendant. It is sufficient that they prove by any description of direct, or circumstantial evidence, the intention of the testator that the legacy, or a part of it, should enure to his foreign heirs, coupled with the certainty that the instituted heir has discovered that intention, and has either executed, or intends to execute, it. We say, under the rule of the civil law, as it is believed the commen law never reaches secret intentions, not manifested by outward acts. That limitation is one of the great safeguards of freedom. It is the rule of our penal jurisprudence; and, whether it should not also be held to extend to issues of fraud, is a serious question, but a question which the opinion we have formed does not render it necessary to determine.

Taking the rale of the civil law as our guide, although the appellee is not limited by it in the nature of the evidence, that evidence, whatever it be, must make the allegations certain. In this, as in other cases, fraud is not to be presumed, however probable it may appear. Should the evidence leave the fact of fraud doubtful, says Merlin, "il faut que le juge ferme les yeux à toute conjecture purement humaine, pour s'en tenir aux simples décisions de la loi. Chardon, chap. 2, art. 1, nos. 16-20. Merlin, Répertoire, Fidéi-commis tacite.

The defendant was ordered to answer in open court, during the trial, certain interrogatories propounded by the plaintiff. The substance of his answer is, that there was no pact of understanding between him and his brother in relation to the transmission of any portion of the property bequeathed; that his brother gave him no instructions or directions whatever, but simply told him: "I make you my heir. Dispose of my fortune—it is yours." The last interrogatory was in these words: "State whether it is not your intention to transmit, give, or remit, now or at a future time, or at your death, the property left you, or part of the same, to the other heirs of the testator, or to some of them? If yea, state the names, and the amounts"—to which he answered: "I have, on that subject, no other intention but that of disposing of my fortune according to my will. I do not consider myself bound to make, at this moment, a public will. When I make it, I will follow my own intentions.

It is contended that he has not answered the last question propounded, and that the facts not answered must be taken for confessed. The answers are

STATE,

in french, and the manner in which they are made may depend upon the form adopted in the translation of the interrogatory. The declaration of the defendant that, his only intention is to follow his own will, and to make his testament according to its dictates, negatives the idea of a deliberate intention to dispose now of the property in favor of any determinate person. We cannot, therefore, consider the intention to transmit, as judicially admitted. But, if we did, the presumption which usually results from that intention, that the trapsmission is made in furtherance of the wishes of the testator, would be rebutted by the presumption resulting in this case from the relationship of the defendant and the heirs at law. He is the brother of the testator, unmarried, and much advanced in life. His only legal heirs are the foreign heirs of the testator; and, unless the intention of the latter, that he should transmit the property during his life, is clearly established, he may without danger avow his intention to make, in favor of his nephews and nieces, the disposition which the law will make for him, if he does not. Such a disposition is not only legal, but natural and proper.

Many witnesses have been examined to prove the alleged intention of the testator—from his declarations in private conversations; from the circumstance that he induced his brother to come and live with him; and from the great dislike he had of the law of 1842, which it is alleged he attempted to evade. Judge Merphy, one of his associates, states that, from his conversations, he was in doubt whether he sent for his brother to avoid paying the tax to the State, by making him really his universal legatee, or whether the universal disposition in the will was intended merely to evade the tax, without disinheriting the other heirs. Judge Simon says that, the impression on his mind was that Judge Martin did not absolutely intend to disinherit his foreign relatives, but knows no fact which can authorize that belief. Judge Bullard testifies that, when cases in which this tax was involved came before the Supreme Court, the testator expressed his opinion upon the law imposing it, but otherwise never spoke of it; nor does the witness believe he had the intention of evading it himself; when he spoke of it, it was a general question.

Had our minds been brought to the state of doubt in which Judge Morphy seems to be, it would be our duty to give the defendant the benefit of that doubt-But the evidence in the record has not produced that result; and the life and character of the testator, as exhibited in the jurisprudence of this State for the last thirty-four years satisfies us, as they did Judge Bullard, that he could not, and did not, intend to commit a fraud. It is shown that he was on good terms with his relations; but it is also shown that he repeatedly gave, as a reason for instituting his brother his universal legatee, that he was of the same tastes and habits as himself; that he would be "un autre lui-même," and take care of them, as he had been in the habit of doing. It is shown that he often complained of the act of 1842, and that he said it might easily be evaded; but it is in evidence also that, he was in the habit of saying that it was the duty of a man to leave his fortune to his relatives, and to those nearest to him; that he thought his niece, Blanche Amélie Martin, rich enough with 60,000 francs, and did not intend to give her any thing else. That, at one time, he requested Judge Simon to find for him a plantation worth \$100,000, which he wished to purchase, and give to two of his nephews, on condition that they would come to Louisiana, and settle here; and that, not long before his death, when Judge Simon told him he had not succeeded in finding a suitable place, he said he was glad of it;

STATE '

that his nephews refused to leave France, and should not have his money. It is in proof that he made similar statements to Judge Grima. It is true he was heard to say that the tax was unjust and foolish; he held it to be an exceptional, and therefore arbitrary, exaction, which those upon whom it operated were not without reasons to complain of. His saying that it might easily be evaded, under the circumstances in which it was said, cannot be taken as proof of his deliberate intention to evade it. Besides, Blanche Amélie, and the two nephews who refused to come to Louisiana, his only relatives in France, are the son and the daughter of one of his sisters, who lately died there. He may have been attached to his sister; but he could not have known her children at the time he made his will. Upon what principle of human action can it be explained that a man of great intellect, occupying the highest judicial station of the State, known to us all from our youth as having been a law unto himself, and who, whatever may have been his oddities and faults, justly prided himself on the purity of his life, should have died perpetrating a vile fraud, for the benefit of relatives unknown to him.

There is another view, far more consistent with his character. The love of independence was a passion with him; and the things of this earth, by which independence is secured, had a large share in his affections. His desire that his worldly goods should be kept together after his death, exhibited by the pain he felt at the mere suspicion that his brother would sell them and leave the country, far outweighed in his mind his attachment for those persons. We believe in the sincerity of his anguish. The last looks of the man of wealth, dying without posterity, are cast upon the property he has amassed; his last hope on earth is, that his succession may live and continue to represent him. The defendant in this case was the instrument selected to give life to that cherished fiction. We have no doubt of his being really universal legatee; nor that the intentions of the testator were, as he expressed them, that his brother should continue to be, in all respects, "un autre lui-méme."

We have examined the questions submitted to us, on the hypothesis that the rights of the fisc were the same as those of the heirs. We do not wish to be understood as conceding that proposition. The fisc has no right to annul a will for defects of form, although the heirs may; nor would it be good policy to do so, if the power existed. The policy of the State, as declared by its laws, recognises the validity of probated wills till they are set aside by the heirs, and limits the time within which this may be done. Under those laws the will had been ordered, in the name of the State, to be executed. The fisc could not, without an express warrant of law, interpose to prevent its execution, for the purposes of gain.

The act of 1842 provides that, foreign heirs, legatees, or donees, not domiciliated in this State, shall pay a tax of ten per cent on all sums, or on the value of all property, which they may actually receive from a succession, after deducting the debts due by it. No one is heir, legatee or donee against his will, or before his acceptance, express or implied. There is no legal rule in relation to heirship, analogous to that of pater est quem nuptice demonstrant in relation to filiation. Suppose that the other foreign heirs should affirm the validity of the will, as Blanche Amélie has done, or that they should all renounce the succession, it would, in either case, devolve upon the defendant, who is already the heir at law for one third, and the State would surely not be entitled to the tax. If it be said that the fisc is exposed to be defrauded, by the connivance of the

heirs with the legatee, the answer is, that this is a casus omissus, requiring special legislation. Fiscal laws are in the nature of penal statutes; they act upon things as they find them; and their operation should not be extended to cases not contemplated by their framers. United States v. Eighty-four Boxes Sugar, 7 Peters, 453.

But should the right of the fisc to interfere, before the acceptance of the heirs and their judicial recognition in that capacity, be nothing more than doubtful, non putamus delinquere eum, qui in dubiis questionibus contrà fiscum facile respondit. L. 10, Digest, De Jure Fisci.

The representative of the State has faithfully discharged, what, under the information he had received, he conceived to be an official duty. Upon us devolves the more grateful task to determine that he was misled by that information, and that the name of François Xavier Martin stands unsullied by fraud.

It is ordered that the judgment rendered in this case in favor of the State be reversed, and that there be judgment for the defendant, with costs in both courts. STATE W.



ROBIN v. FLOWER.

Where in an hypothecary action against a third possessor of property mortgaged to secure the payment of a note, defendant expressly denies that any amicable demand was made of the original debtors thirty days before suit as required by law, the testimony of a witness that he went to the residence of the original debtors for the purpose of demanding payment, that he found the house closed and no one there, and that he enquired for, but could not find either of them, is not evidence of due diligence, and cannot excuse the want of amicable demand. Per Curiam: Nothing shows that the debtors were not at their house the next day, ner that they could not have been found in the neighborhood.

A PPEAL from the Court of Probates of West Feliciana, Weems, J. Phillips, for the appellant. No counsel appeared for the defendant. The judgment of the court was pronounced by

Rost, J. This is an hypothecary action against a third possessor. The petition alleges that payment of the note has been demanded amicably from the original debtors, more than thirty days previous to the institution of the suit. That allegation is expressly denied in the answer.

All the evidence adduced in support of it is the testimony of Stevens, who deposes that he went to the residence of the original debtors, in September, 1840, for the purpose of demanding payment; that he found the house closed, and no person there; that he made enquiry for them, but could not find either of them.

The diligence used in the search of the original debtors is insufficient; nothing shows that they were not at their house the next day, or that they could not have been found in the neighborhood at any subsequent time. Nothing is shown which can dispense the plaintiff from making the amicable demand required by law; and until it is made he cannot maintain his action.

It is therefore ordered that the judgment be reversed, and the plaintiff's petition dismissed, with costs in both courts.

Morris et al. v. Kenton.

To make a vendor liable under his warranty, the purchaser must be evicted by some lawful authority. Per Guriam: The latter must maintain and vindicate his possession against intrusion, or any force but that of the law itself.

A PPEAL from the Parish Court of New Orleans, Maurian, J. Durant, for the plaintiffs. Preston, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. By an instrument under private signature, dated the 3d of July, 1840, at New Orleans, the defendant sold the plaintiffs a tract of land of one arpent front on the Pass of Biloxi, in Hancock county, Mississippi, for the sum of \$1000 in each, and their three notes of \$500 each, payable at one, two, and three years from the date of the sale. This suit is brought for the recovery back of the purchase money and notes, and a further sum for an alleged eviction from the premises under a writ issued from the Circuit Court of Harrison county, State aforesaid, in a certain judgment rendered in a certain action of ejectment against one Elizabeth Curtis, at the suit of Doe ex dem. Holley, and Dorsite Richards. There was judgment for the plaintiffs, and the defendant has appealed.

The only party defendant to the action of ejectment appears to have been Elizabeth Curtis. It does not appear that either the plaintiffs, or the defendant, were parties to it, and there is no evidence of any eviction by process of law of the plaintiffs from the land which the defendant sold, and the title to which he warranted:

To make a vendor liable on his warranty, we understand, that the purchaser must be evicted by some lawful authority. Cockerell v. Smith, 1 Ann. Rep. 1. We have nothing before us which shows that any judgment of eviction has been pronounced against them, or how their title is affected by the judgment against Elizabeth Curtis, whom we should judge to be a nominal party. She was the vendor to Kenton, the defendant, but had neither the ownership, nor was she in possession of the property on which the judgment is said to have effect. It was incumbent on the plaintiffs to maintain and vindicate their possession against intrusion, and any force but that of the law itself, for which alone the defendant is responsible. Pothier, Contrat de Vente, § 83. Mackeldey, Druit Romain, 370.

The judgment appealed from is therefore reversed, and judgment rendered for the defendant, with costs in both courts.

CHAMPOMIER v. WASHINGTON.

To relieve an appellant from the consequences of his omission to file the record of appeal in time, on the ground that it was not filed through the mistake or misconduct of the clerk, a strong and clear case must be made out. The testimony of the counsel for the appellant that he was under the impression that the record had been filed, and that he had given to

the clerk the name of a person, as surety for the costs, with whom the clerk was satisfied, in CHAMPOMIER the absence of any proof of the waiver by the clerk of a written bond for the costs, is not sufficient proof of a compliance by the appellant with the rule of court as to security for Washington. costs, or of a violation of duty on the part of the clerk in omitting to file the appeal.

PPEAL from the Parish Court of New Orleans, Maurian, J. Benjamin, A for the plaintiff. Peyton and I. W. Smith, for the appellant. The judgment of the court was pronounced by

King, J. The order of appeal in this case made the appeal returnable on the first monday of May, 1845. The transcript was not filed until November 30, 1846. On the 22d May, 1846, the plaintiff obtained a certificate that the record had not been filed, which he filed in the court below, and obtained execution. The appellant has endeavored to relieve himself from the consequences of the omission to file the record, by the testimony of his counsel as to what occurred between himself and the clerk of the Supreme Court, now deceased. It appears by this testimony that the counsel was under the impression that the transcript had been filed; but, on the other hand, the conduct of the clerk is a tacit proof of his unwillingness to file it. The whole difficulty is solved by supposing that the clerk waited until security for costs should be furnished in writing, as provided by the rule of the court, which was not done. It does not appear that the clerk expressly waived a written bond for costs, though satisfied with the name proposed. See rule 13th April, 1814. A very strong and clear case should be made out to authorise us to relieve an appellant from the consequences of his omission to file the record in time. The records of the court must speak for themselves; and, if we are permitted to look behind them, and to correct them, the mistake of the officer must be established beyond all possibility of doubt. The clerk in question is dead, and we cannot say, upon the evidence adduced, that he violated his oath of office in omitting to file this transcript. By reason of the omission to file the record in time, and the taking out of a certificate to that effect by the appellee, the appeal is in law abandoned. C. P. 594.

Besides these considerations we must add, that our power to correct the records of the former Supreme Court, is, to say the least, very questionable.

The case is not before us; and the application made on the 1st May, 1847, for an order directing the clerk to make an endorsement of filing nunc pro tunc, and for other relief as set forth in said application, is dismissed.

JACKSON et al. v. FERGUSON.

One who has paid for services rendered at a higher rate than that stipulated in the contract between the parties, cannot recover the amount so overpaid, where the original contract was a hard one, and the amount paid not more than a fair compensation for the services, and cannot be considered as having been paid in error. C. C. 2280, 2281.

PPEAL from the Commercial Court of New Orleans, Watts, J. G. B. Duncan, for the plaintiffs. Elwyn, for the defendants.

The judgment of the court was pronounced by

SLIDELL, J.* The judge of the Commercial Court, in our opinion, took a

^{*} Eusris, C. J., absent.

JACKSON E. FERGUSON. practical and just view of the rights of these parties. The contract as originally made, was a hard one. The plaintiffs paid for the services rendered by the defendant not according to the contract, but at a higher rate, which was not an unfair one. The judge below was of opinion that, under the testimony in the cause, these payments could not be considered as having been made in error; and in this view we concur. Civil Code, arts. 2280, 2281.

It is said that, even if the payments are to be considered as not made in error, and must stand as payments not made under the original contract, but according to the fair and reasonable value of the services, yet that the defendant has been overpaid according to his own bills as rendered. The testimony is somewhat loose; but so far as we have been able to make the calculations, we find an excess of twenty dollars of payments over bills rendered—a very trifling discrepancy, which has perhaps arisen from a charge for costs being embodied, without discriminating, in the amount of what was paid to defendant upon a judgment in the city court.

We are unable to say that there is any error in the judgment of the court below,

Judgment affirmed,

Sophie v. Duplessis et al.

The decree of a Probate Court ordering a will to be executed, does not amount to a judgment binding on those who are not parties to it; and when the will is offered as the title in virtue of which property is claimed or withheld, its validity may be enquired into. The admission of a will to probate, and the order for its execution, are mere preliminary proceedings, necessary for the administration of the estate. Per Curiam: Nor are we prepared to say that the mere order of a judge for the execution of a will, has the effect of a judgment binding on those at whose instance it was made, so far as to conclude them from subsequently contesting the validity of the will, unless, at the time of the probate, its validity was expressly put at issue.

The only requisites for the validity of a nuncupative testament under private signature are prescribed by arts. 1574, 1575 of the Civil Code. It is not necessary to the validity of such a testament, that it should be dated, or should mention the place at which it was executed. The date and place of execution may be shown by evidence at the time of its probate.

It is not necessary that a nuncupative will under private signature should exhibit, on its face, evidence that all the formalities essential to its validity have been complied with. It is unnecessary to mention in such a will the fulfillment of any formalities; it is sufficient to establish, when the will is offered for probate, by evidence dehors the instrument, that the formalities required by law have been observed. It is not even necessary that the names, or places of residence of the witnesses to such a will should appear in the instrument.

Where a party claims her freedom under the provisions of a will, she must show that it has been properly admitted to probate, and its execution legally ordered, on proof of its having been made in the form and manner required by law. Where the evidence shows that the will was admitted to probate on insufficient proof, but there is no proof that it is defective from the omission, at the time of making it, of any formality essential to its validity, there will be only a judgment of nonsuit, as the plaintiff may still be able to supply the defect of proof.

In a suit for freedom against the heirs of a succession, plaintiff offered in evidence as an acknowledgement of her right to recover, an act of partition, signed by some of the defendants, but not by all, and which was not signed by the parish judge. The only clauses in the act, intended for the benefit of the plaintiff, purported to be donations made to her of certain undivided interests in the succession, for the purpose of en-

abling her to acquire her and her children's freedom: Held, that the act being invalid as a donation (C. C. 1523), even if in other respects binding on the parties who had signed it, cannot conclude the defendants.

SOPHIE DUPLESSIE.

PPEAL from the District Court of Plaquemines, Rousseau, J. The facts of this case are stated in the opinion infrd.

Lombard, for the plaintiff. The order for the execution of a will is a judgment which, though rendered on insufficient evidence, must have full force until reversed. Legendre v. McDonogh, 6 Mart. N. S. 514. Fulton v. Welsh, 7 Mart. N. S. 257. Clark v. Barham, 4 Mart. N. S. 411. Such a judgment cannot be attacked collaterrally. Psyché v. Paradol, 6 La. 377. Broussard v. Bernard, 7 La. 223. Kilgour v. Ratliff, 2 lb. N. S. 292.

Ross, for the appellants. The act of partition was never perfected. It can have no effect as a donation. C. C. 184. Bullard & Curry's Dig. pp. 428 to 430, nos. 4, 8, 14. A date is essential to a nuncupative will, because the precise time at which the testator makes his will is material. He must be of sound mind. Arts. 1461, 1456. Pothier, Testaments, art. 1, ch. 11, p. 531. The place is essential in nuncupative testaments, because it is material to know whether the witnesses reside in the place where the will is made. The place is the parish. Arts. 1578, 1574. Where it does not appear that the witnesses reside in the parish, it is presumed they reside out of it. In this case, it does not appear that a greater number of witnesses could not be had. Art. 1576. The will is signed by five witnesses, and their residence does not appear; the judge reports, that the four first reside in the parish of Plaquemines, and the last in the city of New Orleans. It does not appear, however, that that was their actual residence at the time the will was made. In which parish was the will made? The want of the formalities to which testaments are subject, renders a will null and void. Art. 1588. Benj. & Slidell's Dig, p. 194, nos. 2, 30, 42, 44. "The object of these ceremonies is to prevent impositions being practised on men in their last moments." 5 La. 396.

The admission of a will to probate and the order for its execution are only preliminary proceedings necessary for the administration of the estate, and do not amount to a judgment binding on those not parties to them. 10 Rob. 196. See also 1 Rob. 196. 9 Mart. 90. 12 lb. 263, 503. 3 Mart. N. S. 376. 11 12 Ib. 214. The case in 18 La. 552, and that in 5 La. 387-395, La. 385. which declares that "no other tribunal can examine into the correctness of the proceeding by which a will is probated" than the one by which it was admitted to probate, relate to cases where the "genuineness of the execution of the will" is contested. See 9 Mart. 90, before cited. 4 Mart. N. S. 413. 3 Ib. N. S.

The judgment of the court was pronounced by

King, J.* The plaintiff claims her liberty in virtue of a nuncupative testament under private signature, made by her former owner, Martin Duplessis, a free person of color. The defendants contend that the will is null: 1st. Because it is without date. 2dly. Because it makes no mention of the place where it was received. 3dly. Because the place of residence of the witnesses is not stated in the instrument. There was a judgment for the plaintiff in the court below, and the defendants have appealed.

The will was admitted to probate in the parish of Plaquemines, where the testator died, and upon proof being made, which was satisfactory to the judge, its execution was ordered. The plaintiff contends that this judgment, standing as it does unreversed, cannot be attached collaterally, and that the testament can only be declared null in a direct action. It has been repeatedly held by the late Supreme Court, and may be considered a well settled point, that the decree of the Probate Court ordering a will to be executed, does not amount to a judgment binding upon those who are not parties to it; and that, notwithstanding

^{*} Eusrus, C. J., absent.

SOPHIE .V. DUPLESSIS. such order, when the will is offered as the title in virtue of which property is claimed or withheld, its validity may be enquired into. In the case of O'Donegan v. Knox, 11 La. 388, it was held that admitting the will to probate and granting an order for its execution, were only preliminary proceedings, necessary for the administration of the estate, and not a judgment binding on those who were not partiest to them. The principle was subsequently reiterated in the cases of Robert v. Allier's agent, 17 La. p. 14; Rachal v. Rachal, 1 Rob. 116; and Succession of Duplessis, 10 Rob. 196.

We are not prepared to say that the mere order of the judge for the execution of a will has the effect of a judgment, binding even upon those at whose instance it was made, so far as to conclude them from subsequently contesting the validity of the will, unless upon the probate the question of its validity was expressly put at issue. It consequently becomes necessary to enquire into the alleged nullities.

The will commences: "Aujourd'hui le vingt-trois de l'année mille huit cent trente trois, sur son habitation, Martin Duplessis desirant," &c. No other date or place of making the will is mentioned in the instrument, than those stated in this clause. It is contended that the omissions constitute fatal defects. The only requisites for the validity of a nuncupative testament under private signature, are prescribed in articles 1574 and 1575 of the Code, and among these the date and place where it is passed are not enumerated. It is expressly declared that such testaments are subject to no other formality than those declared in those articles; and courts can require the observance of no others. Reasons have been suggested why it is important to fix the date of the testament, and place where it was received. The facts may be shown by evidence on the probate of the will. The principle invoked by the defendants, that a will must exhibit, upon its face, the evidence that all the formalities required for its validity have been fulfilled, has no application to nuncupative testaments under private signature. Such testaments are not required to make full proof of themselves, and the observance of formalities which do not appear upon the face of the will, may be shown by testimony dehors the instrument. In the case of Falkner v. Friend, the late Supreme Court held that in nuncupative wills under private signature it is not necessary to mention the fulfilment of any formalities; that it is sufficient. if, when the will is probated, they appear to have been observed; and such, we think, is the spirit of the Code. 1 Rob. 48.

At is true that it is necessary that a will of this kind should appear to have been received in the presence of five witnesses; but it is not indispensable that their names or residences should be stated in the act. In the case of Bouthemy v. Dreux, 12 Mart. 639, decided under dispositions of the old Code similar to those of the new, it was held not to be necessary, in a will of this kind, that their names should appear in the instrument; and in the case of Falkner v. Friend, the objection was formally made, that the will did not appear to have been executed in the presence of five witnesses residing in the place, and the omission was held to be immaterial. Proof of the place of residence on the probate of the will, was deemed sufficient.

Although the evidence before us is not such as to show that the will is defective, the plaintiff can only avail herself of it as the foundation of her claim to her liberty, upon adducing proof that it has been admitted to probate, and that its execution has been legally ordered. This, in our opinion, she has failed to do. The five witnesses who attested the will, appeared before the probate

SOPHIE V.

judge. Four of them are stated in the procès-verbal and decree to be of the parish of Plaquemines, and the fifth of the city of New Orleans. It is essential to the validity of the nuncupative will, under private signature, that it be executed in presence of five witnesses residing in the place where the will is received, or of seven residing out of the place. C. C. 1574. An exception is established in regard to wills executed in the country, for whose validity it is sufficient if they be received in the presence of three witnesses residing out of the place, provided a greater number cannot be had. C. C. art. 1576.

The residences of none of the witnesses at the time when they attested the will in question, has been shown. It was indispensable that this fact should have appeared, either upon the face of the instrument or by the testimony at the probate, that the judge might determine whether the will was properly attested. The evidence adduced before the judge has not established the execution of the testament with the forms required for the validity of a will of this kind, passed either in a town or in the country, and was clearly insufficient to authorise the order for its execution.

The plaintiff's rights, however, have not been concluded by this failure to administer the necessary proofs, particularly in a proceeding to which she was no party. It has not been shown that any formality has been omitted, essential to the validity of the will; and, in the absence of such proof, we are not authorised to pronounce its nullity. The plaintiff may still be able to supply the present defects of proof, by showing that the witnesses all resided in the parish in which the will was made; or, if they did not, that a greater number could not be procured by the exercise of reasonable diligence. Until proof is administered of every fact necessary to establish the validity of the will, its execution can not legally be ordered; and until such order, the plaintiff can not avail herself of the will as a title to her freedom.

The plaintiff further contends that, the defendants have acknowledged her right to her freedom, in an act of partition attempted to be made by the defendants. That act was never perfected. It was signed by several of the defendants, but not by the others. It was never signed by the parish judge, and wants the authenticity of a public act. The only clauses in that instrument, intended for the benefit of the plaintiff, purport to be donations made to her and several of her children, of certain undivided interests in the succession of Martin Duplessis, for the purpose of enabling them to acquire their freedom. As a donation, the act is clearly invalid, even if it have any binding force whatever, in other respects, between such of the parties as have signed it. C. C. art. 1523.

The only judgment that can be rendered in the present state of the evidence, is one of non-suit. It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that there be judgment against the plaintiff as in case of non-suit, she paying the costs of both courts.

DUNBAR v. HIS CREDITORS.

A safe of community property surrendered by a surviving husband to his creditors, made by order of court without the advice of a family-meeting, is irregular, so far as the minor heirs of the wife are concerned; but as this irregularity may be cured, and the sale be ratified under art. 1788 of the Civil Code, by afterwards obtaining the ratification of the sale by a family-meeting, the court may make a ratification of the sale by the heirs the condition of allowing them relief on other points.

A PPEAL from the District Court of West Feliciana, Boyle, J. Paterson, Ratliff and Morgan, for the appellants. Bowman and Lyons, for other opponents. No counsel appeared for the other parties.

The judgment of the court was pronounced by

Rost, J.* The children of the insolvent, Ananias Dunbar, have appealed from a judgment ordering the syndies to place them on the tableau of distribution for the sum of \$13,140 31, and interest, to be paid by preference over all other mortgages, this amount being, in the opinion of the court, the nett proceeds of one half of the property of the community at the time of their mother's death, and to which they are entitled as her heirs. The appellees ask that the judgment be amended in their favor.

Before entering into an examination of the case, it is necessary to state that, nearly all the property surrendered by the insolvent was community property, and that it was sold by the syndies without making the appellants parties to the proceedings. After the surrender, the under tutor of the appellants was duly authorised, on the advice of a family-meeting, to institute, and did accordingly institute, legal proceedings to recover, on behalf of the minors, the undivided half of the community preperty. On an exception taken by the syndics to this proceeding, the action was cumulated with the concurso. The syndics subsequently filed their tableau of distribution, and the minors filed their opposition, setting out their claims, and praying that, "they be decreed to have a superior mortgage on all the real estate and slaves of the community, and that they be placed on the tableau filed by the syndics, to be paid out of the proceeds of the sale of the land and slaves made by the said syndics, by preference to all other creditors of the insolvent."

The record in this case being very voluminous, and the ascertainment of the state of the accounts between the insolvent and the community having been rendered intricate and difficult, in consequence of the destruction of the books of the insolvent by fire, the court, for the furtherance of public business, and with the consent of counsel, referred it to experts, so far as it involves the settlement of the affairs of the community. The experts appointed have conscientiously discharged their duty, and made a report, according to which the sum due the minors would appear to be \$8004 93\frac{1}{2}, reserving their claims to certain property of the community, alienated by their father after its dissolution and before his failure. The appellants have opposed this report on various grounds, which we will proceed to notice.

I. It is alleged that the experts erred, in placing on the account the debts due to Johnson and Tingley, and to several others whose names are mentioned in the statement marked B, annexed to their report, on the ground that not one of those claims was either placed on the bilan by the insolvent, or on the tableau of distribution by the syndics; that these parties have never presented their claims to the syndics for allowance; that such of the claims as fell due in 1834 and 1835, were prescribed against prior to the surrender made by the insolvent, and are all now barred by prescription.

We do not think there is error in this. The 'existence of the debts, at the

^{*} Eustis. C. J., absent.

DUNBAR 9. CREDITORS.

time of the dissolution of the community in 1833, is proved beyond all doubt. It is shown that the insolvent had, at that time, large means under his control, and that he was prompt in the payment of debts due by him, until serious losses and the general derangement of the monetary affairs of the country, compelled him to make a surrender of his property to his creditors, in May, 1840. His schedule centains a detailed account of his indebtedness, and he stated under oath that it was in that respect faithful and correct. None of the claims opposed are found in the schedule, and those who hold them, among whom is the Canal and Banking Company, have never presented them to the syndics. Were the books of the insolvent in existence, we are are satisfied that they would show that those claims had been paid, and as they are not in existence the evidence adduced makes out a prima facie case of payment. We cannot go upon the presumption that the Canal and Banking Company, and the other creditors, have abandoned their claims; nemo facile presumitur donare. They must be considered as paid, and no provision is to be made for them in the tableau of distribution.

II. As to the debt due the estate of Linton: It existed at the dissolution of the community, and whether or not it has since been novated is immaterial. Whether novated or paid by Dunbar, the community is to be charged with the amount due Linton at its dissolution. That amount is proved by the account of Linton, and the testimony of Wm. E. Thompson. The judgment obtained by Mrs. Linton, as administratrix of her husband's estate, on mortgage notes, includes the sum of \$6661 13, this sum being the first item of the account rendered a few days before the death of Mrs. Dunbar.

III. The appellants complain that the sum of \$3400, charged as expenses of the plantation for the year 1833, is much too large, and should be reduced to \$2000. There is very little evidence in the record to guide us in relation to this item. Considering the number of slaves engaged on the plantation and the crop made, we are disposed to think the sum allowed for expenses as rather too high, and we will reduce it to \$2700.

IV, V, VI. There is nothing in the fourth and fifth objections. But the sixth appears to be well founded, as to the manner in which the interest is calculated in the report. It would have been more regular to have charge the three several sums paid by *Dunbar* as interest, at the time he paid the instalments, and to add to this the instalments paid, the interest thereon, and the balance due on the 6th May, 1837, to wit; \$5,312 50, with interest from that date. This mode of calculating interest makes a difference of \$234 32, in favor of the appellants. There is also an error in the calculation of interest on the *Linton* debt, instead of \$2,432 60, it should be \$2,220 46. The difference of \$212 14 must be allowed to the appellants.

These changes in the report of the experts will make the claim of the minors amount to the sum of \$9,151 39½, without prejudice to their rights in the property of the community alienated by their father after its dissolution. Those alienations cannot be made valid, so far as they embrace the rights of the minors; the property which they convey has never come into the hands of the syndics, and the claims of the minors in relation to it cannot be settled in the concurso.

The property surrendered was sold at public auction, and the sale of that portion of it which belonged to the community not having been made by the order of the judge rendered on the advice of a family meeting, was irregular, so far DUKBAR U. CREDITORA. as the minors are concerned. But under the spirit of art. 1788 of the Civil Code, the irregularity may be cured, and the sale ratified, by resorting now to a similar proceeding; and for the preservation of the rights of the purchasers, we will require this ratification before the appellants are authorised to receive the sum allowed them by this decree.

It is, therefore, ordered that the judgment of the court below be amended: That the appellants be placed on the tableau of distribution for the sum of \$9,151 39\frac{1}{2}, with legal interest from the 21st December, 1844, till paid, without prejudice to their rights in the property of the community which existed between their mother and the insolvent, alienated by the latter after her death, and before his failure: That the judgment as amended be affirmed; and that the sum allowed the appellants be paid to them by preference over all other mortgage or ordinary claims, on their producing to the syndics a decree of court, rendered on the advice of a family meeting, ratifying and confirming the sale of the community property made by the syndics, as authorised by art. 1788 of the Civil Code. It is further ordered, that the costs of this appeal be paid by the appellants.

Succession of Chew.

It is not necessary that the stat. of 11 March, 1830, relative to the giving of special mortgages to secure the rights of minors, should be read to the under-tutor and members of a family-meeting convoked, at the instance of the tutor, for the purpose of advising as to the propriety of selling the interest of the minors in property belonging to himself as surviving partner of the community, and to his children.

RULE to show cause why a mandamus should not be issued to the judge of the Second District Court of New Orleans, Canon, J. G. B. Duncan, for the rule. The judgment of the court was pronounced by

SLIDELL, J.* Beverly Chew, as tutor of his minor children, obtained, under order of court, the session of a family-meeting to advise upon the propriety of selling the interest of said minors in certain property belonging to himself, as surviving partner in community, and his children. A duly certified copy of the proceedings of the family-meeting was filed, and a petition presented for its homologation, which the judge refused to grant because, in the procesverbal of the proceedings, the notary does not declare that he had read to the members of the family-meeting and the under-tutor, the statute of 11 March, 1830, pursuant to the 7th section thereof, which declares: "That it is hereby made the duty of all public officers before whom family-meetings shall be called, to read this act to them and to the under-tutors; and any officer failing to perform this duty shall be responsible for any loss arising from such neglect, either to the under-tutor or to the minor or minors." The statute in question treats of the subject of giving special mortgages to secure the rights of minors, and is in our opinion irrelevant to the present case.

It is therefore ordered that a peremptory mandamus issue as prayed for in this case, commanding the judge of the Second District Court of New Orleans, to sign an order homologating the proceedings of the family-meeting held before David L. McKay, on the 27th of April, 1847, in the matter of the succession of the wife of Beverly Chew, and to proceed therein in other respects according to law.

^{*} Eustis, C. J., absent.

LITTLE et al. v. Commissioners of the Consolidated Association.

Whether a decree, from which a suspensive appeal is prayed for, be a new judgment changing the legal rights of the parties as fixed by a former judgment, or be merely declaratory of the legal effect of the first judgment, is a question which cannot be determined on a rule to show cause why a mandamus should not be directed to the inferior court commanding it to allow an appeal; it can only be determined when the case comes up on the appeal.

 $\mathbf{R}^{\mathrm{ULE}}$ to show cause why a *mandamus* should not be issued commanding the judge of the Fifth District Court of New Orleans to allow a suspensive The managers of the Consolidated Association of the Planters of Louisiana allege: That on the 1st of March last a judgment was rendered against them in the Fifth District Court of New Orleans, in favor of Jacob Little & Co., in the following words: "It is ordered that the said Jacob Little & Co. recover of the defendants, the Managers of the Consolidated Association of the Planters of Louisiana, the sum of \$5,000, with legal interest from the 3d October, 1846, till paid and costs; to be satisfied and paid by the said managers in the course of administration of the affairs of the Consolidated Association of the Planters of Louisiana; and that said plaintiffs do furnish satisfactory personal security according to art. 2258 of the Civil Code of Louisianna." That from this judgment the petitioners took a devolutive appeal. That subsequently, on the 7th May following, the plaintiffs, Jacob Little & Co., took a rule on petitioners to show cause why the bond filed by them should not be approved, and petitioners should not allow the judgment to be received in payment of any claims of said bank as provided by law; whereupon a final judgment was rendered on the 27th of said month of May, ordering that the objections filed to the said rule be overruled, and that the bond filed by said plaintiffs be approved, and the defendants in said rule allow the said judgment to be received in payment of any of their claims, as provided by law. Petitioners further show that considering said judgment might cause them an irreparable injury, they applied to the judge of the court for a suspensive appeal therefrom, but that the said judge declined granting said appeal.

Wherefore they pray, that a writ of mandamus may issue, directed to the said judge, commanding him to grant said appeal.

Labarre, for the rule.

Buchanan, Judge of the Fifth District Court, showed cause against the rule: That the petitioners have never applied for a suspensive appeal from the judgment rendered on the 1st of March: That on the 7th of May the plaintiffs took a rule on the petitioners to show cause why the bond filed should not be received, and why the latter should not receive the said judgment in payment of any claim of said Association pro lanto, as provided by law: That subsequently to the rule taken by the petitioners in the District Court on the 7th of May, they obtained a devolutive appeal from that judgment: That by an act of 26th March, 1842 (Sess. Acts, p. 454), the legislature required the banks, in course of liquidation, to receive their obligations in payment of notes and obligations due to them: That the petitioners not having taken a suspensive appeal from the judgment of the 1st March, were bound to settle it in the course of liquidation, without delay: That the order made on the rule in the District Court was a modification of the form of execution of said judgment; and that Little et al. are entitled to the benefit of it, as they would have been to an execution under

LITTLE an order of consolidated titled.

an ordinary judgment: That to allow the mandamus to be issued will be, in effect, to grant the petitioners a suspensive appeal, to which they are not entitled.

The judgment of the court was pronounced by

SLIDELL, J.* The decree in this case is a final decree. Whether in reality it is a new decree, changing the legal rights of the parties as established by the first judgment in the cause, or whether it is merely declaratory of the legal effect of that judgment, is a question which we do not think we have a right to determine on a rule for a mandamus, and can only consider when the case comes before us on the appeal. We think the defendants entitled to a suspensive appeal, and the mandamus is therefore granted.

It is ordered that a peremptory mandamus issue in this case, commanding the Hon. A. M. Buchannan, judge of the Fifth District Court of New Orleans, to grant and sign an order for a suspensive appeal, as applied for by the defendants in this case.

THE STATE v. DUBORD.

Sec. 3 of the stat. of 6 March, 1819, punishes three distinct offences, the stealing—the inveigling—and the carrying away, of a slave, each of which subjects the offender to the same punishment; and where, on an indictment under this statute, the accused is charged with the three offences, and a general verdict of guilty is found against him, and no objection is made to the sufficiency of the indictment as to two of the offences, the verdict will not be disturbed.

The provision of sec. 3 of the stat. of 6 March, 1819, as to the stealing of a slave, creates a new offence, different from larceny; and it is not necessary, in indictments under it, to aver the value of the slave, or to use the technical terms descriptive of larceny. The indictment must be governed by the rules applicable to offences created by statute.

A verdict will not be disturbed on the ground of a variance between the names of the jurors who were sworn and tried the case, and those on the list furnished to the accused before the trial. An objection to a juror that his name was not on the list of jurors delivered to the accused before the trial, should have been made when he was presented to be sworn.

A PPEAL from the First District Court of New Orleans, McHenry, J.

1. Elmore, Attorney General, for the State. The defendant claims from this court a reversal of the judgment and proceedings below, upon the following assignment of errors: 1st. That the indictment does not set forth the value of the slave alleged to have been stolen. 2d. That J. N. Otto, S. Golding, L. N. Jahan and J. L. Krabbe, were sworn and tried the case, whereas it appears from the sheriff's list of jurors, that J. M. Otto, J. Golding, L. N. Johan, J. F. Krabbe, were the jurors summoned and drawn to serve during that term.

The first objection is based on the assumption that the offence for which the defendant was tried is a larceny. It is evident from the whole context of the statute of 1819, that the offence at which it is levelled is not the stealing of slaves merely, but all other means or devices by which "the owner is deprived of the use and benefit of his slave." The gist of the offence is "the depriving the owner of the use and benefit of his slave." This may be done by stealing the slave, or by inveigling him away without the animus furandi. And yet the offender would undoubtedly be amenable to the penalties of this statute; because the offence consists in "depriving the owner of the use and benefit of his slave," and not in the manner or mode by which he is so deprived of that use and benefit. The offence charged is not a larceny, and cannot be governed

^{*} Eusris, C. J., absent.

DUBORD.

by the same rules. In the case of the State v. H. Miles, 2 Nott & McCord 2, Gantt, J., dissenting from the majority on another point in the case, says arguendo "that the law of larceny has nothing to do with the case." The judge who delivered the opinion of the majority in that case says: "The act declares that any person who shall be convicted of stealing a slave shall be adjudged guilty of felony and suffer death without benefit of clergy; and as the penalty is annexed to the specific offence, the value of the property is immaterial. Perhaps it is questionable whether it is necessary to lay the property of any value, and, as has been remarked by one of my brethren, the legislature may make the stealing of a pin a capital felony." 't he statute of South Carolina, as recited in the opinion of the judges, is in the very words of our own, with the exception of the penalty. This interpretation of the act of 1819, is strengthened by the practice of all the prosecuting officers of the State since

the passage of the act.

As to the second ground; No objection is made to the personal qualifications of the jurors who tried the cause. It is not pretended that they are not the jurors summoned by the sheriff to serve during the term: let it be remembered also that when they were presented to the prisoner, and he was asked whether he desired to be tried by them, he accepted them. They are, then, as the record shows, jurors of his own choice. His application to this court is therefore based upon the mere naked variance between the clerk's list of jurors drawn and selected, and the entry in the minutes of the jurors who actually served in the case. It is idle to say that they are not the same persons: the slight discrepancy in their names will not raise the presumption against the fact that they were summoned by the sheriff at the place indicated as their residence in the voters' list from which their names are taken. In the earlier stages of the common law almost any defect in the record, or any discrepancy between the different parts of it, was sufficient to sustain a writ of The reason given in the books for this great nicety is a singular one. "It, the writ of error, was never granted, except when the king, from justice, when there was really error, or from favor when there was no error, was willing the judgment should be reversed. After writ of error granted, the attorney general never made any opposition; because, either he had certified that there was error, and then he could not argue agaist his own certificate; or the crown meant to show favor, and then he had orders not to oppose. The King, who alone was concerned as prosecutor, and who had the absolute power of pardon, having thus expressed his willingness that the judgment should be reversed, the Court of King's Bench reversed it upon very slight and trivial objections, which could not have prevailed if any opposition had been made, or if the precedent had been of any consequence. The form of the reversal "for errors assigned and other errors appearing upon the record", delivered them from the necessity of specifying any." 1 Chitty, 747, 748. But when in the reign of Queen Ann, it was decided that a writ of error was due ex debito justitiæ, this nice and technical jurisprudence naturally changed, and a substantial error would alone give rise to a reversal of the judgment. 1 Chitty, 752. Courts of justice have gradually abandoned these niceties to look to the real interests of justice. As a proof of this, it may be seen by an examination of the cases, that these defects are taken advantage of by motion for a new trial. Some equitable and subtantial ground is sought for, behind the error, for a new trial, and little or no reliance is placed upon the assignment of the error. the State v. O'Driscall, (2 Bay, 153,) the defect was apparent on the face of the record; the prisoner moved for a new trial, which was refused, and yet he does not take out a writ of error. In the King v. Hunt, 6 E. R. 475, a case in which a special jury had been struck, two of the special jurymen were not summoned: this omission appeared on the record. A new trial was prayed for and refused, and yet the prisioner does not take out a writ of error. same observation may be made of the case of Hill v. Yates, (12 East. 229,) and of the case of the juryman in the note; for although the record was right in both these cases, yet after the facts had been shown upon the motion for a new trial, the error became apparent and might have been assigned, But whenever defects of this character have been brought to the notice of courts of justice upon a writ of error, they have always refused to reverse the judgment. In Bellows v. Williams, Kirby, 166, one of the jurors who tried the case in the court below sat upon the trial of the same case in the Superior Court. The court refused to arrest the judgment, on the ground that the party had once

STATE Dunonn.

accepted the juror, and that it was too late to object to him after verdict. In Howard v. Gifford, 1 Pick. 43, two talesmen sat upon the trial of a cause for which they were neither summoned nor sworn. Upon writ of error coram nobis, it was held that the objection came too late after verdict. See 1 Pick, 42, n. 2.; and Amherst v. Hadly, Ib. Hill v. Yates is mentioned and relied upon by the court; that case is law in all the States of the Union; it is relied upon in Kennedy's case, 1 Rob. 590. In the case of Horsey v. State, precisely the same ground taken by the prisoner in this case was assigned as error. The objection is taken in these words: "There is a variance between the venire for the petit jury, in the names of the jury, and the names of the jury empannelled to try the cause, and who have found the verdict." Horsey v. State, 3 Har is and Johnson's R. 2. The court refused to arrest the judgment, and sentence of death was passed. This case is strictly in point—it was decided

upon writ of error.

The true rule is this: that if the party does not take the objection when the juror is sworn, it shall not avail him after verdict. In the State v. Fisher, 2 Nott & McCord, 264, the judge states the rule, and adds: "I cannot forbear saying that if this were not law, I am satisfied, from my own experience, that justice would be laid prostrate at the feet of offenders." The juror might have been objected to when he was called to be sworn. In the State v. Powell, 2 Halst, 246, a juror whose name was accidentally omitted in the panel delivered to the prisoner, was objected to and passed. The prisoner in this case might have made the same objection to these jurors. Besides, the jury was empannelled on the 19th January, and continued from day to day until the 23dthe most ordinary diligence would have onabled him to discover the error. The court will not relieve from an error which might have been cured if he had chosen to avail himself of it at the proper time. The case of the United States v. Wilson, 1 Bald. 78, and the case of Dovey v. Hobson, show plainly that if the parties had accepted the jurors the error would have been cured. The reporter in both cases takes care to state that the parties neither consented nor objected. The case of King v. Tremaine, 16 E. C. L. R. 318, turned upon the fact that the juror was incompetent to serve, having neither the required age nor the property qualification, which is not pretended in the present case. The case of Hasset v. Payne, Cro. Eliz. 256, and the case cited from Barnes, were both cases of attaint, and overruled by Hill v. Yates.

R. Hunt, for the appellant, I. The indictment is defective, because it does

not set forth the value of the slave charged to have been stolen; and does not

contain the necessary and technical terms of art.

Starkie says: "As it is essential to every species of larceny that the property be of some value, (x) it seems to be equally necessary that the value should appear to the court upon record. It is questioned by Serg't. Hawkins, whether the value of the goods be essential to an indictment for trespass or any other crime where the value is immaterial to the nature of the offence, since in many ancient writs of trespass the value of the goods is not expressed. There seems however to be this material distinction between writs in civil proceedings and indictments; in the former case, the damages are to be assessed by a jury, and therefore it is not so requisite to set out the precise value upon the face of the record; but in criminal cases, the punishment is frequently inflicted at the discretion of the court, which ought therefore to be judicially informed of the circumstances and magnitude of the offence." Note (x). See Mrs. Phipoe's Case, Leach 774, and Com. Dig. Ind. c. 2. This seems to be necessary even in those cases where a statute makes it capital to steal a specific chattel, as a cow, &c." Stark, Cr. Pl. 221.

The distinction between grand and petty larceny, in England, was abolished by 7 and 8 G. 4, c. 29, s. 2; yet Archbold says, "the value of the chattels, in cases of larceny, must be stated." Arch. C. P. 49, 176. So, the value must be stated, where a statute makes it penal to steal chattels real, or things that belong to the realty. Thus the 7 and 8 G. 4, c. 29, s. 44, enacts, that if any person shall steal any lead, &c., or other metal fixed in or to any building whatever, he shall, on conviction thereof, be punished in the same manner as in the case of simple larceny. Arch. C. Pl. appendix 37. The indictments on this statute, after the usual commencement, run thus: "Sixty pounds weight of lead (or iron, brass, or other metal,) of the value of six shillings, the property of J. N., then and there being fixed to the dwelling house, &c., then and there

STATE D. DEBORDA

feloniously did steal, take and carry away, &c." Arch. Cr. Pl. 201. The indictments also for stealing metal fixed in land, &c., on the same statute, in like manner, set forth the value of the metal stolen. Arch. Cr. Pl. 201, 202. All the precedents in the books agree on this point. It is true that, in the precedents of indictments for stealing records, wills, or writings relating to real estate, the value is not alleged. Arch. 194, 195, 196. But the statute expressly declares, "it shall not, in any indictment for such effence, be necessary to allege that the article, in respect of which the offence is committed, is the property of any person, or that the same is of any value." Exceptio probat regular. This statutory exception acknowledges the general rule.

In the common law States of the Union, where slaves are held to be personal property, they are, of course, subjects of theft. Our Civil Code, art. 461, says: "Slaves, though moveables by their nature, are considered as immovables by the operation of law"; and the statute of 1819, upon which this indictment is framed, enacts, that every person, "who shall inveigle, steal, or carry away any negro, or other slave or slaves, or shall, &c., shall, on conviction thereof, suffer imprisonment at hard labor, not less than two years, nor more than twenty years." Now, the indictment charges that Dubord did inveigle, steal, and carry away a certain slave, named Henry, the property of one J. Desmaries. This is clearly a charge of stealing—of larceny. The value of the

slave should therefore have been set forth.

But the attorney general says: "The offence charged upon the defendant is not a larceny, and cannot be governed by the same rules." Surely the charge that the defendant did steal, is a charge of larceny. He proceeds: "It is evident from the whole context of this statute, that the offence at which it is levelled is not the stealing of slaves merely, but all other means or devices, by which 'the owner is deprived of the use and benefit of his slave.' The gist of the offence is 'the depriving the owner of the use and benefit of his slave.' This may be done by stealing the slave, or by inveigling him without the animus furandi. And yet the offence would undoubtedly be amenable to the penalties of this statute; because the offence consists in 'depriving the owner of the use and benefit of his slave,' and not in the manner or mode by which

he is so deprived of that use and benefit."

We are told first, that "the offence at which the statute is levelled is, all the means and devices by which the owner is deprived of the use and benefit of his slave." And immediately after that, "the offence consists in depriving the owner of the use and benefit of his slave, and not in the manner or mode by which he is so deprived of that use and benefit!" Neither of these contradictory propositions can be maintained. Suppose a slave should be severely beaten, or maimed, or killed by a person who does not own him. The owner would be deprived of the benefit and use of his slave; and yet the wrong doer would not be punishable under this statute. The statute provides against three classes of offenders, viz: 1st. Those who inveigle, steal, and carry away slaves. 2d. Those who hire, aid, or counsel persons to inveigle, steal, and carry away slaves, so as to deprive the owner of their use and benefit. 3d. Those who aid a slave in running away. The notion that, to constitute a larceny, there must be an intention on the part of the thief to appropriate the thing stolen to his own use; in other words, that the act must be done lucri causa, is not well founded. "Larceny is the felonious taking and carrying away the personal goods of another." Black. Com. Dalton says: "Larceny is a fraudulent and felonious taking away another man's personal goods (removed from his body or person), in the absence of the owner, and without his knowledge." Pultou: "Larceny is a fraudulent taking away another man's goods. without the knowledge of him whose the goods be." Lambard; "Larceny is the felonious and fraudulent taking of another man's personal goods, without his will, to the intent to steal them."

In Rex v. Cabbage, R. & R. 293 (decided in 1815,) the prisoner to screen his accomplice who was indicted for horse stealing, broke into the prosecutor's stable, and took away the horse, which he backed into a coal pit and killed. It was objected by the prisoner's counsel, that this was not larceny, because the horse was not taken with an intention on the taker's part to appropriate it to his own use, animo furandi et lucri causá. In Easter Term, the judges met and considered the case. The majority of the judges held the conviction right. Richards, B., Bayley, J., Chambre, J., Thomson, C. B., Gibbs, C. J., and Lord

STATE DUBORD.

Ellenborough, held it not essential to constitute a larceny, that the taking should be lucri causa; they thought "a taking fraudulently, with intent wholly to deprive the owner of the property sufficient." Some of the judges thought that the object of serving the accomplice by the destruction of the horse might be deemed lucri causa, though not in a pecuniary way. So in Rex v. Morfit, R. & R. 307, where the prisoner took his master's corn to give to his master's horse. Eight of the judges held that this was felony; that "the purpose to which the prisoner intended to apply the corn did not vary the case." B., Wood, B. and Dallas, thought this not a felony.

In the 1st Report of the Commissioners on Criminal Law, printed by order of the House of Commons, 30th July, 1834, the rules on this point are laid down

as follows :

"1st. The taking and carrying away are felonies, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends, in any such case, fraudulently to deprive the owner of his entire interest in the property against his will." Rep. p. 16. "The ulterior motive by which the taker is influenced in despoiling the owner of his property altogether, whether it be to benefit himself or another, or to injure any one by the taking, is immaterial." Rep. p. 17.

The attorney general says: "The gist of the offence (in the statute of 1819, "and in the case of Dubord) is the depriving the owner of the use and benefit of his slave," which, he adds, "may be done—(and the indictment in this case, charges that it has been done)—by stealing the slave."

Now it would be difficult to describe a theft more accurately than the attorney general has described it in these words, and yet he says, this is not a larce-He adds: "In the case of The State v. Miles, 2 Nott & McCord, 2, Gantt, J., dissenting from the majority on another point in the case, says arguendo, "that the law of larceny has nothing to do with this case." Unfortunately the majority of the court differ with Judge Gantt on this point, as well as on the other points of Miles' case. In that case a motion was made for a new trial, and in arrest of judgment, upon the grounds: I. That the act (from which our statue was borrowed,) contemplated two distinct offences: first, stealing from the owner; and secondly, stealing from the employer: and that the indictment was not supported by the evidence, as the negro was in the possession of the employer, and not of the owner. II. That the offence, if committed at all, was committed in Williamsburgh and not in Charleston District. III. That the jury were authorised to find the prisoner guilty of petit larceny, under the indictment, and the judge ought to have instructed them to that effect-The court decided : 1st, "That it was the intention of the legislature to make the stealing of a negro, whether from the master or employer, a capital felony; and that in the case before them, the master had not parted with the possession of the negro:" 2d, It is admitted, said the court. "that the evidence of the prisoner's guilt was sufficient to authorise a conviction, if he had been indicted for a larceny at common law; and that the selling of the negro in Charleston, was sufficient to subject him to a trial there for such larceny. But it is contended that the offence created by this act, is in the manner of a compound larceny, and that the act of stealing and carrying away must be accompanied with inveigling, to consummate the felony; and as the inveigling, if any, was in Williamsburg, the defendant must be tried there, and not in Charleston." The court held that the stealing and carrying away were of themselves a felony, and that it was not neccessary that the inveigling should accompany them under the act: that the act embraced all who should steal and carry away, with or without inveigling: That personal property is always considered constructively in the possession of the owner, and whenever one man disposes of another's property without his will, and when he has a right to his service, the law implies a loss of service:" 3d. The court said: the presiding judge informed the jury, that "though he advised them not to find a verdict of petit larceny, they might find a special verdict, declaring the property of less value than twelve pence. But the jury found a general verdict, which puts an end to this point." The court took occasion to add, that even if the jury had found the special verdict, the punishment would have been the same, as the penalty was annexed to the specific offence. Here the case, with all the points in-

STATE

DUBORD.

volved, ended. But the judge, who delivered the opinion of the court, remarked: "Perhaps it is questionable whether it is necessary to lay the property of any value." This is a mere obiter dictum. The point was not before the court; the indictment in the case appears to have set forth the value of the slave; and no court in the Union has more frequently and carefully declared, that "the opinions of the court are only to be considered as authority, on the points actually decided." This obiter dictum is entitled to no weight, against

the authorities cited in this argument.

But we are told that the offence is a new one, and is charged in the words of the statute; and that this is sufficient in an indictment under the statute. Starkie, in his Criminal Pleadings, p. 235, ch. 12, expressly denies this, and lays down the contrary rule, and so does Chitty in 1 C. C. L. p, 2.6 (marg.) does Hawk., b. 2, c. 25, s. 111. In the case of The State v. Raines, 3 Mc-Cord's R. 543, the court said: "Suppose this to be a new offence. It is as necessary in the case of a new offence, as in the case of an old one, that a man should know what he is charged with, and how he is to defend himself. It is evident that the law has been mistaken by the solicitor, in his supposing that it was enough to say an offence has been committed in the words of the act." The court then stated "the reasons for which the law exacts a certain particular description of an offence." They are: "1st, to identify the charge; 2d, to enable the defendant to plead, autrefois acquit, or convict; 3d, to warrant the court in granting or refusing any particular right, claimed as incident to the case; 4th, to enable the defendant to prepare for his defence, to plead, or to demur, &c.; 5th, finally and chiefly, to enable the court, looking at the record after conviction, to decide whether the facts charged are sufficient to support a conviction of the particular crime, and to warrant their judgment; and, also, in some instances, to guide them in the infliction of a proportionate measure of punishment upon the offender. Now this certainty consists of two parts. The matter to be charged, and the manner of charging it. Hence has originated the error as to the law. The matter is the crime, and this, in a new offence by statute, must be in the language of the statute, and with all that is necessary to constitute the crime. Hawk. 73, 77. Chit. 1. But the manner is as necessary in the one case, as in the other; and Starkie, in p. 236, of his treatise on Criminal Proceedings, says: 'It may therefore be assumed, that there is no difference between common law and statutable offences, as far as regards the general rules, according to which the expanded description of the offence should be expressed on the record; except, indeed, in those instances (and the exception confirms the observation,) where the legislature has peremptorily directed that some general form of words shall be used.' And this is confirmed by Chitty, vol. 1, p. 275, and by Hawk. 2, ch. 25, ss. 99, 111. Although they admit that it has been held otherwise by Lord Holt, whose authority, however, on the subject cannot be put in the scale against the satisfactory reasoning of the author referred to, and the repeated decisions made since his day."

From these views, it is manifest that it was necessary to set forth in the indictment against Dabord, the value of the slave charged to have been stolen by him. It is submitted that it was also necessary in charging him with stealing a negro, to make use of the technical and appropriate words descriptive of the offence of stealing. The law knows best how to express itself in its own terms. "By successive decisions the legal value and weight of a term or phrase of art is ascertained; and should a doubt arise as to its meaning, reference for the purpose of removing it, may be had to former authorities, whilst every new expression would introduce fresh uncertainty, and the benefit to be derived from precedent would be wholly lost." St. 81. Blackstone says : "In some crimes particular words of art must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonomous they may seem, are capable of doing it. Thus in larcenies, the words felonice cepit et asportavit are necessary to every indictment; for these only can express the very offence." 4 Bl. Com. 307. Chitty says: "So in an indictment for larceny, the words 'feloniously took and carried away, are necessary." 1 C. C. L. 244. Starkie says: "In case of larceny, the words 'feloniously took and carried away' the goods, or 'took and led away,' the cattle, are essential." Archbold says: "They are technical words, essential to the definition of the offence, and if omitted the defendant may move in arrest of judgment." Arch. C. Pl. 50. In the indictment before the court, STATE O. DUBORD.

the technical term, or word of art, "took, 'cepit,' is omitted. The indictment is therefore defective.

II. Should these objections to the indictment be overruled, the defendant prays for a new trial and an arrest of judgment, upon this ground: It appears by the record, that J. N. Otto, S. Golding, L. N. Jahan, J. Robb, and J. L. Krabbe, who were sworn and acted as jurors in the trial of this case, are not the same persons who were drawn, summoned, and returned to serve as jurors.

The act of March 13, 1833, B. & C. Dig. 526, declares "that it shall be lawful for the sheriff of the parish of Orleans, or his deputy, together with the clerk of the Criminal Court of the First District, or his deputy, to draw during the last week in the month, or as soon thereafter as convenient, under the direction of the court, (in the french text, 'd'après l'ordre de la cour,') the number of jurors, &c., as provided in the act of 25th March, 1831." The act of 25th March, 1831, B. & C. 524, states that to qualify a man to serve as a juror, he must "have resided at least twelve months before a new ventre is formed in the parish or district in which the jury is summoned."—Section I. The 3d section provides, "that if, at any time, the number of jurors drawn to serve in any court of the first district of this State, should become insufficient for the good and speedy administration of justice, the judge of such consider requisite, shall be drawn according to law, on such a day as he shall appoint; and if it should happen that the said drawing be not then made, the judge shall fix another day for that purpose."

It appears from the record that, in conformity with these laws, the judge of the court below, ordered a venire to be issued on the day of December, 1846, for summoning forty-eight jurors to serve during the month of January, 1847; and a second venire to be issued on the day of January, 1847. It recting an additional number of jurors to be summoned for January, 1847. It makes no difference whether these orders are particular precepts to the sheriff, or writs of venire facias; or whether they are more general precepts in the nature of writs of venire facias. They are certainly orders directed by the judge to the sheriff and the clerk of the court, commanding them, &c., and ought to be under seal; and for want of the seal of the court, the process is erroneous, and all the proceedings under it are void. See The People v. McKay, 18 Johns.

Rep.

III. But suppose that the law of Louisiana is otherwise, and that the process need not be under seal. The 35th sec. of the act of 1805, provides that the accused, in cases similar to the present, shall have a copy of the list of the jury, who are to pass on his trial, delivered to him, at least two entire days before he shall be tried. B. & C. 248. The sheriff and clerk who draw and summon the jurors, being officers of dignity and consequence, and acting under the obligation of an oath, and the jurors being summoned beforehand, and the list being delivered to the accused, who has thereby notice of the jurors, their characters, connexions and relations; their associations, passions and prejudice, so that he may discreetly exercise the right of challenge; it was thought that the accused would be secured in the right of trial by an impartial jury. In the present case, a correct copy of the lists of the jurors drawn and summoned to pass on Dubord's trial, was delivered to him more than two days before he was tried. The record also shows that J. N. Otto, S. Golding, L. N. Jahan, J. Robb, and J. L. Krabbe, were sworn and acted as jurors in the case, and that they are not the same persons who were drawn and summoned to serve in the case. The attorney general has not attempted to explain this variance, which is patent on the record. He has not attempted to prove that the jurors sworn were the same persons who were summoned and returned on the venire. list of jurors who were sworn and who tried the case, and the list of jurors drawn and summoned, and returned, a copy of which list was served on the accused, show variances in the christian names, the middle names, and the surnames; and all the books agree that these are material variances. J. R. McQuilland, instead of R. J. McQuilland, was held a material variance. 5 D. & E. 195. McCann and McCarn, Shakepear and Shakespeare, Tabart and Tarbart, Shutter and Shakespeare, Tabart and Tarbart, Shutter and Tarbart, Shutter and Tarbart, Shutter and Tarbart and Tarbart, Shutter and Tarbart and Tarbart, Shutter and Tarbart and Tarba liff and Shirtliff, which the attorney general would daintily term "slight discrepancies," have been held to be fatal variances. R. & R. 351. 2 East. 83. 5 Taunt. 814. 1 C. C. L. 216.

The attorney general says: "No objection is made to the personal qualifica-

STATE DEBORD.

tions of the jurors who tried the cause," and he calls the defendant's objection a mere technical objection, not founded in reason. The true principle in this case, is to consider whether the party accused has had the security of a lawful jury to try him? All questions touching the formation of juries must be examined by the judges with the most scrutinising eye. The complaint in the present case is, that after the judge had issued his order according to the acts of 1831 and 1833; after the clerk and sheriff had drawn from the jury-box the names of the jurors; after these jurors had been summoned, and a copy of the list of them had been delivered to the accused, and due returns had been made of these proceedings to the court; after the list of the jury who were to pass on his trial had been settled and determined according to law, a change was made, and the accused was tried by jurors not on the list—or rather, the list made out according to law was set aside, and a new and illegal list substituted. The defendant was entitled to be tried, and ought to have been tried, out of the list duly drawn and summoned, and served upon him. He was tried out of another list. Five persons sat upon his trial, who were not on the legal list of the jury. If five persons can be thus placed on a jury, how easy would it be to pack the en-

tire jury? Where would then be the right to a trial by an impartial jury.

When the name of a juror is drawn from the jury-box according to law, the presumption undoubtedly is that the person whose name is thus drawn has the qualifications of a juror. But there is no such presumption in favor of one whose name is not drawn from the jury-box. The record shows that the names of five persons who sat as jurors in this case, were not drawn from the jury-box. The presumption of law is that they were not qualified to act as jurors. The attorney general did not offer any proof to show that they were good jurors, duly qualified. None of the statutes of jeofail and amendment in England, extend to criminal proceedings. The stats. 14 Ed. 3, c. 6; 8 H. 6, c. 12, 15; 32 H. 8, c. 30; 21 Jac. 1, c. 13; 27 Eliz. c. 5; 4 Ann. c. 16; 5 G. 1, c. 13; 4 G. 2, c. 26; 18 Eliz. c. 14, do no apply to criminal cases. As to the effect of these variances, see Trials per Pais, p. 60 to p. 63. Coke's Reports, p. 150 and 151. 3 Bac. Abridg. p. 776. 2 Hawk, 416, 418, 421, 422. Norman v. Beamont. Willes, 484. Wray v. Thorn, Willes, 488. King v. Tremaine, 16 Eng. C. L. Rep. 319. In 1 Baldwin, 83, April 1830, before J. Baldwin, of the Supreme Court of the United States, and J. Hopkinson, district judge: "Before the exhaustion of the panel, several jurors were called, who had been returned on the venire by wrong names. John Byrly had been returned by the name of John Byerly; Matthew Pennypacker, in the name of Nathan Pennypacker; George H. Pauling in the name of George M. Pauling." By the court: "The jurors cannot be sworn. It would be a mistrial, if it should appear by the record that the juror sworn was not the same person who was summoned and returned on the venire. The district attorney objected; prisoner's counsel neither objecting nor assenting."

In answer to these authorities, the attorney general refers to The King v. Hunt, 4 B. & Ald. 430, a case in which a special jury had been ordered; two of the special jurymen were not summoned. The court refused a new trial, declaring there was "no direct authority on the point," and sustained the verdict found by the ten special jurymen and two talesmen. This case in no way affects the point made by Dubord. The attorney general next refers to the case of Hill v. Yates, 12 East. 229, and to the case of the juryman in the note, in which case, he says, the record was right; but after the facts had been shown upon a motion for a new trial, the error might have been assigned. Hill v. Wates, is a civil case; besides, the record was there right. In the case of the juryman, 12 East. 231, the man who served on the jury had been duly summoned, though by a wrong name, and he was also proved to be duly qualified to But there is no proof in the present case, that either of the five persons who served as jurors, and who are objected to by Dubord, had any of the qualifications of jurors. Besides, there is not a tittle of evidence to prove that these five persons were ever summoned. Moreover, the record in the case of the juryman was right, and no amendment was necessary. But here the record shows error on its face; shows a variance in the names of the jurors; and shows that the persons who tried the cause were not the same persons sworn and summoned. The case of Hill v. Yates, has been reviewed in The King v. Tremaine, already cited by me; and the reasoning on which it was decided, has

been answered by C. J. Abbott.

STATE v. DUBORD.

The attorney general refers to The State v. O'Driscoll, 2 Bay, 153, and to the case of The State v. Kennedy, decided by our late Court of Errors in criminal cases. 8 Rob. 590. Both these decisions were correct. They simply decide that if an alien is drawn and summoned as a juror, and is returned as such, and his name appears on the jury list furnished to the accused according to law, it is a good ground of challenge before trial; but that it is too late after trial and conviction, to make it a ground for a new trial. This is very different from the case, where a person, who has not been drawn and summoned, acts as a juror.

case, where a person, who has not been drawn and summoned, acts as a juror.
In King v. Tremaine, already cited, Abbott, C. J., said: "I do not see how a challenge, properly so called, could have been taken to this person, he not having been summoned as a juror. If he had been returned on the panel, then a challenge would have been the proper mode of objecting to him. 7 Dowl. & Ryland, 684, decided in 1826. Bayley, J., said: "He has not been summoned or returned on the panel. I apprehend that one of the objects of taking jurors jurors from the panel is, that notice may be given to the parties before the urors come to the assizes, so as they may know to whom to direct their challenges." Bayley, J., then refers to cases in which it was held that if one man be returned in the venire fucias, and a different man in the distringas, who serves as the juror, it is error. Littledale, J., said: "It is admitted on all sides, that if a person is "returned on the panel, who is incompetent to serve on the jury, it is a cause of challenge: but in this case the young man was not returned upon the panel, nor was he summoned. He was, therefore, no juror at all." So in Norman v. Beamont, Willes R. 487, Lord C. J. Willes, said: "We were of opinion that this could be no cause of challenge. There was no objection to Richard Geater, the person returned, But this was an extrinsic objection not appearing on the face of the poll. A challenge to a juryman, supposes him capable of serving on the jury, if the objection be answered. But Richard Shepherd was no juryman at all." He was neither summoned nor returned on the panel. It was held, therefore, that this was not matter of challenge, and could be taken advantage of after verdict. The remarks already made, furnish a full answer to the cases of Amherst v. Healey, 1 Pick. 38, and Howland v. Gifford, I Pick. 43.

The attorney general refers to the case of Dovey v. Hobson. C. J. Gibbes, treated in that case the decision in Hill and Yates with much deference; but he set aside the verdict in favor of Dovey, because a person not summoned on the jury had been sworn and acted as juror in the name of the party summoned. The rest of the court concurred. The Chief Justice said:—"Willes, C. J., with his usual precision, states the four ways in which questions of this sort can be brought before the court: By motion in arrest of judgment; by motion for a nameudment; by motion for a new trial; or by writ of error in a superior court. * * * He shows clearly that there would be a variance between the venire process and the record, on which judgment for the plaintiff might be arrested for the variance, and the question was whether a new trial should be granted. Here no amendment is necessary: as the record now stands, no motion in arrest of judgment can be made, nor can the objection be taken on a writ of error. Here every thing is regular on the record, and can be rectified only on a motion for a new trial. That is discretionary with the court, &c." This decision was rendered in 1816, ten years prior to that of Rex v. Tremaine, and appears to me, in a good measure, to support the motion in arrest of judg-

ment, now under consideration.

A clear proof of what the law upon this subject was in England, is to be found in the 21st section of st. Geo. 4, c. 24, which was passed to remedy certain evils and imperfections in the criminal law. This remedial statute, enacted: "That no judgment after verdict upon any indictment or information for any felony or misdemeanor, shall be stayed or reversed for want of a similiter, nor by reason that the jury process has been awarded to a wrong officer, nor for any misnomer or misdescription of the officer returning such process, or of any of the jurors, nor because any person has served upon the jury who has not been returned as a juror by the sheriff or other officer." Arch. C. Pl. App. XVI. A similar statute was found necessary in New York. "When a verdict shall have been rendered in any case the judgment therein shall not be stayed, &c., or reversed, impaired, or in any way affected by reason of a mistake in the name of any juror or officer." 2 R. S. N. Y. 425, s. 7, 11. And should a question arise apon a defect of this kind, it is further provided that the "defects and variances"

STATE E. DUBORD

of the like nature, not being against the right and justice of the suit or trial, shall be supplied and amended by the court, &c. 2 R. S. 425, s. 8. In Massachusetts, it is provided by statute that "no irregularity in any writ of venire fucias or in the drawing, summoning, returning or empannelling of jurors, shall be sufficient to set aside a verdict, unless the party was injured by the irregularity, or unless the objection was made before the returning of the verdict." Rev. Stat. Mass. Similar statutes have been passed by other States of the Union.

Stat. Mass. Similar statutes have been passed by other States of the Union. The attorney general cites the case of Horry v. State, 3 Har. and John, 2, where a motion was made to arrest judgment on the ground, that there was a "variance between the venire for the petit jury, and the names of the jury empanelled to try the cause, and who found the verdict." The court refused to arrest the judgment. Not a word is said as to the grounds of the decision. No case, no law, no fact is stated. The motion is stated, and the reporters simply add: "The motion was over-ruled. Although I find a statute passed in 1795, to remedy such a variance in civil cases, in Maryland, I have not been able to find any legislative provision on the subject in criminal cases. I leave this case, therefore, to be weighed by this court, against the arguments and authorities which I have brought forward.

The judgment of the court was pronounced by

King, J.* The defendant was prosecuted under the 3d section of the act of 1819, (Acts p. 62-3) which is in the following words: "All and every person or persons who shall inveigle, steal, or carry away any negro, or other slave or slaves, or shall hire, aid, or counsel any person or persons, to inveigle, steal, or carry away as aforesaid any such slave, so as the owners of such slave or slaves shall be deprived of the use, &c., on conviction of any such offence, shall suffer imprisonment at hard labor, &c." The defendant was convicted, and after ineffectual motions for a new trial, and in arrest of judgment, appealed.

It is contended: 1st. That the indictment is defective, because it contains no allegation of the value of the slave, and because it does not contain the technical words essential to the description of the offence. 2d. That the verdict should be set aside, because several of the persons who were sworn and acted as jurors on the trial, were not the same persons drawn and summoned to serve as jurors.

I. To the first objection it would probably be a sufficient answer to say that, the statute declares several offences, among which are: 1st, stealing; 2d, inveigling; 3d, carrying away a slave. Each of these is a substantive offence. All of them have been charged upon the defendant, and a general verdict of guilty has been found by the jury. No objection has been made to the sufficiency of the indictment, as regards the two offences last enumerated. Thus, if the ground be well taken that the stealing of a slave under this statute is strictly larceny, and that it is indispensable in indictments for larceny to aver the value of the thing stated, and to use the technical terms essential in the description of that offence, there still remains a conviction for inveigling, and for carrying away, each of which under the statute is an offence equally as grave as the stealing, and visited with the same punishment.

But we think that, even with regard to the stealing of a slave, the statute has declared a new offence, distinct from larceny; and that it is not necessary, in indictments under it, to aver the value of the slave, nor to use the technical terms descriptive of larceny. The indictment must be governed by the rules applicable to offences declared by statute. Foster, Crown Cases, p. 423, and says: "It may, I think, be laid down as a general rule, that indictments

^{*} Eusris C. J., absent.

STATE B. DUBORD. grounded on penal statutes, especially the most penal, must pursue the statute, so as to bring the party precisely within it; and this rule holds as well with regard to statutes which take away clergy from felonies at common law, as to statutes creating new felonies. "The indictment," saith Stanford, "must set forth the offence in such manner as it is expressed in the statute, otherwise the offender shall have his clergy." And again, p. 424: "Indictments upon penal attatutes must strictly pursue the statute." See also 2 Hale, 170. Hawkins, b. 2, chap. 25, sec. 113. 1 Chitty's C. L., 286, 287. In the present instance the offence could not well have been charged with more precision and certainty, than by using the words of the statute itself.

II. Among the jurors summoned, a list of whom was furnished to the accused, the following names appeared, viz: J. M. Otto, J. Golding, L. N. Johan, J. W. Robb, J. F. Krabbe. Among the jurors who were sworn, and tried the cause, were the following, viz : J. N. Otto, S. Golding, L. N. Jahan, J. Robb, and J. L. Krabbe. It is contended that these variances in the names are material, and vitiate the verdict. No objection was made to the jurors, when they were offered to the prisoner or the trial. The court is unanimously of opinion that the objection now comes too late, and that if the accused desired to oppose the swearing of the jurors on this ground, he should have made his objection when they were presented. The law has carefully protected his rights in this respect, and furnished him with every facility for making such objections as he may have to urge to jurors. He can complain neither of surprise nor injustice. He had in his possession, for two days previous to the trial, a list of the jurors who were to be presented to him. When J. N. Otto, was presented, a reference to the list, furnished expressly for the purpose of enabling him to make his challenges, must have shown him that J. M. Otto was the person whom he had the right to insist on having presented. He had the right before exercising his challenge to enquire whether the juror offered was the juror summoned, and if it appeared that he was not, to insist that he be set aside. No objection was made to the persons in question, on this or other grounds, and no right secured by law to the prisoner was denied to him on the trial. Not only was objection to the jurors waived, but the record shows that they were expressly accepted by the prisoner.

In the case of Hill v. Yates, 12 East, 230, a similar question was presented. Lord Ellenbourgh then said, if the judges "were to listen to such an objection, they might set aside half the verdicts given at every assizes, when the same thing might happen from accident and inadvertence, and possibly sometimes from design, especially in criminal cases." The case of the King v. Tremaine, 16 Com. Law Rep. 319, does not appear to us to overrule the case of Hill v. Yates. In the former it was shown that the person sworn as a juror was a minor, and absolutely incompetent to serve. The court said that the verdict was the verdict of eleven jurors, and distinguished the case from that of Hill v. Yates, in which the juror appeared to have possessed the necessary qualifications. Sec. 2 Bay's Rep. 155. 2 Nott & McCord, 264. 1 Chitty, Criminal Pleading, 545. 3 Harris & Johnson's Rep. 2.

Judgment affirmed.*

^{*} R Hunt, for a re-hearing: It has been intimated by the court, that no writ, no order in writing from the judge, was necessary in directing the jury to be summoned; and that when the law directs the jury to be drawn under the direction of the court, it means in the presence and under the superintendence of the judge, without any order from him. This is at war with the spirit and letter of our statutes. The order ought therefore to have

been under seal; and for want of the seal of the court, the process was erroneous, and the proceedings under it are void. See the case of *The People v.McKay*, 18 Johns. Rep. 212, and *The State v. Dozier*, 2 Spear's Rep. 216. In the latter case the court say, per O'Neall, J: "In this case, it is only necessary to consider the prisoner's third ground, in arrest of judgment, for that will avail him. In 2d Hule's Pleas of the Crown, 160, it is said, "the venire facias, as all other process of that court, (the King's Bench,) issues in the King's name, under the seal of the court, and that of the chief justice, and always ought to bear test after the issue joined between the King and the prisoner." tion of process to compel the attendance of jurors, in 2d Hawk, P. C, book 2, chap. 41, sec. 1, is very much like the course of our own practice in relation to the venire. says: "It is agreed that justices of jail delivery may have a pannel so returned by the sheriff, without any precept or writ; and the reason given for it is, that, before their coming, they always make a general precept to the sheriff on parchment, under their seals, to ing, they always make a general precept to the sherin on parenthesis, and the day of their sessions, twenty-four out of every hundred, &c., to bring before them, at the day of their sessions, twenty-four out of every hundred, &c., This is a do those things which shall be enjoined them on the part of the king, &c. general venire for the term, and is so far like ours, and is only different, that it has no panel annexed; and ours, according to jury law, has. It is to be observed, that this general precept is under the seals of the justices, and without that would be bad. The argument is, therefore, irremstible, even from this authority, which is more favorable to the State than any other, that a summons of the jury by virtue of a pretended writ of venire, not under seal, cannot be good. What effect the want of a venire not under seal, for both the grand and petit jury, upon the trial of a prisoner convicted of a capital felony, would have, the case of The People v. McKey, 18 J. R. 112, is full to the point, that it is a good ground to arrest the judgment."

In the case of the State v Williams, since decided in South Carolina, where the accused was convicted of murder, and in four other cases at the same term, judgment was arrested upon the same ground, on the authority of the previous case of Dozier.

The practice of our courts is also entitled to consideration. I have enquired of the clerks of the Third, the Fourth, and the Fifth District Courts, and I find that writs of venire have always been issued by those courts, and by the former District, Parish, and Commercial Courts of New Orleans, when a jury was summoned to try a cause. The minutes of the First District Court of New Orleans, also show, that under Judges Preston and Cauonge—(I have not examined further)—a venire was always ordered by the court, for drawing and summoning a jury. The courts have called these orders by the name of venire. The statute of 1831, expressly styles the order a venire. Judge McHenry, in his orders, uses the word venire. They answer exactly to what Judge O'Neal terms "a general venire for the term." Style it writ or order, still it must be under seal; and there is no seal to the venires in this case. Unless the law is observed in drawing and summoning jurors, the right to a trial by an impartial jury is gone.

2d. In order to secure to the accused a trial by an impartial jury, the law has not only defined the qualifications of jurors, and prescribed the mode of drawing and summoning them under orders of the court; but it has explicitly declared; that he shall be tried by the jurors so drawn, and by none others. The 35th section of the act of 1805, says: "Every person who shall be accused and indicted for any crime punishable with imprisonment at hard labor for life, or for seven years or upwards, shall have a copy of the indictment and list of the jury who are to pass on his trial, delivered unto him, at least two entire days before he shall be tried for the same." Bul. & Cur. 248.

When the legislature says, the accused shall have a list of the jurors who are to pass on his trial delivered to him, it means that the jurors who are to pass upon his trial shall be upon the list delivered to him; it means that he shall be tried by the jurors upon the list, and no other jurors. It means that, or it means nothing. The record shows, that a list of jurors drawn and summoned, and who, by law, were to pass upon Dubord's trial, was delivered to him; and that five persons who were not drawn and summoned, and whose names were not on the list of the jurors delivered to Dubord in conformity with law, did, notwithstanding, act as jurors in the case, and did pass upon his trial, in direct and palpable violation of law. The court says, that "this objection comes too late." I contend that the objection is never too late, when it appears patent on the record that the law has been violated. This is the doctrine to be collected from the cases cited in argument at p. 739.

It is said the appellant ought to have challenged the jurors who were not on the list, and that the objection comes too late, and the eases from 2 Bay, 155, and 2 Nott & McCord, 264, are relied on in support of this. The answer is at hand: Whenever a person is drawn and summoned as a juror, and his name is on the list served on the defendant, it is his duty, if he wish to object to him, to exercise the right to challenge, at the time the juror is offered; because the juror having been drawn and summoned, if the challenge is overraled, the party would be a good juror on the record. But where a person has not been drawn and summoned, and his name is not on the list of jurors, who are to pass on his trial, he cannot be a juror without a violation of law. See the cases of Norman v. Beamont, and The King v. Tremaine, cited in argument for the appellant. In the cases from Bay, and from Nott & McCord, the juror objected to was duly summoned and sworn, and therefore might have been challenged, and consequently the objection came too late. But in

STATE v. DUBORD. the present case the persons objected to were not drawn, summoned, or returned, and were not on the panel or list delivered to the defendant; they were, therefore, no jurymen at all, and no challenge, properly and technically speaking, could have been taken to them—since, in no event could they be good jurors. The defendant is, therefore, entitled to the benefit of his objection after verdict.

Rehearing refused.

THE STATE v. FOLKE.

Where the original entry on the minutes of a court makes no mention of the swearing of the grand-jury, merely setting forth the names of the jurors, how they were selected, and the term for which they were to serve, on an affidavit by the clerk that the jurors had been regularly sworn and that the emission to state the fact was an inadvertence of his own, the minutes may be afterwards amended so as to conform to the fact. Nor will it be any objection to making the amendment, that the omission occurred while another judge presided. Per Curiam: The power of correcting the minutes of its proceedings so as to make the entries conform to the truth, whenever errors or omissions are satisfactorily shown, is inherent in every court. In criminal proceedings all ministerial acts are amendable at any time.

No writ is required to be issued from the court for selecting and summoning a jury; nor is any order, under the seal of the court, necessary for that purpose. The stats. of 25 March, 1831, ss. 10, 11, and 13 March, 1833, s. 1, direct the clerk and sheriff, or deputy sheriff; to draw, at stated periods, the requisite number of jurors, who are to be summoned.

It is not necessary to the validity of an indictment that the day on which it was found, or the name of the judge presiding, should appear on its face.

It is not necessary that the foreman of the grand-jury should sign his name at full length to the finding endorsed on the indictment. An indictment signed "Geo. W. West, foreman," is sufficient.

A PPEAL from the First District Court of New Orleans, McHenry, J.

Sigur, District Attorney for the State, 1st. The court will presume that the grand-jury were sworn according to law, even if the record did not show the fact. Goyne v. Howell, Minor's Rep. 62; Perdue v. Burnett, 1b. 138. But in this case the record, as amended, shows that the grand-jury was sworn. The mistake or omission of the clerk was amendable. 1 Chitty's Crim. Law. I Saunders, 249, 250. 1 Stra. 136. 2. It is not necessary that the order to summon the jury should be sealed. With us a venire facias is not necessary; jurors are summoned in the same manner as witnesses. The case of The People v. McKay, 18 Johns, 212, was decided under the common law. But in the cases of Haight v. Holley, 3 Wend. 258; Bennett v. Tennessee, Mart. and Yerg. 133; and Johnson v. Cole, 1 Penn. 266; decided under statutes similar to ours, it was held that no seal was necessary, or that the want of a seal was cured by verdict. 3 Stewart, 454. 3d. The other objections proceed upon an erroneous understanding of the word "caption," used in the authorities cited; a caption is no part of the indictment. The objection to the signature of the foreman is futile.

J. M. Wolfe, for the appellant, urged the points recited in the opinion of the court, infrå, citing Bul. & Curry's Dig. p. 19. 18 La. 212. 2 Chitty's Crim. Law, 309, 326. 5 Howard's Miss. Reports, 32. 2 Hawkins, 346. 3 Johnson, 265. 1 Ib. 179. 4 Barn. & Adolph, p. 90.

The judgment of the court was pronounced by

King, J.* To an indictment preferred against the defendant he filed a special plea, setting forth several grounds in avoidance of the proceedings, none of which were sustained. He was subsequently tried, convicted, and sentenced, and from the judgment of the lower court has appealed.

^{*} Eustis, C. J. was absent when the judgment became final by the refusal of a rehearing, though present when the opinion was first read.

The grounds urged in this court for the reversal of the judgment appealed from, are: 1st. That the grand-jury appear, from the records of the court, not to have been duly empannelled and sworn, and that the judge erred in permitting the clerk to amend the record by stating that the grand jury had been sworn. 2d. That the order to the sheriff to summon the jury did not bear the seal of the court. 3d. That the day on which the indictment was found, and the name of the judge presiding, do not appear on the face of the indictment. 4th. That the foreman of the grand-jury did not sign his name at full length to the finding endorsed on the indictment.

I. The original entry on the minutes of the court makes no mention of the swearing of the grand-jury, but merely sets forth the names of the jurors, and that they were selected by the sheriff and clerk under the direction of the court, to serve during the months of November and December. A few days after this entry was made, the grand-jury returned the bill preferred against the present defendant, which commences: "The grand jurors of the State of Louisiana, duly empannelled and sworn, &c." The defendant then made the objection to the indictment now urged, that the grand jurors by whom it was preferred were not daly empannelled and sworn. The clerk, thereupon, made an affidavit that the grand jurors had been sworn according to law, and that the failure to make the entry was an inadvertent emission of his ewn; and asked permission of the court so to amend the minutes as to make the entry accord with the fact. The judge permitted the amendment to be made, and we think correctly. The power is inherent in courts to direct the correction of the minutes of their proceedings, so as to make the entries conform to the truth, whenever errors or omissions are satisfactorily shown; and in criminal proceedings it is well settled, that all ministerial acts are amendable at any time. 1 Chitty's Criminal Pleading, 335, 336. 4 East. Rep. 173. In the present instance it appears upon the face of the indictment that the jurors by whom it was found were duly empannelled and sworn, and the oath of the clerk further confirms the fact. It is no objection to the amendment, that it was intended to supply an omission which occurred while a different judge presided.

II. The seal of the court was necessary to the order for selecting and summoning the jury, if such an order issued. The statutes of 1831 and 1833, (B. and C.'s Dig. 525-6,) directs that the clerk and sheriff, or deputy sheriff, shall, at stated periods, draw the requisite number of jurors, who are to be summoned. No writ from the court, for the performance of these duties, is required, and none such appears to have issued. 2 Rob. 268.

III. No rule of criminal pleading requires that the facts stated in the fourth should be set forth in the indictment. The objection seems to be founded upon the recital of facts essential to the validity of a caption. The caption forms no part of the indictment, and the necessity for that instrument cannot arise while the prosecution is pending in the court in which the bill is preferred. 1 Chitty's Crim. Pleading, 326. State v. Kennedy, 8 Robinson, 990.

IV. The foreman of the grand-jury signed his name "Geo. W. West," to the finding endorsed on the indictment. We are aware of no rule which requires the foreman to sign his name at full length to a finding, and have been referred to no authority in support of the position assumed by the defendant's counsel.

Judgment afterned.

STATE v.

ALLING et al v. BACH.

Where a party proposes to another to purchase merchandise from him for a certain price, and that the merchandise shall be shipped to him at particular place, to be there paid for before delivery, to which the latter assents, the sale will be perfect from the moment of the agreement for the object and the price, and the subject of the sale will be thenceforth at the risk of the purchaser, though not delivered to him; and if it perish before delivery, without the fault of the seller, he will be exonerated from the oblication to deliver, but the purchaser will be bound for the price. C. C. 1903, 2431, 2442.

PPEAL from the Fifth District Court of New Orleans, Buchanan, J. The facts of the case are stated in the opinion infra.

Hoffman, for the appellants. The court below erred in considering that the sale was made on a suspensive condition as to the delivery. The Civil Code declares that conditional obligations are such as depend on an uncertain event. Here there was nothing uncertain in the obligation to deliver. The sale was complete, independent of the delivery. See Delvincourt, vol. 2, p. 16, note 1; p. 526, note 2; p. 537, note 3. Civ. Code, 2444, 2431, 2437, 2442, 2443, 2446, 2450, 2452, 2456, 2458, 2459, 2527, 2528. Pothier, Vente, pp. 179, 180. 18 La. 235. 3 Rob. 331.

L. Peirce, for the defendant. This is an agreement to take effect in future, on account of the postponement of the payment of the price, and of the delivery of the goods. The rule in such a case is, that if nothing remains to be done on the part of the seller, as between him and the buyer, before the goods purchased are to be delivered, the property in the goods immediately passes to the buyer, and that in the price to the seller; but if any act remains to be done on the part of the seller, the property does not pass until that act has been done. case the seller was to ship the goods to New Orleans, and they were to be paid for on delivery; the transfer of the goods to New Orleans was part of the contract, and a condition precedent; the seller had still something to do. The meaning of this stipulation by the purchaser was to free himself from the expense of insurance, and from all costs of charges, freight, warehousing, &c., The seller's duty was to have insured; he does not declare whether he did or not; he has neglected his own interest and is his own insurer.

In the case of Tarling v. Barton, 6 B. & C. 362, the defendant agreed to sell the plaintiff a stack of hay standing in Canonbury Field, for £145; the contract was dated 4th January, the money to be paid the 4th February; and the hay to stand upon the premises until the first day of May; the hay not to be cut until paid for. The purchaser accepted the sellers draft on him for £145, dated 4th January, and payable at one month. The hay was consumed by fire on the same field. Held to be the loss of the purchaser, because there was nothing that remained to be done by the vendor as between him and the vendee.

In Fraganov. Long, 4 B. & C. 219, the plaintiff, residing in Naples, sent an order to Mason & Sons, of Birmingham, for a cask of hardware, to be despatched. to him on insurance being effected; terms, three months' credit from the time of the arrival. The cask was lost on the quay at Liverpool, before being put on board the vessel for Naples. Held to be the loss of Fragano. The arrival at Naples was not a condition precedent. The court, Bayly, J., says: "If the goods were not be paid for unless they arrived, why should Fragano insure them; that shows that the arrival was not considered as a condition precedent to the payment. If the goods arrived, three months from the arrival was to be the period of credit; if they did not arrive, still the plaintiff would be bound to pay in reasonable time after the arrival became impossible. If this were not so, the insurance would be altogether nugatory, for Fragano could not sue upon it, neither could the vendor, the interest being declared to be in Fragano." Halroyd, Justice, in the same case says: "It was not contended that Fragano was not liable to the vendor unless the goods arrived; but the order for insurance is decisive of that. The policy was to protect Fragano, and shows that he considered that he was to be the sufferer if the goods were lost on the voyage; which he

could not have been, had the arrival of the goods been a condition precedent to

his liability to the vendors.

In Simmons v. Swift, 5 B. & C. the court says: "Generally speaking, when a bargain is made for the purchase of goods, and nothing is said about payment or delivery, the property passes immediately so as to cast upon the purchaser all future risk, if nothing further remains to be done to the goods, although the cannot take them away without paying the price. If any thing remains to be done on the part of the seller, until that is done the property is not changed. See also 2d Bing. p. 146.

In the case before the court, the seller had something to do to the goods; we was to land them in New Orleans.

The judgment of the court was pronounced by

King, J.* The plaintiffs sue for the price of a quantity of merchandise, alleged to have been sold to the commercial firm of Bach & Meyer. Payment is insisted on by Bach, the only party cited, on the ground that the plaintiffs undertook to deliver the goods in New Orleans, but have failed to comply with their contract. There was a judgment for the defendant in the court below, and the plaintiffs have appealed.

The only witness present when the contract was entered into states, that Meyer, the partner of the defendant, proposed to the plaintiffs to sell him a bill of goods at certain cash prices, and ship them to the house of the plaintiffs in New Orleans, where he would pay for them before taking possession, to which the plaintiffs acceded. The goods were marked in the name of the defendants, shipped, and a bill of lading taken for their delivery in New Orleans, to Wm. Alling & Co. The vessel upon which the shipment was made was lost at sea, and the goods never reached their destination. The plaintiffs contend that the sale was complete, independently of the contract for the delivery at New Orleans; that they have performed their part of the contract; and that the loss of the goods must be sustained by the defendant. The defendant, on the contrary, urges that the contract was incomplete, and that the goods were at the risk of the plaintiffs until they were landed in New Orleans.

We think that the judge below erred, and that, under the contract proved, the plaintiffs are entitled to recover. The sale was perfect by the assent of the parties, from the moment of their agreement for the object and the price, although no delivery accompanied the contract. As soon as the contract of sale is complete, the object sold is at the risk of the purchaser, although it may not have been delivered to him; and, if it perish before the delivery without the fault of the seller, the latter is exonerated from the obligation to deliver, but the purchaser will still be bound to pay the price. C. C. arts. 2431, 2242, 1903. 4 Toul. no. 59. 7 Toul. no. 202. Pothier, Contrat de Vente, nos. 306, 309. Delvincourt, vol. 2, p. 526, note 2. The only additional obligation assumed by the plaintiffs was that of shipping the goods to New Orleans, where the defendants were to take possession upon paying the price, and this stipulation was performed.

It is therefore decreed that the judgment of the District Court be reversed. It is further decreed that the plaintiffs recover of the defendant, Bach, the sum of stx hundred and forty-five dollars and sixty-nine cents; and that the defendants pay the costs of both courts.

ALLING W. BACH.

^{*} Eustis, C. J. was present when the opinion was first delivered in this case, but was absent when an application for a re-hearing was finally disposed of.

HARVEY v. KENDALL.

Where a disease with which a slave was affected at the time of the sale terminates fatally within three months thereafter, without any fault of the purchaser; and the evidence shows that both the vendor and vendee were ignorant of its existence at the time of the sale, the vendor will be bound only to restore the price, and to reimburse the expenses occasioned by the sale and those incurred for the preservation of the thing sold; the cost of a post morten examination, and the expenses of interment, are not a part of the charges for which he is liable. C. C. 2509.

Where the purchaser of a slave for cash sues to recover back the amount paid by him, with damages, on the ground of the death of the slave from a redhibitory disease with which he was affected at the time of the sale, the vendee will not be allowed any thing for the services of the slave, the use of the money being an offsett to his services.

PPEAL from the First District Court of New Orleans, McHenry, J. The facts of this case are stated in the opinion infra.

Collens, for the plaintiff, contended that the point to be decided, in a case like this, is not whether the disease was or not possibly curable, but whether or not it existed at the time of the sale, and was of such a nature as is contemplated by art. 2496 of the Civ. Code. The old Code required that the rehibitory disease should be in its nature incurable; but we are now governed by a more practical and rational rule. 7 La. 519.

Hunt and Hart, for the appellant, cited Scrapurn v. Bosquet, 15 La. 511; Kiper v. Nutall. 1 Rob. 46; Palmer v. Taylor, 1b. 412; Soubie v. Sougeron, 5 16. 150; arguing that the vendor was not liable as the disease was curable, and that the purchaser failed to procure medical assistance, and to bestow on the

slave the care and attention required by law.

The judgment of the court was pronounced by

King, J.* This action is instituted to recover the price paid by the plaintiff for a slave, who is charged to have died of a redhibitory disease with which he was affected prior to, and at the date of, the sale. A further sum is also claimed for expenses incurred for the preservation of the slave, for an autopsy, and for the interment. There was a judgment against the defendant Kendall, from which he has appealed.

The evidence shows that the slave in question remained in the possession of the plaintiff for seventy-one days after the sale, apparently in perfect health, and performing his usual labor without interruption. At the expiration of that time he reported himself sick. The symptoms which manifested themselves were so slight, that the plaintiff's husband, after conferring with one of his neighbors who was at the time present, considered it doubtful whether the slave was really sick, and concluded that it was unnecessary to call in medical aid. The slave was placed in the plantation hospital under the care of a nurse, and within less than forty-eight hours after he announced his illness, died, no alarming symptoms having manifested themselves until within a few moments previous to his dissolution. A post morten examination was made by two physicians, who discovered the existence of a chronic affection of the liver, to which they ascribe the sudden death, and which, in their opinion, must have existed for some time previous to the sale. Other physicians, who were not present at the autopsy, were also examined as witnesses, and, as usually occurs on such

^{*} Eustis. C. J. absent Rost, J. recused himself on account of relationship to one of the parties.

HARVEY

occasions, some diversity of medical opinion was expressed. The conflict of testimony, however, is not such as to leave any doubt that the cause of the death was discovered. We think it is satisfactorily shown that the slave was affected with a chronic complaint at the date of the sale, of which he subsequently died, without the fault or negligence of the owner. Some importance has been attached to the fact, that several of the physicians declare that the disease was not incurable in its nature, and might have been overcome if timely medical aid had been called in, and that, in the present instance, the patient was not subjected to treatment. The disease is described by all of the witnesses as being slow in its progress, and, in the present instance, was so insidious in its approaches, that it manifested itself by no external symptoms, by no suffering of any kind, which was ever communicated to the owner, and never for a moment interrupted the labor of the slave until within a few hours previous to his death. How, under these circumstances, was it possible for the owner to have caused the slave to be treated for a disease, which was only revealed by an examination after death. The failure to call in a physician when the slave announced his illness, arose from the same cause. No symptoms manifested themselves which excited apprehensions for the slave's safety, or announced a malady which seemed to require the skill of a physician.

The whole tenor of the testimony shows that the defendant must have been ignorant, at the time of the sale, of the disease under which the slave labored, and so thought the judge of the court below. He is consequently only bound to restore the price, and to reimburse the expenses occasioned by the sale and incurred for the preservation of the thing. He has, however, been decreed to pay \$60, the amount disbursed for the examination after death, and for expenses of interment. These are not among the charges for which the defendant is liable. C. C. art. 2509. Fuentes v. Caballero, 1 An. Rep. 27. In this respect the judgment must be corrected.

The defendant contends that he should be allowed compensation for the services of the slave while in the plaintiff's possession. The sale was for cash. The use of the money paid as the price stands as an offset against the services of the slave.

It is therefore ordered that the judgment of the District Court be reversed. It is further decreed that the plaintiff recover of the defendant Kendall, \$537 50, with five per cent interest from the 1st October, 1846, the date of judicial demand, until paid; the appellee paying the costs of this appeal, and the defendant those of the court below.

BENTON v. ROBERTS.

The right of a joint owner to maintain a possessory action depends on the nature of his possession. While he continues to possess nomine communith the right does not exist; but where he has possessed nomine proprio, and in good faith, for more than a year, he is to all legal intents a just possessor, and in case of a disturbance by the other joint owner, the possessory action will lie. Nor will the fact of commencing a suit for a partition after the institution of the possessory action, in any manner affect the right to recover in the latter, where each party had possessed, for more than a year, a portion of the land in his own right.

BENTON W. ROBERTS.

A PPEAL from the District Court of Carroll, Curry, J. Stacy and Sparrow, for the plaintiff.

Bemies and H. A. Bullard, for the appellant. 1. The parties were joint tenants. That there had been no partition, is proved by the institution of a suit to effect a partition, after this action was commenced. From the very nature of the title of joint tenants, one joint tenant cannot maintain a possessory action against his co-tenant. 2. The cumulation of an action for a partition with the possessory action—in fact, the mere institution of an action for a partition after the possessory action—must dismiss the latter; the action for a partition being in its nature petitory, and consequently incompatible with a suit for a partition. C. P. 57, 150.

The judgment of the court was pronounced by

Rost, J.* This is a possessory action. The plaintiff and defendant were, at the time it was instituted, joint owners of the land, the possession of which is in controversy. The case was tried before a jury, who gave a verdict in favor of the plaintiff, with \$1000 damages. The defendant has appealed from the judgment rendered on the verdict.

The main ground relied on by the defendant's counsel is that, from the very nature of the title of joint owners, one cannot maintain a possessory action against another. The right of a party thus situated to maintain a possessory action, depends upon the nature of his possession. As long as he continues to possess nomine communi, the right does not exist. But when he has possesses nomine proprio, and in good faith, during more than one year, he is to all legal intents a just possessor, and in case of a disturbance by the other joint owners, the possessory action will lie. Troplong, Presc. nos. 361, 528, This possession animo domini of the joint owner, is expressly recognised by the Louisiana Code, and made the basis of the prescription of thirty years against the title of his partners. Arts. 1228, 1229, 1292.

The plaintiff and the defendant purchased, in 1839, four contiguous lots of land, forming at the time two distinct and separate plantations, and each took possession of one of those plantations. During the first year the plaintiff rented the place taken possession of by him to a person who has testified in the cause. In 1840, he rented it to another person, whose testimony is also in the record. Those persons contracted with him as the exclusive possessor of the land, and paid him the rent. The last named delivered up the land to him in 1841, and the plaintiff planted a crop upon it; but before the crop was made, the defendant, who had been living all the time on the adjoining place and cultivated it as his own, took possession, by force, of the premises occupied by the plaintiff, prevented him from gathering the crop, and caused him other damage. The plaintiff's right to maintain his action is clearly made out. The fact that he subsequently instituted a suit for a partition, can in no manner affect it. Each of the parties had possessed, during more than one year, a portion of the land in his own right, and an action of partition was the only proceeding to which they could resort to put an end to that state of things.

The verdict of the jury in relation to the damages is fully sustained by the evidence, and the judgment has done justice between the parties.

Judgment affirmed.

^{*} Evers, C. J. was present when this opinion was pronounced on the 12th of April, but was absent when it became final by the refusal of an application for a re-hearing.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA,

M

OPELOUSAS,

IN

AUGUST, 1847.

PRESENT : "

Hon. PIERRE ADOLPHE ROST, Hon. GEORGE ROGERS KING, Hon. THOMAS SLIDELL,

SEGURA, Under-tutor, v. PRADOS, Tutor.

Notoriously bad conduct, or unfaithfulness in the administration of the property of the minors, are the only causes for which a father can be legally excluded, or removed, from the tutorship of his children. C. C. 326. Proof that a father is improvident, careless in pecuniary matters, and wanting in habits of industry, or that he had not caused an inventory to be made, where the delay resulted from no indisposition on his part to take the necessary steps to protect the interests of the minors, are not sufficient to warrant his removal from the tutorship.

A PPEAL from the Court of Probates of St. Martin, Briant, J. Brent, for the plaintiff, cited Civil Code, arts. 266, 269, 323, 324, 326, 1013, 1015, 1016, 1017. De Blanc and Magill, for the appellant. The judgment of the court was pronounced by

King, J. The defendant has appealed from a judgment removing him from the tutorship of his minor children. The grounds on which his removal is asked for are, the notoriously bad conduct of the defendant, and his unfaithfulness in the administration of the property of the minors. These are the only causes known to our laws for the exclusion or removal of the father from the tutorship of his children, and we think that the plaintiff has failed to show the existence of either. C. C. 326.

The facts mainly relied on in support of the averment of an unfaithful administration are, that the defendant caused no inventory to be made of the estate in which the minors are concerned, and that, without such inventory, he alien-

^{*} Chief Justice Eusris was not present during this term-

SEGURA:

ated moveable effects belonging to the community. The evidence shows that the defendant repaired from New Orleans to St. Martinsville, for the purpose of causing an inventery to be made; that he employed an attorney to take the legal steps to accomplish that end; that the latter was prevented by a pressure of business from attending to this engagement; and that, notwithstanding the repeated applications of the defendant, proceedings were postponed from time to time until the institution of this action. The failure to observe this formality, then, appears to have arisen from no indisposition on the part of the defendant to take the measures necessary for the protection of his children's interests. The only effects alienated by the defendant appear to have been a few articles of merchandise amounting to about three or four dollars, but for what purpose, or under what circumstances, has not been shown.

The charge of bad conduct is in our opioion equally unsupported by the evidence. The testimony shows that the defendant is improvident, careless in his pecuniary affairs, and perhaps wanting in habits of industry; but it does not appear that he is addicted to any such vices or immoralities of conduct, as should deprive a father of the care and protection of the persons and property of his children.

It is therefore ordered that the judgment of the Probate Court be reversed, and that there be judgment for the defendant; the appellee paying the costs of both courts.

RIVETTE v. BERGERON, Tutor.

Where the record shows no petition or motion for an appeal, nor any order of appeal, the sppeal must be dismissed on a motion to that effect.

A PPEAL from the Court of Probates of St. Martin, Briant, J. De Blanc and Magill, for the plaintiff. I. E. Morse, and Nicholls, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. In this case there is no petition or motion for appeal, nor order of appeal. The motion to dismiss must prevail.

Appeal dismissed.

DWIGHT v. CURTIS.

A sheriff by whom services had been rendered, before the stat. of 10 March, 1845, relative to fees, in writing notices of the sale of property seized under execution, in posting them, and in applying to the parish judge for mortgage certificates, is entitled to a reasonable compensation therefor, to be fixed by the rate allowed for similar services in other cases. The fact that no allowance is made for those services by the stat. of 28 March, 1813, is no proof that the legislature intended that they should be gratuitous, the statute requiring them to be rendered having been enacted since the statute of 1813. No charge can be made for services which were required to be performed before the stat. of 1813, and for which no allowance was made by it, as for notices of seizure, copies thereof, and mileage for serving them. Ss. 3, 17 of act of 1813. The first sec. of the stat. of 7 March, 1814, allowing mileage for the service of process, does not authorize any charge for mileage in serving notices of seizure. The service of a notice of seizure is not the service of process within the meaning of that statute.

A PPEAL from the District Court of St. Mary, Boyce, J. Dwight, plaintiff, pro se. Splane, for the defendant. The judgment of the court was pronounced by

DWIGHT D. CULTIM-

King, J. The plaintiff, suing for himself and for the use of the parish of St. Mary, claims \$600 from the defendant, alleging that the latter, while acting as sheriff of that parish, charged and received other and higher fees than those allowed by law, under certain writs of execution, in virtue of which property of the present plaintiff was seized. The defendant pleads a general denial, avers that the allegations of plaintiff's petition are false and malicious, and claims damages in reconvention. There was a verdict in favor of the plaintiff for \$50, and from the judgment rendered thereon both parties have appealed.

The services of the defendant were rendered prior to the adoption of the fee bill of 1845, and the rights of the parties are to be tested by the laws in force previous to that date. The plaintiff relies on the 3d and 17th sections of the act of 1813, establishing an explicit fee bill. Bul. & Cur. Dig. p. 440, 444. The 3d section of that act declares that the sheriff shall be entitled to demand and receive the fees therein enumerated and no more; and the 17th section provides that, any clerk, sheriff, coroner or other officer, who shall presume to charge, demand, or receive, any greater, higher, or other fees than are specially mentioned and defined in the act, shall be liable to pay for every offence a sum not to exceed fifty dollars, nor less than twenty-five dollars, to be recovered before any competent authority, one half to the use of the person suing and the other half to the use of the parish. The charges made by the defendant, of which the plaintiff complains, are those for notices of seizure, copies of those notices, and mileage for serving them; for notices of sale, and mileage in posting them, and applications to the parish judge for certificates of mortgage. It is contended that as none of these services are enumerated in the statute establishing the fee bill, the sheriff is entitled to no compensation for rendering them, and has, by charging and receiving fees, incurred the penalties of the act.

With regard to the notices of sale, mileage for posting them, and the applications to the parish judge for certificates of mortgage, these services have been required by a law passed since the adoption of the fee bill; and although the statute requiring them to be performed has fixed no compensation for the officer, it is not to be presumed that the legislature intended that they should be rendered gratuitously. In such cases the officer is entitled to reasonable compensation, and when the rates of similar services are fixed in other cases, those rates should be the standard of his charges.

The statute of 1843 requires that the sheriff shall post up public notices of sales to be made by him under execution, at three public places. Under this law it has been held that, in the parish of St. Mary, two of these notices must be posted up out of the town in which the seat of justice is situated. Pumphrey v. Delahoussaye, 9 Rob. 42. In performing that duty travel becomes necessary to distant parts of the parish, and for that service, as well as for writing the notices, the sheriff is entitled, upon every principle of equity, to remuneration, and, in the present instance, the charge made for mileage is the same which the law allows that officer for serving process of the court. The fees for writing the notices have not been shown to be unreasonable.

The charges, however, for notices of seizure and for mileage in serving them, cannot be made to rest upon the same ground. Those duties were required to

DWIGHT OF CURTIS.

be performed before the adoption of the fee bill of 1813. That act makes no provision for the compensation of the sheriff for those services, but expressly forbids him from making any other or higher charges than those specified in the act. The act of 1814, on which the defendant relies to support his claim for mileage for notices of seizure, does not, in our opinion, authorize that charge. It provides for mileage in serving the process of the court; but the notice of a seizure made, cannot be considered process, in the legal acceptation of the term. The defendant has violated the law in each of the bills collected from the plaintiff. The jury do not appear to us to have awarded to the plaintiff the full amount warranted by the evidence. In each of the three bills the charge occurs, for notices of seizure, copies, and mileage for serving them; and the fees illegally received by the defendant amount to \$14,24. In this respect the judgment must be corrected.

It is therefore ordered that the judgment of the District Court be amended, and that the plaintiff recover of the defendant eighty-nine dollars and twenty-four cents, instead of the sum of fifty dollars, the defendant paying the costs of both courts.

LEWIS, EXECUTOR, v. SPLANE.

An appellee is not entitled to have the appeal dismissed on the ground that the bond, given for a suspensive appeal, is not for as large an amount as the law requires, where it is sufficient for a devolutive appeal.

Where a lost instrument is made the foundation of a suit or defence, the loss must be shown by direct evidence, or be rendered probable by circumstances, supported by the oath of the party; and it must be shown that its loss was advertised in some public paper. C. C. 2258, 2259.

A PPEAL from the District Court of St. Mary, Boyce, J. Dwight, for the plaintiff. Splane, appellant, pro so. The judgment of the court was pronounced by

. King, J. A motion has been made to dismiss this appeal, on the ground that the bond furnished by the appellant is not for a sum exceeding by fifty per cent the amount of the judgment appealed from. The bond given by the appellant, probably from some inadvertence or error of calculation, is for about \$18 less than the sum required by law for a suspensive appeal, but is for an amount more than sufficient to cover the costs. In the case of Balph v. Hoggatt, lately decided, ante p. 462, we held this to be an insufficient cause for a dismissal, and that the case would be considered as pending before us on a devolutive appeal. See also Parks v. Patton, 9 Rob. 167.

The defendant has appealed from a judgment rendered against him for the amount of a promissory note, with interest from judicial demand. He complains that the court below has not allowed, in part extinction of the plaintiff's demand, a draft which is averred in the answer to have been lost or mislaid. We think the judge did not err. The loss of the instrument has not been shown either by direct testimony, or by such circumstances, supported by the oath of the party, as render the loss probable, which was an indispensable prerequisite to proving its contents. Nor does it appear that the loss was advertised in a

public paper, which the law deems equally necessary to a recovery in all cases, where a lost instrument is made the foundation of a suit or defence. C. C. arts. 2258, 2259.

Judgment affirmed.

LEWIS 9. SPLANE.

HAYDEL v. BATEMAN.

Where an action, as shown by the original petition, is neither petitory nor possessory, the plaintiff may amend his petition so as to make it clearly petitory.

A third person, who claims to be the owner of the land in controversy in a petitory action.

has a right to intervene, and try his title in the sait, provided he call no other parties in warranty, nor in any other way arrest the progress of the litigation.

A PPEAL from the District Court of St. Mary, Boyce, J.

A Oilivier, for the plaintiff. The amendment was properly allowed. Hower v. Richards, 1 Rob. 35. 4 La. 400. Bauduc v. Domingon, 8 Mart. N. S. 438. Petitpain v. Frey, 15 La. 198. Code Pr. 151. The intervention of Comeau was properly rejected; because the decision of the matters between the plaintiff and defendant could not affect his rights. In the case of Pierre v. Massé, the court held that, "it is not sufficient that the interpleader has claims to establish and enforce against plaintiff or defendant, to authorise an intervention; he must show that the decision of the matters at issue between them, will, or may, affect his rights." The case of Caraby v. Morgan, 5 N. S. 501, is still more directly in point. It was a possessory action. The court said: "The ground on which a third party is permitted to come between plaintiffs and defendants is, that the action between them may be injurious to him. His right is, therefore, limited to the suit pending: to see that it is correctly and legally decided."

Splane, for the appellants. The amended petition should not have been received. C. P. 419. It changes the natuer of the action. Castalle v. Dumartrait, 5 Mart. N. S. 69. Babcock v. Shirley, 11 La. 75. Bell v. Williams, 10 La. 516. Gasquet v. Johnson, 1 La. 434. McRae v. McRae, 11 La. 571. Bauduc v. Domingon, 8 Mart. N. S. 438. The intervention should have been received. C. P. 389. Stat. 7 April, 1826. 11 Mart. 455. 1 Mart. N. S. 499. 11 La. 449. 5 La. 486. 3 La. 183. 1 La. 431.

The judgment of the court was pronounced by

Rost, J. This case presents questions of practice, in which we are invariably disposed to be governed by authority. The action as originally commenced, was neither petitory nor possessory; and, under the rule established by the Supreme Court in the case of *Hoover*, tutor, v. Richards and wife, 1 Rob. 35, the amendment which made the action clearly petitory was admissible.

The action being petitory, the intervention of Comeau should have been allowed. He claimed to be the owner of the land in controversy, and had the right to try his title in this suit, provided he did it without calling any other parties in warranty, or in any other manner arresting the progress of the litigation. Interventions of this kind are of frequent occurrence in our courts. See Phelps v. Hughes, 1st Ann. Rep. 320. Gibson v. Foster, ante, 503.

The judgment in this case is reversed; and the case remanded for further proceedings in conformity with the views expressed in the opinion of the court. The plaintiff and appellee paying the costs of this appeal.

DWIGHT OF CURTIS.

be performed before the adoption of the fee bill of 1813. That act makes no provision for the compensation of the sheriff for those services, but expressly forbids him from making any other or higher charges than those specified in the act. The act of 1814, on which the defendant relies to support his claim for mileage for notices of seizure, does not, in our opinion, authorize that charge. It provides for mileage in serving the process of the court; but the notice of a seizure made, cannot be considered process, in the legal acceptation of the term. The defendant has violated the law in each of the bills collected from the plaintiff. The jury do not appear to us to have awarded to the plaintiff the full amount warranted by the evidence. In each of the three bills the charge occurs, for notices of seizure, copies, and mileage for serving them; and the fees illegally received by the defendant amount to \$14,24. In this respect the judgment must be corrected.

It is therefore ordered that the judgment of the District Court be amended, and that the plaintiff recover of the defendant eighty-nine dollars and twenty-four cents, instead of the sum of fifty dollars, the defendant paying the costs of both courts.

LEWIS, Executor, v. SPLANE.

An appellee is not entitled to have the appeal dismissed on the ground that the bond, given for a suspensive appeal, is not for as large an amount as the law requires, where it is sufficient for a devolutive appeal.

Where a lost instrument is made the foundation of a suit or defence, the loss must be shown by direct evidence, or be rendered probable by circumstances, supported by the oath of the party; and it must be shown that its loss was advertised in some public paper. C. C. 2258, 2259.

A PPEAL from the District Court of St. Mary, Boyce, J. Dwight, for the plaintiff. Splane, appellant, pro se. The judgment of the court was pronounced by

Kine, J. A motion has been made to dismiss this appeal, on the ground that the bond furnished by the appellant is not for a sum exceeding by fifty per cent the amount of the judgment appealed from. The bond given by the appellant, probably from some inadvertence or error of calculation, is for about \$18 less than the sum required by law for a suspensive appeal, but is for an amount more than sufficient to cover the costs. In the case of Balph v. Hoggatt, lately decided, ante p. 462, we held this to be an insufficient cause for a dismissal, and that the case would be considered as pending before us on a devolutive appeal-See also Parks v. Patton; 9 Rob, 167.

The defendant has appealed from a judgment rendered against him for the amount of a promissory note, with interest from judicial demand. He complains that the court below has not allowed, in part extinction of the plaintiff's demand, a draft which is averred in the answer to have been lost or mislaid. We think the judge did not err. The loss of the instrument has not been shown either by direct testimony, or by such circumstances, supported by the oath of the party, as render the loss probable, which was an indispensable prerequisite to proving its contents. Nor does it appear that the loss was advertised in a

public paper, which the law deems equally necessary to a recovery in all cases, where a lost instrument is made the foundation of a suit or defence. C. C. arts. 2258, 2259.

Judgment affirmed.

LEWIS F. SPLANE.

HAYDEL v. BATEMAN.

Where an action, as shown by the original petition, is neither petitory nor possessory, the plaintiff may amend his petition so as to make it clearly petitory.

A third person, who claims to be the owner of the land in controversy in a petitory action.

has a right to intervene, and try his title in the sait, provided he call no other parties in warranty, nor in any other way arrest the progress of the litigation.

PPEAL from the District Court of St. Mary, Boyce, J.

A Oilivier, for the plaintiff. The amendment was properly allowed. However v. Richards, 1 Rob. 35. 4 La. 400. Bauduc v. Domingon, 8 Mart. N. S. 438. Petitpain v. Frey, 15 La. 198. Code Pr. 151. The intervention of Comeau was properly rejected; because the decision of the matters between the plaintiff and defendant could not affect his rights. In the case of Pierre v. Massé, the court held that, "it is not sufficient that the interpleader has claims to establish and enforce against plaintiff or defendant, to authorise an intervention; he must show that the decision of the matters at issue between them, will, or may, affect his rights." The case of Caraby v. Morgan, 5 N. S. 501, is still more directly in point. It was a possessory action. The court said: "The ground on which a third party is permitted to come between plaintiffs and defendants is, that the action between them may be injurious to him. His right is, therefore, limited to the suit pending: to see that it is correctly and legally decided."

Splane, for the appellants. The amended petition should not have been received. C. P. 419. It changes the nature of the action. Castalle v. Dumartrait, 5 Mart. N. S. 69. Babcock v. Shirley, 11 La. 75. Bell v. Williams, 10 La. 516. Gasquet v. Johnson, 1 La. 434. McRae v. McRae, 11 La. 571. Bauduc v. Domingon, 8 Mart. N. S. 438. The intervention should have been received. C. P. 389. Stat. 7 April, 1826. 11 Mart. 455. 1 Mart. N. S. 499. 11 La. 449. 5 La. 486. 3 La. 183. 1 La. 431.

The judgment of the court was pronounced by

Rost, J. This case presents questions of practice, in which we are invariably disposed to be governed by authority. The action as originally commenced, was neither petitory nor possessory; and, under the rule established by the Supreme Court in the case of *Hoover*, tutor, v. Richards and wife, 1 Rob. 35, the amendment which made the action clearly petitory was admissible.

The action being petitory, the intervention of Comeau should have been allowed. He claimed to be the owner of the land in controversy, and had the right to try his title in this suit, provided he did it without calling any other parties in warranty, or in any other manner arresting the progress of the litigation. Interventions of this kind are of frequent occurrence in our courts. See Phelps v. Hughes, 1st Ann. Rep. 320. Gibson v. Foster, ante, 503.

The judgment in this case is reversed; and the case remanded for further proceedings in conformity with the views expressed in the opinion of the court. The plaintiff and appellee paying the costs of this appeal.

McIntosh v. Smith.

Where the record of a judicial partition from another State, properly authenticated, is offered in evidence, any objection to it as not being a complete transcript of all the proceedings, or on the ground that the partition is of no effect, not having been homologated, goes to its effect and not to its admissibility.

Where a party is present at the trial he may be ordered to answer interrogatories instanter, though then propounded to him for the first time, where the questions require no recourse to books or papers.

The provision of art. 3491 of the Civil Code, that "prescription is suspended during marriage in every case when the action of the wife may be prejudical to the husband," must be construed with reference to the french text. That article is taken from the Code Napoléon, and its meaning is settled in the jurisprudence of France, as embracing all cases in which the action of the wife would, if maintained, give the defendant, or any other person, a right of action against the husband.

Though a wife suffer her property to be sold to pay her husband's debts, without opposition, she will not be thereby precluded from reclaiming it. The law presumes that she was prevented by her husband from asserting her rights.

Where, by agreement of counsel, a jury is permitted to separate after the adjournment of the court, the defendant cannot complain that, after having scaled their verdict as directed by the court, the jarors separated for the night, and that, after their verdict was delivered into court the next morning, they were sent out again, with the papers of the suit, to make the verdict more explicit.

In an action by a wife against the purchaser of slaves claimed as paraphernal property, bought by the defendant at a sale under execution, in which the husband is cited in warranty, judgment may be rendered against the defendant for the whole of the slaves and their bire, though the community had been dissolved by the death of the wife pendente life; nor will the death of one or more of the slaves defeat the right to recover their hire while alive, on the ground that eviction was a prerequisite to its recovery.

Acts or omissions which would constitute fraud in other persons, will not necessarily be construed to be fraudulent against married women.

The discontinuance of a suit cannot affect the legal rights of a party.

In questions of title silence does not, in any case, show consent, unless continued during the time necessary for prescription.

Where a purchaser of property sold under execution is evicted, the plaintiff in the execution, cited in warranty, can be condemned to pay legal interest only from the date of the purchase.

A PPEAL from the District Court of St. Mary, Overton, J. Splane, for the plaintiff. Dwight, for the defendant. Gibbon, for Barron, cited in warranty. The judgment of the court was pronounced by

Rost, J. The plaintiff claims, as her paraphernal property, certain slaves sold under execution to satisfy debts of the community existing between her and her husband, and purchased by the defendant. The defendant cited the plaintiff's husband, and the seizing creditors, in warranty. There was judgment against him in favor of the plaintiff, and in his favor against the parties cited by him. After an ineffectual attempt to obtain a new trial, the defendant and one of the seizing creditors appealed. Our attention has been called to several bills of exception which we will briefly notice, so far as it is necessary to do so.

I. The court properly overruled the objection of the defendant to the introduction as evidence of the copy of a record of the Orphan's Court of Adams county, in the State of Mississippi.* That copy was properly authenticated, and the grounds taken by counsel go to its effect, not to its admissibility.

McIntosh v. Smith.

II. The defendant being present at the trial, the court had the undoubted right to order him to answer instanter the interrogatories put to him. He did not require his counsel's advice as to the answers he was to make. He was bound to speak the truth, and was able to do so without previous notice.

III. The judge correctly charged the jury, that, under art. 3491 of the Louisiana Code, prescription does not run against the plaintiff. The english side of that article provides that prescription is suspended during marriage, in every case, when the action of the wife may be prejudicial to the husband. The french says: "Dans tous les autres cas où l'action de la femme refléchirait contre le mari." The english text must be construed with reference to the french. This article was originally taken from the Code Napoléon, and its meaning is settled by the jurisprudence of France, as embracing all cases in which the action of the wife would, if maintained, give the defendant, or any other person, a right of action against the husband. The present case comes clearly within the rule.

IV. The judge refused to charge the jury that if one stands by and sees, or if one knows of, his property being sold to pay the debts of another, without making opposition, he cannot afterwards recover back the property; and also that a party guilty of fraud and collusion is estopped from having any advantage from his own fraudulent and collusive acts. Supposing those principles to be correct as laid down, about which we express no opinion, they are not applicable to the wife who sees her property sold to pay her husband's debts. If she suffer it to be done without opposition, the law presumes that she was prevented by him from asserting her rights. The legal presumption which excuses her when she commits a certain felony in his company, must avail her also in cases like this. The judge did not err. Hypothetical propositions not applicable to the case at bar, only tend to mislead the jury.

V. From the beginning of the trial the jury were permitted, by an express agreement of counsel, to separate after the adjournment of court. This being the case, the defendant cannot complain that, after having sealed their verdict in the evening, as directed by the court, they separated for the night, and that, when the verdict was delivered into court the next morning, they were sent out again with the papers of the suit, in order to make it more explicit as to the time of the death of two of the slaves, and the amount to be recovered by the defendant from his warrantors. The evidence of the facts which the court below directed the jury to find is before us, and the irregularities complained of would not, if they existed, authorise us to remand the cause.

^{*} This record was objected to by defendant, as appears by a bill of exceptions, on the grounds that, "it was not the whole, but only a part of the record; that a material paper, to wit, the will, was wanting; that a part of the record is not admissible in evidence; that the document purporting to be a copy of a judicial partition, which is not homologated, is no evidence of a partition, and can have no effect as such."

[†] The defendant objected to the right of the plaintiff to propound these interrogatories, on the grounds: "1. That, after trial commenced, one party cannot propound interrogatories to anothor, and require him to answer them during the progress of the trial: 2, That the court cannot require such interrogatories to be answered instanter, but can only fix a day when they shall be answered, when the party interrogated will have the whole day to answer: 3. That a party, at the time of trial, cannot propound successive interrogatories to an opponent, and require him to answer them successively until he obtains a satisfactory result."

McIntonu v. Snith. The defendant has assigned two errors of law, which he says are apparent on the face of the record: 1st. That the wife of the defendant has died, leaving children, since the institution of this suit, and that her heirs should have been made parties. 2d. That the defendant cannot be made to pay the hire of the slaves that have died. There is nothing in those objections. The defendant has the slaves in his possession, and withholds them from the plaintiff. As head and master of the community, he remains liable for all its obligations. The recourse which the law gives him against the heirs of his wife in case they accept the community, cannot affect the rights of third persons. The death of two of the slaves was a fortuitous event, which cannot affect the right of the plaintiff to their hire.

On the merits the slaves are proved to be paraphernal property, and the law and evidence are clearly in favor of the plaintiff. There is no doubt that the laws intended for the protection of married women should not be so construed as to enable them to commit fraud; but their dependant condition greatly restricts the application of that principle, and we have already had occasion to determine that acts or omissions which would constitute fraud when done or emitted by other persons, would not necessarily be so construed against married women.

The plaintiff was no doubt aware that the slaves had been seized and sold, and it is further shown that she instituted two suits in relation to those slaves, which she afterwards dicontinued. The discontinuance of suits by a party, cannot affect his legal rights; and it is not true, in any case, that, in questions of title, silence shows consent, unless it continue during the time required for prescription, when the law of prescription is applicable. We have already stated that neither the knowledge of the plaintiff that the slaves were sold, nor her presence at the sale, could affect her rights.

We see no error in the judgment so far as the defendant is concerned, except that, under the act of 1839, the claim in reconvention should have been allowed, as far as it was proved. We will therefore amend the judgment, and allow the defendant \$339 45 in compensation.

The judgment must also be amended in relation to the seizing creditor, Barron. The judgment as rendered charges him with interest at the rate of eight per cent per annum. He is only responsible for legal interest, and the amount which he is to refund is \$273, only.

For the reasons assigned, it is ordered that the judgment in this case be amended, so as to allow the defendant a credit of \$330 45 on the sum he is to pay for the hire of the slaves in controversy. It is further ordered that the judgment be amended, and Joseph Barron adjudged to pay the defendant the sum of \$2731, instead of \$2771, with interest thereon at the rate of five per cent per annum, instead of eight per cent, from the fifth day of February, 1833, till paid. It is further ordered that the judgment as amended be affirmed; the costs of this appeal to be paid by the plaintiff and appellee.

^{*} The errors, as assigned, are: "1. That the wife has died since the institution of suit, leaving heirs of age and under age; that her death was suggested in the lower court; that there is judgment against the defendant for all the negroes and the whole of their hire; that there cannot lawfully be a judgment against him for but the half of each; that if a judgment for the whole is sought, the heirs of the wife must be made parties. 2. Defendant cannot be compelled to pay the hire of slaves of which he has not been evicted; eviction is a prerequisite to the recovery of hire; judgment for the hire of the slaves who have died is contrary to law."

Dwight, Syndic, v. Smith, Tutor.

The claim of one whose occupation is that of a school-master, for the board and lodging of pupils, is prescribed by one year, under art. 3499 of the Civil Code.

A PPEAL from the District Court of St. Mary, Voorhies, J. Dwight, appellant, pro se. Splane, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The items of the bill upon which the plaintiff sues, are for the board and tuition, and advances of money for the use, of certain minors, the nephews of *Roberts*, the inselvent. The items for board and tuition were rejected by the court below, as barred by prescription.

It is urged that the item for board was improperly subjected to the prescription of one year. The argument of the appellant is, that Roberts was not an inn-keeper, and that therefore the claim does not fall within article 3499 of the Code. The language there used is: "That of inn-keepers and such others, on account of lodging and board which they furnish." It is true that the occupation of Roberts was that of a school-master and not of an inn-keeper; but the nature of the service charged for, the boarding of the minors, falls within the literal terms of the Code; and, in view of the expression "such others," may be fairly taken as the test of the prescription applicable to the case. By taking persons to board with him for hire, Roberts assimilated himself to an inn-keeper. We cannot reconcile, either with the letter or the spirit of the Code on the subject of prescription, the pretention of the appellant that a claim of such a character is barred only by ten years.

The court below also properly rejected an item for travelling expenses incurred by Roberts, the nucle, on a journey of affection and kindness in quest of one of the minors. It resulted in no advantage to the minor, and was not made at the request of his tuter; ner, as we believe, with any expectation at the time of reimbursement.

Judgment affirmed.

Union Bank of Louisiana v. Campbell.

In an action against the endorser of a note who resided at the time of the protest in the parish of S ———, the certificate of a notary, by whom the note was protested, "that the parties were duly notified of the protest thereof, by letters to them written and addressed, &c., and served upon them in the manner following, by means of written notices addressed to the endorsers, all of the parish of St. Mary, which notices I deposited in the post-office," &c., will be insufficient to charge the endorser. Per Curiam: The notary certifies that the endorsers were "all of the parish of S.", but we are not permitted to infer that the notices were addressed "Parish of S." In the absence of any further direction, the letter enclosing the notes would have remained in the office in which it was deposited.

A PPEAL from the District Court of St. Mary, Voorhies, J. I. E. Morse and Nicholls, for the appellants. Splane, for the defendant. The judgment of the court was pronounced by

Union Bank v. Campbell.

SLIDELL, J. The defendant is sued as endorser of a promissory note, and the case turns upon the question of notice. At the time of the protest the defendant lived in the parish of St. Mary, and Franklin was the post-office nearest to his residence. The certificate of the notary declares, "that the parties were duly notified of the protest thereof by letters to them written and addressed, dated on the day of said protest, and served upon them respectively in the manner following, viz : by means of three written notices addressed to the drawer, J. Smith, and to the endorsers, James Campbell and James S. Norris, all of the parish of St. Mary, which three notices I have deposited in the postoffice at St. Martinsville, and by leaving and furnishing the said cashier, Adrien Dumartrait, similar notices as those directed as aforesaid." This certificate is insufficient to charge the endorser. It does not show that the notice was addressed to any place. It certifies that the drawer and endorsers were "all of the parish of St. Mary," but we are not permitted to infer from this that the notices were addressed " parish of St. Mary." In the absence of a statement of place, in the address of the letter, it would remain in the post-office at St. Martinsville, instead of being transmitted to Franklia; in other words, it would not reach the endorser. Judgment affirmed.

Bowles r. WILCOXEN.

It is only in the case of the seizure of ships or other vessels, that property provisionally seized can be released by the defendant on the execution of a bond in favor of the plaintiff. The right to bond property provisionally seized is given by sec. 12 of the stat. of 28 March, 1839. Sec. 18 of that stat. relative to the bonds given to release property so seized, must be considered as referring to the cases enumerated in sec. 12.

A distrings will not be issued to compel a specific execution of a judgment rendered against a party for a portion of a crop in kind, where, in consequence of the bonding and sale of the property, it had become impossible to deliver it in kind. Per Curiam: The office of the writ is to enforce the performance of things that are possible; not to punish parties for failing to do what is impracticable.

Defendant having obtained a judgment against plaintiff for a certain number of hogsheads of sugar due to him as rent, took out a distringas to compel a specific execution of the judgment. Plaintiff enjoined the proceedings on the ground, that the sugar, having been sold, could not be delivered in kind; the injunction was sustained as to the delivery of the particular sugar, but it was ordered that an equal quantity of sugar should be delivered in satisfaction, and a distringas was authorised to be used to enforce its delivery; Held, that the distringas could only have been used to coerce the specific performance of the contract, and that, when that could no longer be accomplished, it should have been revoked.

A PPEAL from the District Court of St. Mary, Voorhies, J. Maskell and Magill, for the appellant. Dwight, for the defendant. The judgment of the court was pronounced by

Kine, J. Wilcoxen, the defendant in this suit, obtained a judgment against the present plaintiff, Bowles, for a sum of money, and for twenty-eight hogsheads and one barrel of sugar, and twelve hundred and forty-three gallons of molasses, of the crop produced by the latter in 1844, which judgment was affirmed by this court. See 1 Ann. Rep. 230. That suit was commenced by a provisional seizure of a quantity of sugar, which Bowles was permitted to bond on the day on which the seizure was made. The bond was returned into court,

Bowles v. Wilcoxes.

and the sheriff stated in his return, the fact of its having been taken. No opposition to this proceeding was made by the plaintiff, who nevertheless took a judgment for one-fourth of tile crop produced by Bowles in 1844, in kind. Upon an execution issued in virtue of this judgment, the monied part of the demand was satisfied, and the sheriff returned that an ineffectual application had been made for the sugar and molasses. A rule was, thereupon, taken on Bowles, to show cause why a writ of distring as should not issue against him, and, after a hearing, the rule was made absolute. From the judgment on the rule Bowles asked for an appeal, which the judge refused. A written notice was given to the sheriff by Bowles, of his readiness to deliver the quantities of sugar and molasses specified in the judgment, which Wilcoxen refused to receive, unless they were the identical sugar and molasses provisionally seized. An offer was also made to satisfy the judgment by paying the current price of sugar in October, 1846, with eight per cent interest from that date, which was also declined. Written instructions to the sheriff were endorsed on the writ by the counsel of Wilcoxen, to receive nothing in satisfaction of the judgment, except the specific articles mentioned in the decree. Bowles enjoined the execution of this writ on various grounds, and, among others, that a distringus was not a remedy of which the defendant could avail himself. The injunction was sustained so far as to relieve the plaintiff from the delivery of the specific sugar and molasses described in the judgment, and the sheriff was authorised to receive the required quantity of both, of equal quality with that produced by Bowles in 1844. From this judgment, Bowles, the plaintiff in this action, has appealed.

The right of the plaintiff to an appeal from the judgment rendered on the rule, has been much discussed at bar, but the question is not before us in a shape to authorise the expression of an opinion in relation to it; nor is the enquiry material to the decision of the true issues which the controversy presents.

It is contended that the bond executed by the plaintiff was legally received by the sheriff; that its effect was to release the sugar from the seizure, and to deprive the defendant of his right to claim a specific execution of his judgment. The only authority relied on by the plaintiff in support of the right to bond property provisionally seized, is the act of 1839. That statute we understand to relate alone to ships or other vessels, the provisional seizures of which it permits to be set aside, on a bond being executed in favor of the plaintiff as in cases of attachment. The 18th section of the act, which provides for the disposition to be made by the sheriff of bonds given to release property from provisional seizure, must be considered to refer to cases enumerated in the 12th section, of ships and other vessels, the only species of property to which the right of bonding in such proceedings has been extended. Acts 1839, p. 166, ss. 12, 18. The act of the sheriff was clearly illegal, and the unauthorised bond taken by him opposed no impediment to a specific execution of the judgment, if, in other respects, it had been practicable.

'I he question which next arises is, whether the defendant, under the facts of the present case, could resort to a distringus to enforce a compliance with the judgment which he had obtained. The contract of lease, upon which that judgment was rendered, stipulated for the payment in kind of one-fourth of a crop of sugar and molasses, as rent. The judgment was in conformity with this contract, and the defendant would, under ordinary circumstances, have had his election, upon the refusal of the debtor to surrender the objects, the delivery

BOWLES WILCOXEN.

of which was decreed, either to institute an action for damages, or to compel a specific execution by means of a distringus. C. P. 635, 636. But it is conclusively shown by the evidence, that a specific execution of the judgment had become impossible at the date when the writ issued; that the defendant was aware of the impossibility; and that he persisted in resorting to this process without the remotest expectation that it would coerce a specific performance. Wilcozen knew that the sugar had been released on the boud of the plaintiff, and delivered to the latter, whether illegally or not is immaterial; and it appears from the evidence that he was aware, at the time the order for the distringus was granted, that the sugar had long previously been shipped and sold, and that the proceeds were then in the hands of the plaintiff's attorney. He was aware then that a specific execution of the judgment was impracticable, and that the writ he was seeking could only serve to harnss his debtor. With this knowledge he instructed the sheriff-to receive in satisfaction of his judgment no other than "the specific articles named in the judgment;" and he new contends, that the law accords to him-the right of resorting to this suit, for the mere purpose of punishing his debtor. The proposition is novel, and can meet with little favor in this court.

The appropriate office of the writ is to enforce the performance of things that are possible, and not to punish parties for the failure to perform those which are impracticable. When the impossibility of a specific execution became apparent to the judge below, he correctly dispensed the defendant from that part of the judgment; but fell into the error of directing that other sugar and molasses should be delivered in satisfaction, and of authorising the use of the distringus to enforce the delivery. The writ could only have been used to coerce the specific performance; and when that end could no longer be accomplished, it should have been revoked, and the party left to other remedies. In view of the facts of this case, we think that the defendant was not entitled to a distringus, and that the judge erred in not sustaining the injunction.

It is therefore ordered that the judgment of the District Court be reversed, and that the injunction sued out by the plaintiff be made perpetual; the appellee paying the costs of both courts.

FISHER v. GORDY et al.

The profits of all the effects of which the husband has the administration, and all the estates which either spouse may purchase during the marriage, though the purchase be only in the name of one of them, are considered by law to belong to the community, and are liable for the debts of the husband whether contracted before or during the marriage. C. C. 493, 2371. To establish a tale in the wife, in her separate right, to property purchased under such circumstances, she must show that the price was paid with paraphernal funds of which she had the administration.

One who claims a privilege on a crop for the wages of her slaves employed in producing it, must assert it by way of third opposition; it is no ground for enjoining the sale of the crop.

A PPEAL from the District Court of St. Martin, Overlon, J. Heard, for the plaintiff. Maskell, for the appellants. The judgment of the court was pronounced by

King, J. The plaintiff has enjoined the execution of two writs of fieri facias,

directed against her husband, Daniel Fisher, in virtue of which she alleges that a quantity of sugar, the product of her separate property, has been seized. The injunction was sustained for one-half of the sugar levied upon, and for the other half dissolved. From that judgment the defendants have appealed.

FINTER U.

It appears from the evidence that the plaintiff, at a sheriff's sale of her husband's property, became the purchaser of a tract of land and two slaves, and that, at the time of her marriage, she awned several other slaves. The sugar seized under the writs enjoined was the product of the land and slaves of which she thus claims the ownership. At the date of the adjudication to the plaintiff she had been separated in property from her husband, but shortly after instituted a suit claiming a separate administration, which was pending during the time that the angar was produced and at the date of the seizure. The judgments under which the levies were made, were for debts of the husband contracted prior to the marriage, and the question presented is, whether the whole, or any part, of the crop thus produced, could be seized in satisfaction of his debts. Our law considers the profits of all the effects of which the husband has the administration, and the estates which the husband and wife may acquire during the marriage, although the purchase of the latter be only in the name of one of the two, to belong to the community. C. C. 2371.

In addition to a title in ther own name, it was incumbent on the plaintiff to show that the price of the land and slaves adjudicated was paid with her paraphernal funds of which she had the administration, in order to establish that she had been invested with title to them in her separate right. This proof has not No circumstances have been shown which exclude the land and slaves adjudicated to her from the operation of the general rule, which renders that property common which is acquired by either of the married parties during the existence of the community. 17 La. 299. 1 Rob. 367. The husband appears to have retained the administration of the property thus acquired, and the wife could not have legally opposed his administration. The fruits which it yielded, although produced in part by the labor of the plaintiff's slaves, belonged to the community of which the husband was head, and were liable for the payment of his debts, whether contracted prior to or during the marriage. C. C. 493. If the plaintiff has a privilege upon the sugar for the labor of her slaves in producing it, that right must be exercised by means of a third opposition; it forms no ground for an injunction.

The judgment of the District Court is therefore reversed. It is further decreed that the injunction obtained by the plaintiff in this case be dissolved, and that the plaintiff and his surety be condemned, in solido, to pay to the defendants five per cent damages on the amounts of their respective judgments enjoined, reserving to the plaintiff her right of enforcing any claim she may have to reimbursement for the labor of her slaves in producing the sugar seized; the appellee to pay the costs of both courts.

MURPHY, Executor, v. MASKELL.

An injunction obtained against an order of seizure and sale should not be perpetuated for the whole amount claimed by the seizing creditor, where a part of the claim is justly due. He is entitled to proceed with the sale for the amount really due. C. P. 743.

MURPHY S. MASKELL A PPEAL from the District Court of St. Mary, Voorhies, J. Gibbon, for the plaintiff. Maskell, appellant, pro se. The judgment of the court was pronounced by

SLIDELL, J. The defendant having obtained an order of seizure and sale, was restrained by an injunction. Relief was properly granted as to a portion of the claim. A payment of \$1005 had been made on account, and should have been credited.

Whether the payment of \$1005 to Brownson, the original creditor and the assignor of Maskell, was prematurely made, is a question which cannot be raised by the defendant. He stands in the stend of Brownson, who having been paid in part, could not have an order of seizure and sale for the entire amount. Maskell's responsibility, in his capacity of executor of Dough, to other parties for the amount paid to Brownson, is a subject not properly before us, and which cannot be blended with the consideration of his rights as the assignee of Brownson. We are of opinion, however, that the injunction was improperly perpetuated against the entire claim. For what is really due, the seizing creditor is entitled to proceed. See 17 La. 508. C. P. 743.

It is therefore decreed that the judgment of the court below be reversed, and that the said Maskell have leave to proceed in the execution of the order of seizure and sale for the amount of \$1,684-82, with interest thereon at the rate of ten per centum per annum from the 13th day of February, 1843, until paid, and costs of the execution of said order of seizure and sale; and that, as to the residue of the amount claimed by said Maskell, the injunction be perpetuated; the costs of this suit in the court below to be paid by said Maskell, and those of this appeal to be paid by the appellee.

OSBURN v. CURTIS, Sheriff.

A purchaser of property sold under execution for cash at the suit a bank, cannot require the sheriff to receive in payment notes and bonds of the bank. Per Curiam: The mandate of the court required him to receive the lawful money of the United States. He was incompetent to determine judicially the genuineness and validity of the obligations, or to settle the rights of the parties as mutual debtor and creditor.

A PPEAL, by the Planters Bank of Mississippi, from a judgment of the District Court of St. Mary, Voorhies, J. Splane, for the plaintiff, cited 6 Rob. 387. 11 Rob. 286. 12 Rob. 125. Maskell, for the appellants, cited 7 La. 91. 1 An. R. 9. Olivier, on the same side. The judgment of the court was pronounced by

SLIDELL, J. The Planters Bank of Mississippi having obtained a judgment against Osburn, the plaintiff's husband, levied execution on certain slaves, which were offered at public auction by the sheriff, in the usual manner, for cash, and were adjudicated to Mrs. Osburn for the price of \$1500. This amount she tendered to the sheriff in notes and bonds of the Planters Bank, the plaintiff in execution. He refused to receive any thing but lawful money of the United States, and proceeded to re-advertise the property. The plaintiff then obtained an injunction; and asked a decree compelling the sheriff to

accept the payment of the price as tendered, and to execute a deed for the property.

OSBURN V. CURTIS.

The sheriff was a mere executive officer, charged with the execution of the judgment of the court. The command of the writ of fieri facias was to seize and sell the defendant's property for money, and pay that money to the plaintiff in execution, to the amount of his claim. The mandate of the court empowered him to receive no money but the lawful money of the United States. What was tendered was bank notes or honds, purporting to be the obligations of the plaintiff in execution. An executive officer, proceeding under such an order, could not be required to act judicially, and determine the genuineness and validity of the obligations tendered. He was incompetent to adjudge a question of compensation, and aettle the rights of the parties as mutual debtor and creditor. We think the tender was properly rejected, and that the sheriff did right to refuse a deed, and re-advertise.

It is therefore decreed that the judgment of the court below be reversed; that the injunction be dissolved; and that there be judgment for defendants, with costs in both courts.

BELL v. MURPHY, Executor.

The maker of a note executed a mortgage, to secure an accomposation endorser against loss in consequence of his endorsement of the note. At maturity, part of the note was paid, and another note, endorsed by plaintiff, was given for the balance, the first note being returned to the maker. The second note was paid, after protest, by the endorser. In an action by the latter, claiming to be paid the amount by preference out of the mortgaged property: Held, that the mortgage was given to secure a specific debt, which was extinguished by novation, and that the mortgage was extinguished with it.

A PPEAL from the District Court of St. Mary, Voorhies, J. Splane and Stewart, for the appellant. Maskell, for the defendant, contended that the mortgage claimed by plaintiff was extinguished by the novation of the debt it was executed to secure, citing 1 La. 527. 4 La. 247. 8 La. 276, 531. 16 La. 370. 2 Rob. 59. 9 Rob. 484.

The judgment of the court was pronounced by

Rost, J. The plaintiff gave the defendant's testator an accommodation endorsement on a note which was discounted in bank, and took from him a mortgage on two slaves as security against any loss, damage, or injury he might sustain, in consequence of the endorsement of said note. At its maturity it was paid in part; another note, endorsed by the plaintiff, was furnished for the balance, and the original note was returned to the maker. The second note was protested at maturity for non-payment, and subsequently taken up by the plaintiff, who now sues for the amount and claims to be paid by preference out of the proceeds of the property mortgaged to him. There was judgment in his favor for the amount claimed without mortgage, and he has appealed.

There is no error in the judgment. The mortgage was not a general one, to secure the plaintiff for endorsements; it was given to secure the payment of

BELL O. MURPHY. a specific debt, which the evidence shows to have been subsequently novated and extinguished. The mortgage was extinguished with it.

Judgment affirmed.

Soileau et al. v. Rougeau.

A donation made by a wife to her busband during marriage, in case of her death without descendants or ascendants, will comprehend only the property, moveable and immoveable, existing at its date. C. C. 1514.

A donation inter vives of moveables or immovables must be executed before a notary and two witnesses, under pain of nullity. C. C. 1525. This is the only nullity of form declared by law; and no other can be recognized. By the Code of 1808 a detailed estimate of the effects given was required to be inserted in, or annexed, to, the act of donation, under pain of nullity; but the law was changed by the Code of 1825. The last paragraph of art. 1525 providing that "the act of donation ought to contain a detailed estimate of the effects given", is directory to the notary who executes it, and its omission may make him liable for any damage the parties may sustain in consequence thereof, or subject him to any penalty imposed by law for such peglect of duty, but cannot annul the act.

A PPEAL from the District Court of St. Mary, Voorhies, J. Swayze and Taylor, for the plaintiffs, contended that an act of donation inter vivos of moveables must contain a detailed estimate of the effects, citing C. C. 1525. 3 Rob. 194. 8 Toullier, no. 180. Dupré, for the appellant. The judgment of the court was pronounced by

Rost, J. The plaintiffs, heirs in the collateral line of Marianne Soileau, deceased without issue and leaving no ascendants, claim her entire succession from her husband. The defendant sets up title to the entire succession, under a donation inter vivos of present and future property, executed by his wife in his favor, on the 12th of June, 1829, during the existence of the marriage. The court below maintained the donation, for the immovables and slaves acquired previous to its date, but gave judgment in favor of the plaintiffs for the immovables and slaves subsequently acquired, and for all the moveable property left by the deceased at her death. The defendant appealed.

We concur in the opinion of the judge of the first instance, that the donation could comprehend only the present property of the donor, and that it is null so far as it embraces future property. C. C. 1514. But we are unable to agree with him that the donation is also null for the moveables, which the donor possessed when it was made. In donations of moveables, the old Code required a detailed estimate of the effects given to be inserted in, or annexed to, the act of donation, under pain of nullity; but the law was changed by the present Code. Article 1525 provides that a donation of moveables will not be valid

^{*} The mortgage recited that: "Whereas the appearer had executed his promissory note for \$500, payable at the office of the Gas Light and Banking Compay at Franklin, twelve months after date, dated — April, 1841, which note was duly endorsed by said David Bell, and was discounted at said office on the 28th day of the present month for the accommodation of said appearer, the drawer thereof, the proceeds of which note he the said appearer has realized to himself exclusively; now therefore, for the purpose of securing the said David Bell against any pecuniary loss, damage, or injury, in consequence of his, said Bell's, endorsement as aforesaid, the said appearer declares that he doth by these presents mortgage, &c."

SOILEAU E. ROUGEAU.

unless an act be passed of the same before a notary and two witnesses. This is the only nullity of form declared by law; and, under our repeated decisions on similar questions, we can recognise no other. The last paragraph of the article cited, providing that the act ought to contain a detailed estimate is directory to the notary who executes the act. The omission of this formality subjects that officer to the payment of all damages which the parties may sustain by reason thereof, and to such penalties as the law may pronounce against him for neglect of duty; but it does not authorize us to annul the donation.

It is therefore ordered that the judgment in this case be reversed; that the defendant be quieted in his possession and title to all the property claimed, which belonged to Marianne Soileau, his wife, and to the community existing between them, on the 12th day of June, 1829; and that the plaintiffs recover all the property which may have been acquired by the deceased in her own right, and one half of the property acquired by the community, since that date. It is further ordered that the case be remanded for the purpose of settling the succession of Marianne Soileau, in accordance with the views expressed in this opinion, and that, in the settlement, the defendant be charged with one half of the community debts. It is finally ordered that the costs of this appeal be paid by the plaintiffs and appellees.

MILLER et al v. Andrus et al.

Where a donation inter vises, though styled by the donor a remunerative donation, does not exceed the disposable portion, the heirs of the donor cannot dispute his estimate of the value of the services. Per Curiam: The donation may be treated as an ordinary one; the announcement of the donor's motive cannot affect it.

A PPEAL from the District Court St. Landry, Cushman, J. T. H., and W. B. Lewis, Martin, and Swayze, for the plaintiffs. Dupré and Brent, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This suit was before us at the last term, and was remanded for further proceedings. See 1 Ann. Rep. 237.

It is not now pretended that the donation inter vivos made to Jesse Andrus, by his father, exceeds the disposable portion; but it is said that the donation was, upon its face, and in express terms, a remunerative donation, and that the value of the services rendered did not equal the amount of the donation. This objection cannot be sustained. As the donation did not exceed the disposable portion, the value of the sen's services was a matter within the discretion of the donor, and the estimate which he has thought proper to put upon them cannot be questioned by the heirs. The donation, though styled remunerative, may be treated as an ordinary donation; the announcement of the denor's motive does not affect it. The value of the services would only have been material, if it had been found that the donor had exceeded the disposable portion. The donation might then have been reduced. See Succession of Fox, 2 Rob. 292. Civil Code, 1500.

In our former decree we reserved to Susan Andrus, the right of establishing, by proper evidence, her claim, if any she had, against the succession for services rendered. No allowance has been made to her by the court below, and

MILLER W.

of this she now complains. We are unable to give her relief. She offered no testimony at the second trial, as to the nature and value of the alleged services. Some testimony had been offered at a previous trial, and a consent has been filed in this court, signed by a portion of the litigants, that this testimony may be considered. But as all the parties in interest have not joined in the consent, we do not consider ourselves at liberty to notice it. We may add that, even if the testimony were properly before us, it is probable we should consider it too loose and unsatisfactory to form the basis of an allowance.

Judgment affirmed.

LATASTE, Administrator, v. BERAUD.

The effect of the registry of an act conferring a privilege ceases by the omission to re-inacribe it within ten years from the date of the first inscription. C. C. 3333.

A PPEAL from the District Court of St. Landry, Overton, J. Lataste, pro se. Lewis, Swayze and Taylor, for Dupré. Hallam, for the appellant. The judgment of the court was pronounced by

Rost, J. The defendant, in right of his wife Féliciane Déjean, has appealed from a judgment distributing the proceeds of immovable property among certain mortgage creditors.

The facts material to this part of the case are as follows: The mother of Féliciane Déjean, formerly owned the property sold, and the latter had during her minority, a legal mortgage upon it to secure her rights. After she became of age she released the mortgage, and the property was shortly after mortgaged to the Union Bank. In 1833, the mother of Féliciane sold the property to her five sons, and they assumed, as part of the price, to pay the claim of the said Féliciane, which had not been satisfied when the legal mortgage was released by her. In 1836, Félix Déjean, one of the purchasers, sold his share to his brothers, who again assumed to pay said claim as a part of the price. In 1839, Lastie Dupré took a conventional mortgage on the same property from three of the purchasers. The Union Bank has caused the property to be sold, and the defendant has become the purchaser, for a sum larger than the claim of that institution.

The right of priority of the bank, and of the State for the taxes due at the time of the sale, is not contested; but the defendant maintains that the claim of his wife is entitled to priority over that of Lastie Dupré. We think other wise. The release of the mortgage, whatever may have been the motive which induced Féliciane Déjean to give it, precludes her from claiming now under that mortgage, adversely to other mortgage creditors; and if it be conceded that, in 1833, she acquired a privilege on the property by virtue of the assumption of her brothers to pay her a part of the price, and that, on the 20th of January, 1836, the sale from Félix Déjean to his brothers created another privilege in her favor, the property was sold by the sheriff on the 7th of March, 1846, and those two privileges had then ceased to operate against third persons, for want of re-inscription within ten years from the date of the first registry. C. C. 3333. Shepherd v. Orleans Cotton Press, ante p. 100.

The claim of Féliciane Déjean against her brother Edmond Déjean, must be settled in due course of administration of his succession.

Judgment affirmed.

GUILBRAU v. HIS CREDITORS.

Where the transcript was not filed at the time when the appeal was made returnable, and no application was made to extend the time, the appeal must be dismissed.

A PPEAL from the District Court of St. Martin, Voorhies, J. Magill, for the appellants. Brent, contra. The judgment of the court was pronounced by

SLIDELL, J. An appeal was allowed in this case returnable at New Orleans, on the second monday of February last. The transcript was never filed there; no application was made for further time; and, after a delay of several months, the transcript was first filed at Opelouses, at the present term. The motion to dismiss must prevail.

Appeal dismissed.

Broussard v. Broussard et al.

An appellee cannot require an appeal to be dismissed on the ground that he has not been cited. It is the duty of the clerk to issue, and of the sheriff to serve, the citation; and their neglect of duty cannot deprive a party of the right to be heard on appeal. In such a case further time will be allowed to cite the appellee. Stat. 20 March, 1839, s. 19.

A PPEAL from the District Court of Lafayette, Boyce, J. Brent, Crow and Porter, for the plaintiff. Magill, for the appellants.

The judgment of the court was pronounced by

Kine, J. The plaintiff has moved to dismiss this appeal, on the grounds, that she has not been cited to answer the appeal, and that the defendants have acquiesced in, and voluntarily executed, the judgment appealed from.

The first ground taken is not sufficient to authorise the dismissal of the appeal. It is the duty of the clerk to issue, and of the sheriff to serve, the citation, and make his return. No failure of these officers to perform these duties can deprive parties of their right to be heard on appeal; but authorises the granting of further time for citing the appellee. Acts of 1839, p. 170, § 19.

In support of the second ground, the receipt of the sheriff to the appellee for the slaves which form the subject of the judgment appealed from, and a certificate of the sheriff that they were delivered in compliance with the instructions of one of the defendants, have been produced. The defendants take issue on this point, which is a matter that has arisen since the rendition of the judgment appealed from, and can only be inquired into by the court of the first instance. For the purpose of making that inquiry, it becomes necessary to remand the cause. It is therefore ordered that this cause be remanded to the District Court, with instructions to the judge to enquire whether either or both of the parties defendant have acquiesced in the judgment rendered therein, by voluntarily executing it.

HERBERT P. BENSON.

Any individual member of a town corporation may sue for the abatement, as a nuisance, of a warehouse erected by an individual, for his private emolument, on the bank of a navigable stream within the corporate limits. Per Curian: Public places within the limits of a corporation cannot be appropriated to private use; and individual corporators, as well as the officers of the corporation; have a right to prevent such appropriation, and to sue for the demolition and removal of the buildings. Art. 859 of the Civil Code does not authorise the erection of buildings for private emolament.

Municipal corporations are not established for the exclusive advantage of the corporators, but for the public at large; and an agreement by which a person is permitted to erect a warehouse on a public place, authorizing him to exact from other inhabitants of the parish any rate of storage provided none was claimed from the corporators, is not one intended for the public utility.

A PPEAL from the District Court of St. Martin, Overton, J.

A Brent, for the appellant, cited 3 Mart. 296, 496, 303. 11 lb. 620. 2 lb. N. S. 317. Greiner's Dig. Laws of La. art. 2936; act of 1808. 5 Mart. N. S. 410. 3 lb. N. S. 140. 5 La. 145, 132, 174. 1 La. 153. 13 lb. 328, 331. 18 lb. 286. 10 Rob. 357. Act of 1809. ch. 13. s. 2.

18 Ib. 286. 10 Rob. 357. Act of 1809, ch. 13. s. 2.

Simon, on the same side. The judgment below should be reversed. The warehouse erected by defendant, was not constructed for any purpose of public utility, in the meaning of art. 859 of the Civil Code. The use of the banks of navigable streams is public. C. C. 446.

Olivier, for the defendant, urged that the erection of the warehouse was legal, under the authority conferred on town corporations by art. 859 of the Civil Code, which limits the effect of art. 446.

The judgment of the court was pronounced by

Rost, J. The object of the suit is the abatement of a nuisance. The defendant applied to the mayor and city council of St. Martinsville, for leave to erect a warehouse on the bank of the bayou Teche, which is a navigable stream, offering to store the freight of the planters free from charge, provided they gave him the storage of their crops. This application appears to have been referred by the corporation to the District Court, which determined that the land on which the petitioner proposed to erect the warehouse was a public place, which the corporation had no power to dedicate to private use. The application was then rejected; but subsequently an ordinance was passed authorising the defendant to erect a warehouse at his peril and risk, without any warranty whatever from the corporation, and on the express condition that he should store, free from charge, the goods of the cerporators-and that he should pay an annual rent of fifty dellars for the land. It was further stipulated that thereafter the defendant should at all times be bound to remove the warehouse at his own expense, upon three months' previous notice from the corporation, and that, in case of any complaint being made, he should be prepared at all times to remove it.

At the end of the first year the defendant having refused to pay the rent stipulated, the corporation repealed the ordinance authorising the erection of the warehouse, and caused notice to be given to the defendant to remove the said warehouse within three months, and that, if he failed to do so, it would be demolished and removed at his expense. The warehouse was erected on a portion of the quay in front of a house and lot owned by the plaintiff, who has

instituted this action to have it demolished and removed. There was judgment in favor of the defendant, and the plaintiff appealed.

HERBERT V. Benson

It is conceded by the defendant, in his application to the corporation, that the place upon which the warehouse was proposed to be, and was subsequently, built, was a public place. It has been so often and so uniformly held by the former Supreme Court, that public places within the limits of a corporation cannot be appropriated to private use, and that individual corporators, as well as the officers of the corporation, have the right to prevent such appropriation, and to sue for the demolition and removal of buildings erected on them by individuals, that the question can no longer be considered an open one. Article 859 of the Louisiana Code, which provides that corporations of cities, towns, and other places, may construct on the public places, in the beds of rivers, and on their banks, all buildings and other works which may be necessary for public utility, for the mooring of vessels, and the discharge of their cargoes, does not authorise the erection of buildings for private emolument. Municipal corporations are not established for the exclusive advantage of the corporators, but of the public at large, and an agreement which enabled the defendant to exact from the other inhabitants of the parish any rate of storage he might see fit to ask, provided no storage was claimed from the corporators, was not intended for public utility.

We are unable to perceive on what grounds the defendant rests his pretensions. The conditional ordinance authorising him to erect a warehouse has been repealed. He has been notified to remove it, and the corporation have the power at any time to cause it to be removed at his expense.

The plaintiff is entitled to a judgment. It is therefore ordered that the judgment in this case be reversed, and that there be judgment in favor of the plaintiff; that the warehouse mentioned in his petition be demolished, and the materials removed at the defendant's expense; the said defendant paying costs in both courts.

BIENVENU v. DERBES et al.

After a separation of property, the dotal effects of the wife cease to be inalienable.

A PPEAL from the District Court of St. Martin, Overton, J. Magill, for the appellant. Heard, for the defendants. Dotal property may be alienated after separation of property. C. C. 2410, 2411, 2343, 3490. 8 Rob. 457. The judgment of the court was pronounced by

Kine, J. The plaintiff, who is a married woman, separated in property from her husband, has enjoined the execution of a writ of fi. fa. directed against her, alleging: first, that the judgment under which it issued was for a debt due by her husband; and, secondly, that the sheriff has levied upon her dotal property, which by law is inalienable during the marriage. The injunction was dissolved in the court below, and the plaintiff has appealed.

The judgment under which the writ enjoined was issued, was rendered on the confession of the plaintiff, in 1841. It was for the amount of two promissory notes, executed by her several years after a separation of property between her and her husband had been decreed, and with the authorization of the latter. Nothing in the record of that suit shows that the debt was due by the husband,

BIENVENU V. DERBES. but, on the contrary, the petition charges that it was due by the wife; she acknowledged her indebtedness, and, with the authority of her husband, consented that a judgment should be rendered against her. No measures were taken to procure the revision or reversal of that judgment, although more than three years elapsed between its rendition and the issuing of the writ enjoined; nor was any evidence adduced on the trial of the present suit in support of the plaintiff's allegation that the debt was due by her husband. We do not therefore deem it necessary to enquire whether, after having suffered the time to elapse within which she could have sought a revision or reversal of the judgment, she may still resist that judgment on grounds which she could have opposed to the original action.

The accord question presented has been settled by the Supreme Court in the case of Guerin v. Rivarde, 8 Rob. 457. It was then determined that, after a separation of property, the dotal affects of the wife cease to be inalienable.

Judgment affirmed.

Johnson v. Marsh et al.

The power of a partner to bind his co-partners, either by note or by his acknowledgments, or to use the social name, ceases with the dissolution of the partnership. Any subsequent power is derived, not from previous relations of the parties as partners, but from a new contract, which is one of mandate; and this mandate must be express and special. C. C. 2966.

Answers to interrogatories on facts and articles can only be used against the party interrogated, and not other parties to the action; the latter have a right to insist on a cross-examination of the witness by whose testimony they are to be bound.

A PPEAL from the District Court of St. Martin, Overton, J.

A Magill, for the appellant, contended that an authority conferred on one partner to liquidate a partnership, is an express and special power, within the meaning of art. 2966, authorising him to execute notes for balances due to the creditors of the partnership.

creditors of the partnership.

I. E. Morseand Nicholls, for the appellants. After dissolution, a partner cannot bind the firm without a special power. C. C. 2966. 18 La. 332. 5 Rob 172. 6 Rob. 70. 11 Rob. 95. Story on Partnership, 161, 460. Answers to interrogatories can only affect those immediately concerned in asking or answering them. 10 Toullier, no. 391.

The judgment of the court was pronounced by

Kine, J. The defendants were partners in a plantation and distillery, which was dissolved in October, 1834, when Marsh, one of the partners, was charged with the liquidation of its affairs. In 1840, Marsh executed the note upon which this suit is founded, and subscribed it with the partnership name. For the amount of this note the plaintiff seeks to render the defendants liable in soludo, as commercial partners. Two of them, I. E., and M. C. Morse, resist payment, on the ground that the partnership was dissolved before the execution of the note, and that it was made by Marsh without authority to that effect from those defendants. A judgment was rendered by the judge below against Marsh, for the entire amount of the claim, and of non-suit as to the remaining parties. The plaintiff has appealed.

No authority to Marsh to execute the note in question is shown, other than the notice published announcing the dissolution of the partnership, and that

JOHNSON U.

"Jonas Marsh was charged with the liquidation of the concern." It has been repeatedly held that the power of a partner to bind his co-partners, either by note or by his acknowledgments, or to use the social name, ceases with the dissolution of the partnership, and that such authority is derived, not from the previous relations of the parties as partners, but from a new contract, which is one of mandate. This mandate our law requires to be express and special. Civil Code, art. 2966. 8 La. 568. 5 Rob. 174. 6 Rob. 70.

Interrogatories were propounded by the plaintiff to Marsh, with the view of proving the consideration of the note. His answers were objected to by I. E., and M. C. Morse, as far as they tended to charge those defendants, and were properly disregarded by the judge below. Answers to interrogatories on facts and articles can only be used against the party interrogated; other parties have a right to insist on a cross-examination of the witness, by whose testimony they are to be bound. In the present instance, however, we think that the answers of Marsh do not connect the note, with sufficient distinctness, with the affairs of the partnership to authorise a judgment against his co-defendants, even if they were admissible in evidence, and the form of the action permitted us to enter upon the enquiry. Marsh has not complained of the judgment.

Judgment affirmed.

FUSELIER v. SPALDING.

Where the burning of a brick kiln, erected near a dwelling, would expose the latter to danger from fire, besides seriously incommoding the occupants, the burning of the kiln may be prevented by injunction.

A PPEAL from the District Court of St. Martin, Overton, J. Brent, for the plaintiff, cited C. C. arts. 852, 853, 860, 861, 862, 863. Magill, for the appellant. The judgment of the court was pronounced by

Kine, J. The plaintiff obtained an injunction prohibiting the defendant from burning a brick kiln, which the latter had erected near her dwelling house in the town of St. Martinsville, alleging that the security of her premises, and the health of herself and family, would be endangered, if the defendant were permitted to execute his purpose. The injunction was perpetuated in the court below, and the defendant has appealed. We think that the judge did not err. The plaintiff had a clear right to invoke the aid of a court in this form, to protect her property from an impending denger, and the health of herself and family from being impaired. The evidence, in our opinion, shows that the kiln could not have been burnt in the position where it stood without exposing the premises of the plaintiff, which were all of wood, to danger from fire, besides seriously incommoding, if not injuring the health, of the occupants.

Judgment affirmed.

FONTENOT et al. v. Soileau.

A husband, on whose property a legal mortgage existed in favor of his wife, having borrowed money from a third person to purchase lands from the government, after making the entry, and on the same day, executed a mortgage on the land in favor of the lender to secure the amount loaned, and, a few days after, registered the mortgage: Held, that the mortgage in favor of the lender was inferior to the wife's, which existed before it, and took effect on the land the instant it was purchased by the husband.

Where a sale is made for cash, and the price paid at the time, no vendor's privilege can

Privileges are stricti juris. They exist only when expressly allowed. C. C. 3159.

A PPEAL from the District Court of St. Landry, Overton, J. W. B. Lewis, for the appellants. Swayze and Taylor, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. Damacène Ortego, wife of Soileau, had a legal mortgage on the property of her husband, dating back as far as the year 1833. The validity of this mortgage, the plaintiffs do not dispute; but they contend that they have a superior mortgage upon certain land which has been seized and sold, and the proceeds of which form the subject of the present controversy.

It appears that Soileau, the defendant's husband, purchased this land from the United States, in the year 1838. Fontenot and Stagg loaned him the money to make the purchase; and on the same day upon which the entry was made, and after making it. Soileau executed a mortgage upon the land in favor of the plaintiffs, to secure the payment of the amount loaned in one year, with interest, which mortgage was registered a few days afterwards. The plaintiffs contend that these circumstances give them a right of mortgage or privilege, superior to that of the defendant. So far as the plaintiffs rely upon a right of mortgage, it is obvious that it is inferior to the mortgage in favor of the defendant, which existed long before the mortgage to the plaintiffs was granted, and took effect upon the land the moment it was purchased by her husband.

But it is said that Fontenot and Stagg are entitled to the vendor's privilege. The privilege of a vendor would have existed in favor of the United States, had they sold on a credit; and in that case a subrogation of such right might have been made in favor of the plaintiffs by the vendor. But as the sale was for cash, and the price was paid down at the time of sale by Soileau, the vendor's privilege never existed. Privileges are matters stricti juris. They exist only in those cases which the lawgiver has expressly declared. C. C. 3152. The case before us is not protected by the Code, and however strongly its hardship may appeal to the conscience of the defendant, there is no authority in us to relieve the plaintiff:

Judgment affirmed.

FISHER v. FISHER.

The matrimonial rights of a wife, who married with the intention of removing into another State, must be governed by the laws of her intended domicil.

Where parties contracted a marriage in another State with the bona fide intention of estab-

FISHER D.

lishing their matrimonial residence in this, and, within a reasonable time thereafter, become domiciled here, any property belonging to the wife before the marriage, received by the husband afterwards or at the time, will remain her separate estate, according to the laws of this State; and the mortgage of the wife for the security of her paraphernal rights will attach from the dates at which any sum of money may have been received by the husband, though received before the removal of the spouses to this State; and this without registry. C. C. 2367, 3297, 3298.

A PPEAL from the District Court of St. Martin, Overton, J. Heard, for the plaintiff. Maskell, for the intervenor and appellant. No counsel appeared for the defendant. The judgment of the court was pronounced by

King, J. The plaintiff sues for a separation of property from her leastend, claiming certain slaves in kind, and several sums of money alleged to have been received by the latter during the marriage. To secure the reimbursement of the sums of money, she asks that a legal mortgage on the property of her husband be recognised and enforced. Thomas Maskell, a judgment creditor of the defendant, intervened in the suit, and opposed the wife's claims. A judgment was rendered in favor of the plaintiff for the slaves claimed, and for several sums of money, with a legal mortgage to take effect from the dates when the latter were respectively received by the defendant, and the intervenor has appealed.

From the evidence it appears that, in September, 1841, the defendant, who was at the time a citizen of this State, intermarried with the plaintiff in Nashville, Tennessee, with a view to a residence in Louisiana. He remained in Tennessee for nearly a year after the marriage, during which time he received several sums of money due to the plaintiff in her separate right. At the expiration of that time he returned to his domicil with his wife, bringing with him the property of the latter, and has continued to reside here ever since. Previous to the marriage a deed of trust was executed by the plaintiff, by which the property described in the act (being the same claimed in this suit,) was conveyed to trustees, to be held for her use until the celebration of the marriage, upon which event it should vest in the plaintiff, as her separate estate, for her sole use. This act was not registered in the office of the parish judge of the defendant's domicil, until February, 1843.

The correctness of the judgment, as regards the slaves decreed to the plaintiff, has not been seriously questioned, and the evidence leaves no doubt that the several sums awarded to the wife were her paraphernal funds, received by the husband at the dates fixed by the judge below. The complaint of the intervenor relates principally to the recognition of the plaintiff's right of mortgage. He contends that the plaintiff having been a citizen of another State at the time of her marriage, and when several of the sums claimed by her were received by her husband, no mortgage attached in her favor to secure the reimbursement of those sums, previous to her becoming a resident of this State. He further contends that the legal mortgage took no effect to the prejudice of third persons, until the registry of the act furnishing the evidence of her claim.

As regards the right of the plaintiff to the effects which she owned at the date of her marriage, this case is not distinguishable from that of Routh v. Routh, 9 Rob. 224, in which it was held that where "parties contracted marriage with the bona fide intention of making Louisiana the place of their common or matrimonial residence, and, in pursuance of such intention, did, within a reasonable time, become domiciled in this State, then the property belonging

Finner.
v.
Finner.

to the wife before the marriage, and received by the husband afterwards or at the time, remained her separate estate, according to the laws of Louisiana."

The principle is well settled that the matrimonial rights of the wife, who marries with the intention of removing into another State, must be governed by the laws of her intended domicil. 2 Mart. N. S. 574. 3 Mart. 60. Story, Confi. of Laws, no. 191, et seq. The intended matrimonial domicil of of these parties was Louisiana; and, by our laws, the mortgage of the wife, for the security of her paraphernal rights, attaches from the dates at which sums of money are received by the husband, and this without registry. This question can no longer be considered open. C. C. 2367, 3297, 3298. 10 Rob. 159. 6 La. 25. 10 La. 303.

Judgment afirmed.

Bonin et al. v. Dunand.

The scal of the court is emential to the validity of an execution; without it a sheriff has no authority to act. There is no difference between a decree for the seizure and sale of mertgaged property and an ordinary decree, as to the necessity for issuing a writ of execution.

By the omission to reinscribe a mortgage within ten years from the date of the first inscription, the effect of the inscription, not of the mortgage itself, ceases. The doubt which has existed as to the proper interpretation, on this point, of art. 3333 of the Civil Code, has arisen from the inaccurate translation from the french text. The mortgage is unimpaired thereby, as between the mortgager and those claiming under him, and the mortgages. C. C. 3314, 3315, 3316.

A PPEAL, by the parties cited in warranty, from a judgment of the District Court of St. Martin, Overlon, J. The facts of the case are stated in the opinion infrd.

Brent, for the plaintiffs. The sale under which defendant claims, is null, the execution not having the seal of the court affixed to it. C. P., 179, no. 7, 625, 626, 627, 774. 7 La. 70. 9 La. 542. 10 La. 483. 12 La. 573. 2 Rob. 377. 3 lb. 155. 17 La. 40. Unless the forms of law have been complied with, a purchaser can acquire no title under a sheriff's sale. 4 Mart. 513. 5 lb. 625.

11 Ib. 610. 3 La. 421. 9 La. 543. 10 Rob. 32.

Simon and Magill, for the appellants. We contend: 1. That neither the seal of the court, nor the signature of the clerk, are necessary to authorise the sheriff to carry into effect an order of seizure and sale granted by the judge; that it is sufficient for him to have a memorandum or list of the property to be seized, and that the order of the judge is a sufficient authority to act. 2. That if a seal is required to the list of property or to the writ, its absence is not sufficient to annul a sheriff's sale, which, in all other respects, has been

made with all the formalities of the law.

1st. The sale was made by virtue of an order of seizure and sale granted by the judge at chambers, a proceeding which our Code of Practice calls "executory process." C. P. art. 732 et seq. The rules of proceeding pointed out by arts. 734, 735, 736 and 737 of the Code of Practice are the only ones under which the sheriff derives his authority to seize and sell. They require a simple petition to the judge, who thereupon grants an order, under which the creditor may proceed against the debtor, by causing the mortgaged property to be seized and sold. Art. 736 says: "The judge has the power to issue the order of seizure and sale," and nothing in any of the provisions of the law relative to this subject shows that an order of seizure and sale ought to issue in the same manner as a writ of fi. fa., which the Code, art. 641, says, the party in whose favor a judgment has been rendered must apply for to the clerk, who, under art. 774, is bound, in issuing all orders or writs, to seal them and sign them. Here, the order was granted, that is to say, issued by the judge, and it was undoubtedly

BONIE DURAND

a sufficient authority for the sheriff to act under, from the moment that, according to art. 735, in obtaining the order of seizure and sale, due notice was given to the debtor. It follows that a writ issued by the clerk was unnecessary; that the order of the judge was a sufficient authority for the sheriff to act; and that, in order to enable him to seize the property, a list or memorandum of its description is all that was required to be given to the sheriff. Thus, it is immaterial whether there was a seal to the certificate signed by the clerk, and even whether the clerk had signed it or not, for the sheriff does not derive his authority to act in executory process from any writ or order issued by the clerk, but from the order granted or issued by the judge to whom the petition is presented.

2d. But if it be necessary that there be a regular writ issued by the clerk, after having obtained the order of the judge, the law does not say, in any of its provisions, that its absence shall be a cause of nullity. This court have decided that they would never recognise any nullity as resulting from irregularities or informalities, unless positively pronounced by law. The want of a seal to a writ issued and signed by the clerk, does not and cannot lessen the authority which the sheriff had to carry the order of the judge into execution. The order is a sufficient warrant; and no injury can ever result to the party against whom the order is obtained, from the absence of a seal, or of the mark, which it is customary to affix to judicial proceedings. In the case of The State v. P. B. Martin, ante p. 667, this court have, to a certain extent, expressed views similar to these with regard to nullites resulting from informalities, and have said that they would not recognise such nullities, unless expressly declared by law.

The judgment of the court was pronounced by

SLIDELL, J. Several alleged informalities in the judicial proceedings and sale under which the defendant claims title, have been specially set forth in the petition, and elaborately discussed at bar. We shall give our attention to one, which appears to us a fatal defect. A decree of seizure and sale was rendered, in 1838, against certain mortgaged property, including the slaves now in controversy. A writ of seizure and sale issued, which was returned by order of the seizing creditor. In 1844, without any new order of court, the clerk issued a second writ of seizure and sale, upon the authority of which the judicial sale was effected. This writ was signed by the clerk; but, as is admitted by the parties, did not bear the seal of the court. We consider the seal of the court an essential requisite to the validity of an execution; and as it did not exist in the present case, the sheriff must be considered as having made the sale without any lawful authorisation. It is urged by the learned counsel for the defendant, that no writ was necessary; that it was sufficient that a decree of seizure and sale had been made by the court. We cannot recognise any distinction, in this respect, between a decree of seizure and sale and an ordinary final decree. Both are judgments, and in both a writ is necessary as the sheriff's warrant for their execution. That process is to be issued by the clerk in the proceeding via executiva, is obvious from the provisions of the Code of Practice, and upon general principles; and the universal practice since the promulgation of the Code, as we believe, has been to issue a formal writ under the seal of the court, as in ordinary cases.

It is not indispensable for the decision of the present suit that we should express an opinion upon the other points made in the case. But as they have been fully argued, and as it is evident that there will be further litigation between these parties, we have considered it proper to notice some of the points presented by the plaintiffs.

We consider the mortgage executed by the plaintiffs' ancestor to the bank, as covering not merely the stock, but also the loan made to Madame Martinez, pursuant to the credit to which she was entitled as a stockholder. A consi-

Bowin 9.

deration of the true intent and spirit of the charter of the "Consolidated Association," which charter is expressly referred to in the act of mortgage, might perhaps suffice for the solution of the question. But besides this, the language of the contracting parties in the act of mortgage very clearly indicates their intention, that the loan should be secured by mortgage. It recites that the mortgagor desires to furnish a mortgage in conformity to the provisions of the charter, specially referring to the 5th and 6th sections of the statute of 1827, and the 6th section of the amendatory statute of 1828, in which sections the security of the capital by mortgage is contemplated, the right of the stockholder to a loan declared, and hypothecary obligations of whatever nature subscribed by individuals in favor of the bank are constituted a special guarantee and security for the reimbursement of the capital of \$2,500,000. The mortgagor, after these recitations, proceeds to mortgage the slaves in question, describing them, and adding the usual covenants de non alienando, &c. The mortgagor then declares her intention to avail herself of the credit allowed her as a stockholder, and acknowledges the receipt of the loan. The act then recites that she has furnished her bond for the amount of the loan, "laquelle obligation a eté signé et paraphé ne variétur par le juge. ex officio notaire, soussigné, conformément à la loi, et en conformité de l'acte hypothécaire susmentionné."

It was argued that the mortgage had been lost by the failure to re-inscribe it within ten years. The plaintiffs are the heirs of the mortgagor, and represent the person of their ancestor. The failure to re-inscribe would, in ordinary cases, be fatal as to third persons, but leaves the mortgage unimpaired as between the mortgagor and mortgagee. The doubts which have existed as to the proper interpretation on this point of article 3333 of our Civil Code, have arisen from the inaccurate translation of the french text. It is the "effect" of the inscription which ceases, not of the mortgage. The subject was very carefully considered, after full argument, in the recent cases of Shepherd v. The Orleans Cotton Press, ante p. 100, and McElrath v. Dupuy, ante p. 520. See also Civil Code, arts. 3314, 3315, 3316.

Upon the plea of prescription of the debt set up by the plaintiffs, the court below was of opinion that the debt was not prescribed, and gave judgment accordingly. In this the plaintiffs say there is error; and, in their answer to the appeal, they pray that the judgment of the court, in this respect, be reversed. After a careful consideration of the evidence our minds are not entirely satisfied upon the question of prescription. While we, however, reverse the opinion of the district judge upon this point, we are not prepared to adjudge the question in the plaintiffs' favor. Much light may be thrown upon the facts of the case in the future contest which will probably occur; the examination of the point is not indispensable to the decision of the present suit, and we shall leave it entirely open.

It is therefore decreed that so much only of the judgment of the court below as decrees "that prescription as to the debt has not attached, but that the plea of prescription to the mortgage is sustained," be reversed. And it is further decreed that, in all other respects, the said judgment be affirmed, with costs; leaving the question of prescription as to the debt open. And it is further decreed that the plea of prescription, or peremption, of the mortgage executed in favor of the said Consolidated Association, be dismissed.

BONIN v. BERARD.

A PPEAL from the District Court of St. Martin, Overton, J. Brent, for the plaintiff. Simon and Magill, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The reasons assigned for our decree in the case of *Bonin* v. *Durand*, just decided, apply to this case, in which the writ of seizure and sale, besides having no seal, exhibits the additional defect of not being signed by the clerk.

TOLEDANO v. GARDINER.

An action by a factor against his principal, for a balance of account, one item of which is for the amount of a bill accepted by the former for the accommodation of the latter, and paid by the acceptor, is prescribed only by ten years. C. C. 3508. The action is not upon the bill, but upon the contract for reimbursement between the drawer and accommodation acceptor.

In an action by a factor on an account current between him and his principal, embracing their dealings in that relation, the latter will not be permitted to isolate the items, and apply to any particular item the prescription which might be applicable if it stood alone, and if the relation of factor and principal did not exist. The various items are component parts of one account, which is to be regarded as a whole, and the prescription to be applied to an action on such an account is that of ten years, established by art. 3506 of the Code.

An agent who advances money for the business of his principal is entitled, without any express agreement, to legal interest from the day on which the advance was made. C. C. 2994.

A PPEAL from the District Court of St. Landry, Overton, J. W. B. Lewis, for the appellant. Swayze, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought to recover the balance of a factor's account. The account is composed of items for plantation supplies furnished. cash advanced, an accommodation acceptance, and charges for commissions and interest, forming the debit side; and of credits of the proceeds of cottons shipped to plaintiff by defendant. It is the usual account of planter and factor, and the dates of the items run from 21st October, 1836, to 20th April, 1838. This suit was brought in 1844. The defendant answered by a general denial. He also pleaded the prescription of one, two, three, five, and ten years. He averred that the plaintiff was indebted to him in the sum of \$2,506 25, the value of fifty-seven bales of cotton consigned to Toledano at various periods to be sold for defendant's account; and asked a judgment for that sum against the plaintiff. At the trial of the cause the correctness of the account was proved by the plaintiff's clerk. A draft of the defendant was also offered in evidence for \$2,525, the principal item of the account, in which it is charged as an accommodation acceptance. This draft purports to be drawn upon and accepted by the plaintiff.

The first ground of defence urged is, that the amount claimed exceeds \$500,

TOLEDANO O. GARDINER.

and under article 2257 of the Civil Code cannot be established by a single witness. Even if it be true that the article in question covers the present case, still the claim does not rest upon the testimony of one witness only. A strong corroboration is found in the draft signed by the defendant, and in the allegations of his answer, which show that the relation of factor and principal existed between the parties. A comparison of the account with the answer, exhibits a conformity in the quantity of cotton shipped and in its value.

But it is said that the items of the account are barred by prescription. Thus the principal item, the payment of the accommodation acceptance, is said to be barred by the prescription of five years, applicable to negotiable instruments. But it is to be observed that the action of the plaintiff is not upon the bill of exchange. It arises out of the bill, but the bill itself was functus officio when paid by the acceptor. The bill is a voucher, and the claim is upon the contract for reimbursement between the drawer and accommodation acceptor. We have recently considered this subject in the case of the Succession of Guillemin, ante p. 634.

We do not think it necessary to consider separately the various items of the account, the nature of which has been already stated. In an account of this sort between factor and principal, embracing their dealings and transactions in that relation, the defendant is not to be permitted to isolate the items, and apply the rule of prescription which might be applicable to the particular charge, if it stood alone, and if the relation of factor and principal did not exist. The various items are component parts of one account, which is to be regarded as a whole, and the law of prescription is to be applied accordingly. Thus considered, the case falls under the prescription of ten years. Civil Code, 3508.

The plaintiff, in the absence of proper proof of an agreement for a higher rate of interest, is entitled to interest only at five per cent. His character as agent entitles him to legal interest without an express agreement, "If the attorney has advanced any sum of money for the affairs of the principal, the latter owes the interest of it from the day on which the advance is proved to have been made. Civil Code, art, 2994.

It is therefore decreed that the judgment of the District Court be reversed, and that the plaintiff, Christopal Toledano, recover of the defendant, George W. Gardiner, the sum of \$1,061 61, with interest at the rate of five per centum per annum, from the 20th April, 1838, till paid, and costs in both courts.

FONTENOT v. HER HUSBAND.

Where prescription is pleaded, for the first time, in the Supreme Court, the party to whom it is opposed may require the case to be remanded for trial upon that plea. G. P. 902.

A PPEAL from the District Court of St. Landry, Overlon, J. Swayze and Taylor, for the plaintiff. W. B. Lewis, for the appellant. Martin, for the intervenors. The opinion of the court was pronounced by

Rost, J. The plaintiff sued her husband for a separation of property, and asked to be authorized to resume the administration of the slave Hélène and her descendants, whom she alleges to be her paraphernal property. The defendant filed a general denial; and further averred: that he married the plaintiff, on the 12th day of January, 1806; that she was then in possession of

the slave Hélène; that the laws then in force regulate his matrimonial rights; FORTEROT that under those laws the issue of slaves held by the wife, as paraphernal property, fell into the community; and that should the plaintiff's action be sustained, he is entitled to one undivided half of the slaves mentioned in her petition. After issue joined, the children of the defendant by her first husband, Don Diego Lafleur, intervened, alleging that the slave Hélène and her ascendants belonged to them, by inheritance from their father. The court below, being of opinion that the plaintiff and the intervenors were each entitled to one undivided half of the slaves, gave judgment accordingly, and authorised the plaintiff to resume the administration of her paraphernal property. From this judgment the defendant alone has appealed, and the other parties pray that it may be affirmed.

The claim for a decree of separation of property appears to be abandoned by the plaintiff, and the only question presented by the appeal is, in relation to the ownership of the slaves claimed. The facts material to that issue are as

The plaintiff was married to Don Diego Lafleur, on the 14th of July, 1795. On the 18th of August, 1796, Lafleur purchased and paid for the slave Hélène; he subsequently died, and the plaintiff married the defendant as already stated. On the 5th of August, 1806, an inventory and appraisement of the property held in common between her and the children of the first marriage was made, at her request, she was called upon to declare all the property belonging to the community, and gave the slave Hélène as forming part of it. In her application to have the inventory and appraisement made, she expressed her desire of having guardians appointed to her children, and prayed that suitable persons might be appointed, and legal proceedings had to ascertain and set apart their respective shares in the succession of their father. The judge made the preliminary orders, and on the 1st day of September, 1806, a judicial sale of all the moveable property belonging to the community and the succession took place.

No written evidence of a partition, or of any subsequent proceeding in the succession of Lafleur, is found at this day in the office where the law required it to be deposited; nothing in the records of the Court of Probutes shows who was appointed tutor of the minors; but obligations and receipts adduced in evidence, bearing dates from 1807 to 1822, show that Garrigues Flaujac acted in that capacity, and that he had the funds of the succession in his hands. No record of a judicial sale of the slaves belonging to the community, or of any other lawful alienation of them, now exists; but three of the intervenors have each given to Garrigues Flaujac, their acting tutor, a receipt for the sum of \$383, which they state to be in full of the fifth coming to them in the succession of their father, amounting to the sum of \$1,916 50. This amount is probably made up of one-half of the proceeds of the sale of the moveables added to onehalf of the appraised value of the slaves.

Having before us the evidence of the application of the plaintiff, that the share of her children in the succession of their father might be ascertained in due course of law, the first orders made upon that application, and the receipt of three of the heirs showing that the amount of the succession had been liquidated and ascertained, it is a serious question whether, after an acquiescence of more than forty years, the rule, Probatis extremis prasumuntur media, should not be applied. It is true that this rule does not generally extend to records and public documents, when it is known that suitable buildings have

FONTENOT been at all times provided for their preservation, and that proper care has been HER HUSBARD, taken of them; but it is an historical fact that such is not the case with the ancient records of Louisiana; and as we observed in the case of Gibson v. Foster, ante p. 503, if the validity of ancient titles originating in judicial proceedings was made exclusively to depend upon the records, as they might be found at any subsequent time, the surest way to destroy private rights would be to ascand to their origin.

In this case no reasonable doubt can exist that Garrigues Flaujac was the tutor of the minors, and yet his appointment, his bond, and his oath, are nowhere to be found.

If we should come to the conclusion that there was a partition of some kind, it is probable that the claim of the intervenors to set it aside, or to recover any part of the property of the succession, would be barred by the time that has elapsed since they became of age. The plea of prescription was filed in the Supreme Court, and as it may be material in the decision of the cause, the application of the appellees that the case be remanded, must be granted.

It is extremely desirable that cases like this, in which courts of justice have nothing but remote probabilities to act upon, should be settled by the parties themselves, in a spirit of mutual justice; and we earnestly recommend that

The judgment in this case, so far as it affects the defendant, is reversed, and the case remanded for further proceedings; the appellees paying the costs of

NEDA v. FONTENOT et al.

A judgment creditor having a judicial mortgage upon all the immovables of an insolvent succession, may sue a third person alleged to have in his possession property belonging to the succession, to compel its delivery to the administrator. Per Curiam: An administrator is only bound to account for what he receives; and if he could not be compelled by the creditors to take possession of all of the assets of the succession, they would be left without a

The deliberations of creditors touching the sale of the property of an insolvent succession must, in all cases, be homologated, or the sale will be null.

Clerks of courts have no power to homologate the deliberations of creditors touching the sale of the property of insolvent successions. Const. art. 79. Stat. 29 May, 1846. The homologation is a judicial act.

Where the mortgage creditors of an insolvent succession have declared their wish to exercise the right of requiring that so much of the property should be sold for cash as may be necessary to satisfy their claims, they should not be considered, in counting the votes to ascertain the wish of the majority of the creditors in number and amount, as to the terms of sale of the residue of the property.

Where an administrator, charged with the sale of the property of a succession, acts at the sale as the agent of one who purchases a large portion of the property, the sale will be null. It will make no difference that he did not act from improper motives. C. C. 19.

Under the laws in force in 1805, the appraisement in the marriage contract of a slave brought into the marriage by the wife transferred the right of property in the slave to the husband; and the only claim of the wife was for the amount of the appraisement.

PPEAL from the District Court of St. Landry, Overton, J. Martin and Brent, for the plaintiff. Lewis, Swayze and Taylor, for the appellants. The judgment of the court was pronounced by

NEDA v. Fontrhot.

Rost, J.- The administrator of the succession of Garrigues Flaujae, believing the solvency of the succession to be doubtful, caused a meeting of its creditors to be held before a notary public, to deliberate and decide upon the terms and conditions of the sale of the property left by the deceased. The proceedings were kept open eleven days by the notary, and during their continuance two of the present defendants, representing themselves to be mortgage creditors to the amount of about thirty thousand dollars, exercised their legal right to require a cash sale up to the amount of those claims. Placing the amount of those mortgage debts out of view, a majority in number and amount of the other creditors voted that the property be sold at a credit of one year for all sums of one hundred dollars and under, and on three equal annual instalments for all sums over one hundred dollars. The proceedings before the notary were then closed, and filed in court on the 28th of December, 1846.

On the 16th of January following, the administrator applied by petition to the District Court for the homologation of the proceedings of the creditors, and for a sale of all the property for cash, subject to the mortgages of the *Union Bank* and *Citizens Bank*; and, on the same day, the following order was made thereon by the clerk of the court:

"Let the proceedings of the meeting of creditors of the late Garrigues Flaujac, deceased, be, and they are hereby homologated and confirmed, no opposition having been filed within the time prescribed by law; and let a sale of the property belonging to the estate of the said deceased be made by Evariste Débaillon, public auctioneer in and for the parish of St. Landry, on the terms fixed by the majority in claims of the creditors of said estate."

The record farther shows that these proceedings were followed up by a commission, which the clerk issued on the 23d of the same month, to sell the whole estate for cash, subject to the mortgages held on said property by the Citizens Bank and the Union Bank of Louisiana. On the 23d of February, and the two following days, property of the succession was accordingly sold for cash, to the amount of \$43,644. A portion of the property not having brought the amount of the appraisement, the administrator, on the 2d of March ensuing, applied to the court to be authorised to sell it on a credit of twelve months: the authorisation was granted on the same day by the clerk, and the remainder of the property was sold in conformity therewith.

On the 16th of February, before the first sale took place, the plaintiff filed an opposition to the sale on the terms fixed in the decree of homologation, alleging, among other grounds, that the clerk had no power to homologate proceedings of that description. This opposition was served on the defendants four days previous to the sale of the succession, which took place, as already stated, on the 23d and the two succeeding days, and which gave rise to the institution by the plaintiff of another action to set it aside and annul it, and farther to cause to be brought into the succession certain slaves, and also rents and profits produced by the plantation and slaves of the deceased since his death, alleged to have been received and expended by his widow, the defendant Maric Louise Fontenot. This suit was cumulated with the opposition, and presents, in addition, other grounds of nullity, some of which we will notice. The court below, after a thorough investigation of the facts of the case, and of the law applicable to them, gave judgment in favor of the plaintiff, and the defendants appealed.

The exception filed by the defendants to the capacity of the plaintiff to main-

NEDA V. PONTENOT. tain her action, so far as it has for its object to compel the defendant Marie Louise Fontenot to deliver to the administrator slaves alleged to belong to the succession, was properly overruled. The succession is proved to be insolvent. The plaintiff is a judgment creditor, and has a judicial mortgage upon all the immovable property of the succession; her right to prevent any portion of it from being either withheld or unlawfully sacrificed, cannot be doubted. The administrator is only bound to account for what he receives; and if he could not be compelled by the creditors to take possession of all the assets of the succession, they would, in cases like this, be left without a remedy.

We find it unnecessary to go into an examination of all the grounds of nullity taken by the plaintiff's counsel. The following are fatal to the defendants: 1st. The deliberations of creditors touching the sale of property must be homologated. 2d. The clerks of the District courts have no power to homologate them. 3d. The terms on which the property was sold, were not those which had been fixed by the creditors.

Article 1164 of the Louisiana Code expressly requires the homologation of the proceedings of the creditors in cases like the present; and we know no rule of construction upon which that article can be considered as repealed by article 1039 of the Code of Practice. Supposing the latter article to have reference to the insolvent act of 1817 and the acts amending it, those acts only dispense with homologation, when no opposition is filed within ten days, in proceedings for the appointment of syndics. It was never doubted before, that the deliberations of creditors touching the sale of property must be in all cases homologated; and the facts of this case place in the strongest light the necessity of the rule.

Article 79 of the constitution provides that the powers which the legislature is authorised to vest in the clerks of courts shall be specified and determined. In the act of 1846, defining the powers given to the clerks, the power to homologate the deliberations of creditors is not specified.

It was contended at bar that, where no opposition is made within ten days, the power to homologate is incidental to the delegated power of ordering the sale of the property of the succession; that in such cases it is a ministerial, not a judicial act; that the law does not require the deliberations of creditors to be placed on the docket of the court, unless opposition has been made; and that if the clerk has not the power to homologate them, no action whatever can be had upon them.

If the homologation be a ministerial act when no opposition has been filed, how does it happen that the clerk who granted it in this case fell into two capital errors? The two mortgage creditors were entitled to have so much of the property sold for cash as would satisfy their mortgage claims, but those claims should not otherwise have been taken into consideration in the counting the votes; without them, the majority of the creditors in number and amount had voted for a credit sale, and the clerk ordered it to be made for cash. In relation to the claims of the *Union Bank* and *Citizens Bank*, the creditors had not the right to require a cash sale; and, if they had done so, their deliberations in that respect should have been disregarded, as being contrary to law. The decision of those important questions, which the nature of the debts, the laws regulating the administration of property banks, and the conflict between the creditors as to the terms of sale, presented, was, in the strictest sense of the term, a judicial act, which clerks are not authorized to perform.

When the deliberations were filed in court it was the duty of the administrator to have them homologated; and it cannot be seriously urged that the court had not the power to homologate them, at any time during its session.

NEDA O. FONTENOT.

We have already shown that the terms of the sale were different from those fixed by the majority of the creditors; but we cannot close this part of the case without observing, that another cause of nullity has been shown. It is in evidence that the administrator, being charged with the sale of the succession property, acted at that sale as agent of *Marie Louise Fontenot*, who purchased nearly the whole of it. This was clearly illegal. It is not proved, and we have no reason to believe, that he acted thus from improper motives; but "when to prevent fraud, or from any other motives of public good, the law decleres certain acts void, its provisions are not to be dispensed with on the ground that the particular act in question has been proved not to be fraudulent, or not to be contrary to the public good." Civil Code, art. 19.

We concur with the learned judge of the first instance in the view he has taken of the rights of the succession to the slave Sophic, and her children. The marriage contract between the deceased and his wife was executed in 1805. The slave Sophic was brought into the marriage by the wife, and appraised in the contract. Under the laws then in force, the appraisement transferred the right of property to the husband, and the only claim of the wife is for the amount of it. Gordon et al. v. Williams et al. 6 Mart. 659.

The claims of the succession against the defendant Marie Louise Fontenot for the proceeds of the fruits of the property of the succession received by her, must of course be compensated with an equal amount of her claims; and when a tableau of distribution is filed, the creditors will have the means of ascertaining whether the administrator has done his duty in this behalf.

The care taken by the judge of the court below in the preparation of the case, and his lucid and able opinion, have greatly facilitated our investigation. We are satisfied that he has done justice between the parties, and that the judgment ought to be affirmed.

Judgment affirmed.

OFFUT v. MONQUIT et al.

A bond can be legally selzed by a sheriff only by his obtaining actual possession of it. A purchaser at a sheriff's sale made without a previous seizure, acquires nothing.

A PPEAL from the District Court of Lafayette, Overton, J. W. B. Lewis, for the plaintiff. Brent and Porter, for the appellants. The judgment of the court was pronounced by

King, J. The commercial firm of Dupré, Jubertie & Tinet, while in liquidation, received, under an execution, a twelve months' bond executed by the defendants. On the day on which the bond was taken it was transferred to the plaintiff, in part satisfaction of a larger sum which he, as endorser for the firm, had paid. At the time of the transfer Tinet was dead, and his succession represented by Jubertie, as administrator. Some months after the transfer, Miramond, a judgment creditor of "Jubertie, executor," caused an execution

OFFUT O. Monguit. to issue, in virtue of which this bond was, as, it is contended, seized. Previous to the alleged seizure, the attorney of Miramond was notified of the transfer, but persisted in instructing the officer to seize. On the day of the sale, the sheriff, when offering the bond, proclaimed that it had been transferred, notwithstanding which the defendant Monquit, the principal obligor, purchased it. The plaintiff claims in this action the amount of the bond, and the defendant Monquit sets up in defence that the seizure of the sheriff and his adjudication to her were legal, and that by reason of her purchase the bond has been extinguished. A judgment was rendered in favor of the plaintiff, from which the defendants have appealed.

We are satisfied from the evidence that, no legal seizure of the bond was ever effected. That instrument appears to have remained in the possession of the plaintiff, from the date of his purchase until the commencement of this suit. The sheriff, so far from having been in possession of it under the writ, was unable to describe it in his notices. In an attempt at a description he emitted the date, and left its amount in blank. We have lately held that the sheriff can only seize such effects by obtaining actual possession of the object levied upon. Fluker v. Bullard, ante 338.

The defendant, under the defence set up, can only successfully resist the claim of the plaintiff, by showing the superiority of her own title to the bond, and in this she has failed. She not only purchased with a previous notice of the transfer to the plaintiff, but acquired at a sheriff's sale made without a previous seizure. The plaintiff, who is the holder of the bond, may legally enforce its payment, as far, at all events, as relates to the parties to this controversy.

Judgment affirmed ..

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

:8 9

ALEXANDRIA.

IN

SEPTEMBER, 1847.

PRESENT :

Hon. GEORGE EUSTIS, Chief Justice.

Hon. PIERRE ADOLPHE ROST,)

Hon. GEORGE ROGERS KING, Associate Justices.

Hon. THOMAS SLIDELL,

TULANE et al. v. LEVINSON.

An allegation, in the answer of a defendant in a petitory action, calling a third person in warranty and disclaiming any title to the property in contest, is not evidence, as against the plaintiff, of possession in the party cited in warranty. To enable the warrantor to avail himself of any legal rights dependent on his possession, it should be established affirmatively as a substantive fact.

An act of sale of land must be registered in the office of the parish judge of the parish in which the land is situated, to have effect against third persons, either as tsansferring title or possession. It is not sufficient that it be recorded in the office of the register of mortgages. Art. 2455 of the Civil Code, which declares that "the law considers the delivery of immovables as always accompanying the public act transferring the property", is subordinate to those articles which require the registry of acts of sale in the parish in which the land is situated.

Notice is not equivalent to registry in relation to conveyances of real property.

A PPEAL from the District Court of Natchitoches, Campbell, J. M. Boyce, for the plaintiffs. P. A. Morse and Roysdon, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J.* This is an action brought for the recovery of a certain lot of ground in the town of Natchitoches, the petitioners alleging that one Joseph Levinson wrongfully detains possession of it, notwithstanding their ownership. The plaintiffs purchased the lot at a sheriff's sale made on the 4th February.

^{*} SLIDELL J., considering himself as having an interest in the question involved in this case, took no part in it. The decision was made by the other judges.

TULANE ...

1843, under a fieri facias which had issued on a judgment obtained in the District Court of the parish of Natchitoches, at the suit of the plaintiffs against Geo. F. Barney. The judgment was rendered on the 28th of April, 1842, and was recorded in the office of the register of mortgages of the parish, on the 3d of May of that year. The sheriff's deed to the plaintiffs was regularly recorded. The defendant, Levinson, disclaimed all title to the lot in dispute, alleging that he was only the lessee of the heirs and legal representatives of Jacob Y. Bartlett, deceased, and that he understands that John C. Bartlett, of the town of Greenwich, in the State of New York, is the sole heir of the said deceased, and he prays that said John C. Bartlett may be cited in warranty to defend the suit. Two gentlemen of the bar were appointed to represent him, and they appeared for him, and defended the suit accordingly.

The answer alleges the defendant to be the sole heir of the deceased Jacob Y. Bartlett; denies that the plaintiffs have any right or title to the lot; and charges that he holds, and still is the legal proprietor of it by virtue of a sale made by George F. Barney to Jacob Y. Bartlett, on the 19th of March, 1842, by act passed before William Y. Lewis, notary public, in the city of New Orleans, and duly recorded in the parish of Natchitoches.

He prays that he may be quieted in his possession of the lot, and the plaintiffs' anit be dismissed with costs, Judgment was rendered for the plaintiffs against the defendant Bartlett, for the lot and costs of the suit; and he has appealed.

Bartlett's title was not recorded in the office of the parish judge of the parish of Natchitoches, but was recorded in that of the register of mortgages; and the decision of the case depends on the respective rights of the parties under a sheriff's sale, and an unrecorded notarial act passed out of the parish in which the property is situated; the record in the mortgage office not being a compliance with our registry laws concerning sales of real property,

The title and possession of Barney neither the plaintiffs nor the defendant contest. Lexinson is charged in the petition as wrongfully holding possession of the property; but no possession is proved to have been taken or held by the defendant, or his ancestor. It is alleged to have existed in the answer and disclaimer of Levinson, but that is no proof of the fact against the plaintiff. It ought to have been established affirmatively as a substantive fact, in order to enable the defendant to avail himself of any legal rights dependent on it. The alleged possession of Levinson cannot enure to the benefit of the defendant, without some evidence establishing his connection with it.

It has been urged that possession passed to the ancestor of the defendant in virtue of the notarial act of sale, passed in New Orleans, on the 19th day of March, 1842; and the Civil Code, art. 2455, and the decisions under it, have been referred to in support of that position. This article is evidently subordinate to those which require the registry of acts of sale in the parish where the land conveyed is situated, in order to give effect to the sale against third persons. An act passed in a remote parish, and not recorded in the proper office, can have no effect, as to third persons, either as transferring title or possession. As the case is before us, the defendant rests upon his naked act of purchase made in New Orleans, without possession or any evidence of consideration, except that resulting from the instrument itself.

The title to the lot being in the name of Barney on the public records it hecame subject to the mortgage, which the recording of the judgment created,

on the 3d of May, 1842, and we think could be lawfully seized under the execution issued on the judgment and sold to satisfy the same. It seems to follow as a necessary consequence that, if it could be lawfully sold under this state of things, a purchaser, having a knowledge of the facts, would be justified in buying the property.

It is in evidence, that the plaintiffs' attorney, before the issuing of the fictifacias under which they became the purchasers, was apprised of the existence of the act of sale to Bartlett, and of its being recorded in the mortgage office; but that, on finding no record of it in the office of the parish judge, he had the lot seized and bought in for his clients, the plaintiffs. As we consider the right of the plaintiffs to have the property sold to satisfy their debt paramount to that of the defendant under his unrecorded deed, by virtue of their recorded judgment, we do not see how that right can be impaired by this knowledge on the part of the attorney.

The theory that notice is equivment to registry in relation to conveyances of real property, we do not understand to have been adopted in our jurisprudence. The subject is one of great interest, and by no means free from difficulty. The facts in this case leave no doubt on our minds as to the correctness of the decision of the district judge.

Judgment affirmed.

FRIEND z. FENNER et al.

A wife has no privilege on the immovables of her husband, for dotal or paraphernal funds received by him. The only privilege given to a wife on the property of the husband is for hor dotal rights, and is restricted to moveables. C. C. 2355, 2356, 3219.

For the protection of her paraphernal funds, the wife has a mortgage only. C. C. 2367.

A PPEAL from the District Court of Claiborne, Campbell, J. Friend, for the appellant. McGuire and Ray, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. This case presents a contest between the plaintiff, who is the wife of Friend, and several of his creditors holding judicial mortgages, as to the distribution of the proceeds of the sale of a slave. The judgment creditors seized the slave who was advertised for sale, and the plaintiff then instituted this suit, alleging herself to be a privileged creditor, and praying that the price of the slave when sold be first applied to the payment of a judgment which she obtained against her husband, in March, 1844. The executions of the creditors appear to have been levied at the time, or shortly before, the wife obtained her judgment. The judgments in favor of the creditors were duly recorded, in the years 1842 and 1843.

The only evidence offered by the plaintiff in support of the alleged privilege upon the proceeds of the intended sale, was a certified copy of the judgment against her husband, unaccompanied by the pleadings or evidence in that cause, or by any other evidence whatever. The judgment restores to her the separate administration of certain property, and further adjudges that she recover from her husband several sums of money, with "a privilege on the immovable property of her husband", to bear date respectively from certain dates in the

FRIEND O. FERRER. years 1841, 1842, and 1843. No evidence was offered, by any of the parties, to show at what period the sleve thus seized had been acquired. The court below decreed a pro rata distribution of the proceeds of sale among all the parties
fitigant, and the plaintiff has appealed. The appellees, in their answer to the
appeal, have prayed that the judgment be amended by rejecting the claim of
the wife entirely, and giving them the entire proceeds of the sale.

In the entire absence of any evidence as to the origin or nature of the claim upon which the wife obtained judgment, and with nothing before us but the mere judgment in her favor, against her husband, we are of opinion that the wife has no right to any portion of the proceeds. The creditors who oppose her have a double claim upon the proceeds of the slaves. They hold duly recorded judicial mertgages, and also the privilege conferred by seizure under execution. The wife, on the contrary, exhibits nothing but a judgment against her husband declared to be privileged on his immovables. Whether the claim arose from dotal or paraphernal funds received by the husband, in neither case does the law grant her a privilege on the immovable property of her husband. The only privilege accorded to the wife on the property of her husband is for dotal rights, and is restricted to movembles. Civil Code, 2355, 3219. Article 2356 expressly declares that in no case can the privilege granted by the preceding article be extended to immovables. For the protection of paraphermal rights the law accords to the wife a mortgage only. C. C. 2367. Privi-Jeges are stricti juris, and can be claimed only for those debts to which they are expressly granted by the lawgiver. 1b. 3152. The judgment, therefore, on which alone the plaintiff's claim of privilege rests, and to which the defendants were not parties, riglates the law, and cannot affect them. It is as against them erroneous on its face, and we can give it no effect. The expression "privilege" may have been inadvertently used for mortgage; but it is an error from which we cannot relieve the party, as we might have done if the plaintiff had not rested solely upon the judgment, but had proved, by further evidence, the existence of claims to which the law accords a tacit mortgage.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment in favor of the defendants; the plaintiff paying costs in both courts.

LACOUR v. CARRIE, Administrator.

Where a mortgage recites that it was executed to secure the payment of a note describing the name of the maker, the date of the note, and the rate of interest, but is silent as to its amount, and the mortgage is recorded, but the note is not, the neglect to insert the amount will be fatal as to third persons, and the mortgage will have no preference upon the property mortgaged. C. C. 3277.

A PPEAL from the Court of Probates of Natchitoches, Greneaux, J. M. Boyce, for the appellant, contended that the note was sufficiently identified with the mortgage by the paraph of the notary, citing Civil Code, arts. 3273, 3274, 3277.

Sherburne and J. B. Smith, for the defendant. The mortgage is a nullity, the exact amount for which it was given not being declared in the act. C. C. 3277. Bosquet, Dict. des Oblig. vol. 2, p. 399. Sirey, 34, 2, 279. 9 Rob. 482.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiff sues the defendant, administrator of the succession of Sylvestre Anty, upon a note executed by the deceased. He asks to be placed on the tableau of debts due by the succession, as a privileged creditor upon the proceeds of certain real estate, and as an ordinary creditor for the balance of his claim.

LACOUR U. CARRIE.

The first point presented for our consideration is, as to the validity of the alleged mortgage. The mortgage recites an indebtedness upon a note described as signed by Anty, dated 1st April, 1840, and bearing interest at ten per cent. The mortgage is entirely silent as to the amount of the note. At the trial of the cause the note was offered in evidence, and exhibited the paraph of the notary before whom the act of mortgage was executed; and a subscribing witness to the act deposed that it was the identical note which was exhibited to the parties by the notary. The mortgage only was recorded; but the note was not.

"The mortgage only takes place in such instances as are authorised by law." Civil Code, 3250. "To render a conventional mertgage valid, it is necessary that the exact sum for which it is given shall be declared in the act." Ib. 3277. Under these articles, the neglect to state the sum is fatal as to third persons; and therefore the claim of preference over other creditors upon the proceeds of the property described in the act, was properly rejected.

We are also of opinion that the plea of prescription was properly overruled. The acknowledgment of the indebtedness by the deceased, within five years before the institution of the suit, and before prescription had accrued, is sufficiently proved.

Judgment affirmed.

CITIZENS BANK OF LOUISIANA v. WALKER.

A notice of protest addressed to the post-office at which an endorser habitually receives his letters, though not the nearest to his residence, is sufficient to fix his liability.

Any address of a notice of protest which will ensure its transmission to the proper post-office, is sufficient. Thus where it is shown that by addressing a notice to an endorser "at the parish of R.," the letter will be taken out and retained for delivery at the office to which the notice should be sent, the name of the office need not be mentioned in the address.

A PPEAL from the District Court of Rapides, Boyce, J. Sherburne, J. B. Smith, P. A. Morse and Roysdon, for the plaintiffs. O. N. Ogden, for the appellant. The judgment of the court was pronounced by

Kine, J. The defendant is sought to be rendered liable as the endorser of a promissory note, duly presented at its maturity, and protested for non-payment. The defence relied on is, the want of legal notice of the dishonor of the note. A judgment was rendered against the defendant in the court below, from which he has appealed.

The notice of protest was addressed to the defendant, at the "parish of Rapides, La." The evidence shows that, at the date of the protest, there were several post-offices in the parish of Rapides, and among the number, one at Cotile; that the principal office in the parish was at Alexandria; and that letters addressed to the "parish of Rapides," would first reach the post-office at Alexandria for delivery, and would be retained there for that purpose. It further

CITIZERS BAKE appears, that the defendant had a box at the office at Alexandria; that he was in the habit of receiving letters and papers through that office; and it is not shown that he received letters through any other. His residence was at a point nearly equally distant from Alexandria and Cetile. One of the witnesses considers it to be half a mile or a mile nearer to the office at Cotile; two others think that it is nearer to Alexandria.

> The defendant contends that, there being several post-offices in the parish in which he resides, no one of which is known as that of the "parish of Rapides," the address of the notice to him, in the form used by the notary in the present instance, is too uncertain to secure its transmission to the post-office nearest to its residence, and is not in compliance with the law. The notice was, in our opinion, sufficient. It has been repeatedly held, that a notice sent to the postoffice at which the endorser habitually receives his letters, will be sufficient to fix his liability, although there may be another office nearer his residence. 6 Rob. 73, and authorities there cited. The office through which the defendant received his letters was at Alexandria, and we are not prepared to say, under the evidence in this case, that it was not the nearest to his residence. Any address of the notice which will insure its transmission to the proper office, is a compliance with the requisites of the law. No useful end would have been obtained by adding "Alexandria" to the address used by the notary, as the notice would have equally reached the office at that place, without the addition. 9 Rob. 162. 16 La. 310. 1 Ann. Rep. 269.

Judgment affirmed.

HICKMAN et al., Executors, v. STAFFORD et al.

Acknowledgment of the debt by the maker of a note, does not interrupt prescription as to the endorser. The maker and endorser of a note are not debtors in solido.

PPEAL from the District Court of Rapides, Boyce, J.

Elgee and Hyams, for the plaintiffs. The maker and endorser of a note are bound in solido. The case of Allain v. Longer, 4 La. 152, is opposed to the decision in Jacobs v. Williams, 12 Rob. 183. The first question to be unswered is, what is an obligation in solido? Art. 2086 et seq. of the Civil Code, says: "There is an obligation in solido on the part of the debtors when they are all obliged to the same thing, so that each may be compelled for the whole, and when the payment which is made by one of them exonerates the others towards the creditors." The obligation may be in solido, although one of the debtors be obliged differently from the other, to the payment of one and the same thing; for instance, if the one be but conditionally bound, whilst the engagement of the other is pure and simple, or if the one is allowed a term which not granted towards the other. See also Pothier, Oblig. 262, 263, 264.

It is impossible to make language clearer than that of art. 2087 is, to render the endorsers of negotiable paper debtors in solido. The endorser, to use the language of the Code, is "conditionally bound," "whilst the engagement of" the maker "is pure and simple;" so that the reasoning of the court, in Jacobs v. Williams, that endorsers are not to be considered solidary debtors, because their contract is conditional, is answered by the plain and unambiguous language of the Code. We treat of the obligation here as it affects creditors, not of the effects of it amongst the co-debtors themselves.

Pothier, in his "Contrat de Change," invariably characterises the obligations of all the parties to a bill or letter of exchange, or other negotiable paper, as being in solido. Nos. 115, 180, 212, 160, and notes, p. 237. See also Code

de Commerce, art. 140. "Tous ceux qui ont signé, accepté, ou endossé une lettre de change, sont tenus à la garantie solidaire envers le porteur."

Pardessus, Cours de Droit Commerciale, vol. 1, nos. 190, 191 and 192, commenting on this article, says that solidarity exists in all commercial contracts, without express mention, by agreement or law; and this, he says, would have existed even if art. 140, cited above, had not been enacted. Toullier, 6 vol., no. 720, cites on this point, with favor, the authority of Pardessus. The authority of art. 2099 of the Civil Code, so much relied upon by the counsel in the case of Jacobs v. Williams, is completely answered by art. 2102.

Edelen, for the defendants, relied on Jacobs v. Williams, 12 Rob. 183.

The judgment of the court was pronounced by

King, J. The defendants are sued as the endorsers of a promissory note, and plead the prescription of five years in defence. A judgment was rendered against them in the court below, from which they have appealed.

The note upon which the action is founded matured on the 4th of January, 1838, and citations were served on the defendants on the 22d and 24th of April, 1844, more than six years after the note fell due. The prescription had therefore become complete before the inception of this suit, unless interrupted. To show such interruption the plaintiffs rely on an acknowledgment of the maker, resulting from a payment made, as they contend, within less than five years previous to the services of citation. If it be conceded that the payment was made as contended for, its effect was not to interrupt the prescription as relates to the defendants. The obligations of the maker and endorsers grow out of separate and distinct contracts. There is no privity between the parties, and no such community of interest as confers upon one of them the authority to make acknowledgments binding upon the others. In the case of Jacobs v. Williams, 12 Rob. p. 183, it was held that prescription as to the endorser was not interrupted by acknowledgments of the maker. We recognised the correctness of this principle in the case of McCalop v. Newcomb, ante p. 332; and, after a careful reconsideration of the question, upon the further arguments and authorities adduced in the present case, we are satisfied with the conclusion at which we then arrived. 6 Toullier, no. 723. Angell on Limitations, p. 277.

The judgment of the District Court is therefore reversed, and a judgment rendered in favor of the defendants; the appellees paying the costs of both courts.

Mason et al. v. Oglesby et al.

No appeal will lie from a judgment on a claim for three hundred dollars, with interest from judicial demand. Const. art. 63. The amount due at the institution of the suit constitutes the matter in dispute.

A PPEAL from the District Court of Caddo, Campbell, J. Roysdon, Hyams, and Gilbert, for the plaintiffs. Crain, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This is a suit for \$300, with interest from judicial demand. The claim is for so much money advanced at the defendants' request. There was judgment for the sum claimed, with interest from judicial demand; and the defendants have appealed.

The appellees have asked for a dismissal of the appeal, upon the ground of want

MASON V.

of jurisdiction. The jurisdiction of this court in cases of this nature is governed by the 63d article of the constitution. It extends to those cases only, in which "the matter in dispute shall exceed \$300." It is the amount due at the institution of the suit, which constitutes the matter in dispute. That amount was only \$300; and the interest which accrued subsequently, ex mora, by the judicial demand, cannot be considered. See Pujol v. Correjolles, 5 Rob. 90. Klady v. McGuire, 1 Rob. 26.

Appeal dismissed.

CUMMING v. BIOSSATT, Curator, et al.

Judgments or mortgages registered in the parish of the supposed domicil of a party, will not be affected by a subsequent discovery, made in running the boundary line, that the residence of the debtor was beyond the line, and within the adjoining parish. Per Curiam: L'erreur commune fait le droit.

Where a mortgage on slaves has been recorded in the mortgage office of the place where the debtor had his domicil at the time of the inscription, his subsequent removal to another parish and acquisition of a domicil there, will not make it necessary to register the mortgage in the parish to which he removes, in order to preserve its effect.

A PPEAL from the District Court of Rapides, King, J. Hyman, for the plaintiff, cited Civil Code, arts. 3314, 3318. Hyams, for the appellants. The judgment of the court was pronounced by

Rost, J. This is a third opposition, in which three several mortgage creditors claim to receive, by preference, the proceeds of the judicial sale of a slave.

In 1835, Lewis Hoffman and his wife, believing themselves to be domicilizated in the parish of Rapides, paying taxes and exercising their civil and political rights in said parish, executed in favor of the Canal and Banking Company, upon their homestead and a slave, a mortgage, which was duly recorded in the parish of their supposed domicil. The priority of this mortgage in the parish of Rapides is admitted. In 1838, Biossatt obtained against Hoffman a judgment, which was also recorded in the parish of Rapides. In 1841, Hoffman gave, upon the same slave, a mortgage, which was at first recorded in the parish of Rapides, and afterwards transferred to the present plaintiff, who, in 1842, had it recorded in the parish of Catahoula, where Hoffman had previously gone to reside. The slave was seized under the judgment of Biossatt, and the plaintiff, as well as the Canal Bank, claim from the sheriff the proceeds of the sale. The court below ordered the plaintiff to be paid by preference, and the other parties appealed.

The plaintiff asks the affirmance of the judgment on two grounds: 1st. That Hoffman never had his domicil in the parish of Rapides, and that the recording of mortgages in that parish against him, on the slave in controversy, could not affect the right of third persons. 2d. That his mortgage was the only one recorded in the parish of Catahoula, where Hoffman resided, and had his domicil, in 1842.

It is in evidence that the boundary line between the parishes of Rapides and Avoyelles, was run and marked by a surveyor after the removal of *Hoffman* to Catahoula, and that his house was found to be within the limits of the parish of

Avoyelles. The jurisdiction previously exercised over it by the parish of Rapides was the result of a common error, which, under the maxim of the law, "Verreur commune fait le droit," cannot prejudice the rights acquired by mortgage creditors during its continuance.

The other ground involves a question of registry, which was new when raised in this suit. It has since been settled by two decisions of the Supreme Court, in which we concur. Hooper v. Union Bank of Louisiana, 10 Rob. page 63. The New Orleans Improvement and Banking Company v. Jewett, 11 Rob. page 20.

The reinscription in the parish of Catahoula was not necessary to preserve mortgages inscribed in the parish of Rapides, where *Hoffman* had his domicil, de facto, when the right of mortgage accrued.

It is therefore ordered that the judgment in this case be reversed, and that that the Canal and Banking Company be paid by preference out of the proceeds of the sale of the slave York, after deducting costs, the sum of \$375, with interest at the rate of eight per cent per annum from the 20th May, 1843, until paid, and \$4 for costs of protest. It is further ordered that if any surplus remain, it be paid over to the seizing creditor, Biossatt, up to the amount of his judgment, interest and costs. It is further ordered that if any balance remain after those two claims are satisfied, it be paid over to the plaintiff; and that the said plaintiff pay the costs in both courts.

THOMAS et al. v. McNeIL.

Bail not fixed with the debt before the passage of the act of 28 March, 1840, "abolishing imprisonment for debt", were discharged by that act.

A PPEAL from the District Court of Natchitoches, Campbell, J. O. N. Ogden, for the plaintiffs. P. A. Morse, contra, contended that the bail was discharged by the passage of the act of 28 March, 1840, abolishing imprisonment for debt, citing Cooper v. Hodge, 17 La. 478. Alchafalaya Bank v. Hozey, 17 La. 510. Nicolls v. Ingersoll, 7 Johnson's Rep. 115. Frey v. Hebenstreit, 1 Rob. 565.

The judgment of the court was pronounced by

SLIDELL, J. In 1839, the plaintiffs obtained a writ of arrest against McNeil, who gave bail. Judgment was rendered against McNeil, in 1842; a writ of fieri facias was issued, and returned nulla bona. A rule was then taken against the surety on the bail bond, to show cause why judgment should not be rendered against him for the amount of the plaintiffs' claim. The defence urged by the defendant in the rule is, his discharge, by reason of the act of 1840, entitled "an act to abolish imprisonment for debt." There was judgment in favor of the defendant in the rule, and the plaintiffs have appealed.

The question thus presented cannot be considered an open one. It has been settled by numerous decisions, which are cited in the case of Frey v. Hebenstreit, 1 Rob. 565. See also Jartroux v. Debergue, 5 Rob. 127. Waring v. Crawford, 9 Rob. 291.

Judgment affirmed.

CUMMING v. BIOSSATT.

CHEW v. POLICE JURY OF RAPIDES.

An application for a new trial or the ground of newly discovered evidence, must be supported by the affidavit of the party making the application, and not by the oath of his counsel, unless some sufficient reason be shown why the party cannot take the required oath. The counsel may be ignorant of evidence material to the defence of the cause, and the client fully informed of its existence.

A PPEAL from the District Court of Rapides, Boyce, J. Hyams, for the plaintiff. O. N. Ogden, for appellants. The judgment of the court was pronounced by

King, J. The defendants were sued on a draft, or warrant, drawn upon a particular fund. The defences opposed to the action are, that the president of the police jury was not authorised to sign the warrant, and that the warrant was drawn to be paid out of a special tax, which was never collected. A judgment was rendered in favor of the plaintiff. The defendants then moved for a new trial, on the ground that new and material evidence had been discovered, by which a payment could be proved to have been made on account of the draft. The application was supported by the affidavit of the defendants' counsel, that the evidence by which he expected to establish the payment was discovered by him on the trial of the cause and after the judgment was rendered, although due diligence had been used to procure the testimony before the trial. The application was overruled, and the defendants have appealed.

The district judge did not, in our opicion, err. The application for a new trial on the ground of newly discovered evidence, should be supported by the affidavit of the party making the application, unless some sufficient reason be shown why he could not take the required oath. The affidavit in support of this motion was not made by the defendants but by their counsel, who has not aworn that his clients were ignorant either of the alleged payment, or of the testimony by which it could have been proved. The counsel may well be ignorant of evidence material to the defence of the cause, and the client fully informed of its existence.

The execution of the draft, the authority of the president of the police jury to sign it, and the construction of the work in payment of which it issued, were fully proved on the trial. The draft was the evidence of a debt due by the parish. It was assignable; and the police jury were bound to provide the means for discharging it.

Judgment affirmed.

REED v. RITCHEY.

An agent employed to demand from an executor an account, to receive any money coming to his principal, and to effect a partition, &c., takes from the executor, for a large portion of the share of his principal, notes and obligations of third persons, and the principal afterwards receives the notes and obligations from the agent, settles with him for his services, collects a part of the notes, and makes no complaint, nor gives any notice, to the agent, of an intention to hold him liable during three years: Held, that these facts, coupled with that

of his having instituted a suit against the executor and her co-heirs, charging them with having combined to defraud her by imposing apon her worthless claims as cash, will amount to a ratification of the acts of the agent, and exonerate him from responsibility.

A PPEAL from the District Court of Avoyelles, Cushman, J. Taylor and Swayze, for the plaintiff. Edden and Waddell, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. In 1841, the plaintiff gave defendant her power of attorney to represent her in the settlement of the succession of Letitia Jones, authorising him to demand an account of the executor, and to receive and receipt for any monies, effect partition, &c. In December, 1841, the agent gave the executor a receipt for \$560. as in full for his constituent's portion of the estate. Of this amount, however, it appears that in fact but \$60 was received in cash, the residue being paid to the agent in the notes and obligations of sundry persons then due. These notes and obligations remained in the attorney's hands for about two years, when the attorney handed them to the principal, stating that he could make no collections upon them; and not being able to agree about the amount of compensation for his services, they referred the matter to arbitration. The plaintiff collected one of the claims, and put the other into the hands of an attorney at law for suit, but did not succeed in effecting any further collection. About two years after receiving the notes and obligations from the defendant, the plaintiff instituted a suit against the executor of Letitia Jones, who was also a co-heir with the plaintiff, and against certain other co-heirs, alleging that they had combined to defraud her. by putting off upon her worthless claims as cash, for her share of the succession. The uncollected notes and obligations which she had received from Ritchey, were annexed to her petition. The amount claimed was \$389. This suit, however, was not prosecuted; and, about two or three years afterwards, to wit, in December, 1846, the plaintiff brought the present action, in which she claims from the defendant the sum of \$500. It does not appear that any complaint was made to the defendant at the time when he settled with the plaintiff by delivering the notes and claims, nor that any notice of her inability to collect them was given to him, or of her inte tion to hold him responsible, until this action was brought. The debtor of these uncollected claims has been dead for some years, and his succession is insolvent.

There is no proof in the record of any bad faith on the part of the agent, nor is it charged in the pleadings. It is questionable whether, under the power of attorney, the agent had a right to receive the claims; and the delay in handing them over to his principal is, in itself, in the absence of any satisfactory explanation, indicative of negligence. If he was engaged during the interval in endeavoring to collect them, it should have been proved. If the plaintiff had refused to receive the claims from the agent, and thrown the liability upon him, are not prepared to say that he could have exonerated himself. But the conduct of the plaintiff in receiving the claims, settling with the agent for his services, collecting a portion of them, and making no complaint and giving no notice to the defendant, during an interval of three years, coupled with the allegations in her suit against the executor and co-heirs, amount in law to a ratification of the agent's conduct, and exonerate him from liability.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment for the defendant, with costs in both courts.

HYNSON v. MEUILLON.

The right of a master, under art. 181 of the Civil Code, to exonerate himself from responsibility for the offences or quasi-off-nces of a slave, by abandoning the slave to the person injured, is not affected by the circumstance of the slave being at the time confined in prison at hard labor, under a judgment of a court condemning him to imprisonment for a term of years as a punishment for the offence committed by him; and a notarial act of abandonment transfers to the party in whose favor it is made, all the possession which the law will, in such a case, permit the master to give. C. C. 2455.

A PPEAL from the District Court of Rapides, Cushman, J. O. N. Ogden, for the plaintiff. Edelen, for the appellant. The judgment of the court was pronounced by

Rost, J. The defendant recovered from the plaintiff \$500 damages, for an outrage committed upon her person by a slave belonging to him, who was sentenced therefor to fifteen years imprisonment at hard labor. On the day that the verdict allowing the damages was rendered in favor of the defendant, the plaintiff, Hynson, abandoned the slave to her in open court, by a notarial act, a copy of which was then and there filed. The defendant having caused execution to issue under the judgment rendered on the verdict, and property of the plaintiff to be seized notwithstanding the abandonment, the latter enjoined the proceedings on the ground that, he is released thereby from all further responsibility. The injunction was perpetuated, and the defendant appealed. The appellant asks a reversal of the judgment on the ground that, the abandonment contemplated by art. 181 of the Civil Code implies a corporeal delivery of the slave abandoned; and further, that the plaintiff did not take the proper steps to obtain the possession of the slave, and refused to authorise the defendant to take them in his name.

The dispositions of the Code authorise the abandoment of slaves who have committed crimes, and make no exception in relation to those who are undergoing the punishment of their offences. Their temporary confinement by the State, does not affect the rights of property of the master. In the eye of the law, he continues to possess, though he may not enjoy; and the notarial act of abandonment transfers to the party in favor of whom it is made, all the possession which the laws of the State will, in such cases, permit the master to give. C. C. 2455.

It has been contended, in argument, that the sentence condemning the slave was illegal, and that he is not confined in the proper place. This may be true, but the plaintiff believes the punishment inflicted to be just; and there is no legal obligation on his part to take any steps to have the sentence reversed. By the express disposition of art. 181 of the Code, the title will be in the defendant as soon as she accepts the abandonment, and she requires no authorisation from the plaintiff to resume the possession of the slave, if it be true that he is unlawfully detained in custody. The confinement of the slave for fifteen years operates, no doubt, a hardship in this case; but it is the inconvenience of all fixed rules of damages, that they, at times, fall short of the actual damage susained.

Judgment affirmed.

Hyde v. Bennett et al.

Decision in Shepherd'v. Orleans Cotton Press Company, ante p. 100, affirmed.

Where an owner of property subject to mortgage is divested of his ownership by a sale of the property under execution at the suit of a third person, the subsequent bankruptcy, and discharge of the debtor, under the act of Congress of 1841, cannot affect the property, so far as the necessity of re-inscribing the mortgage within ten years from the date of the first inscription is concerned. C. C. 3333.

The institution of suit by a mortgagor will not do away with the necessity of re-inscribing a mortgage in the books of the register of mortgages, within ten years from the date of the first inscription, in order to preserve its rank.

The inscription in the office of the register of mortgages of a copy of a judgment obtained by the mortgagee, which, after decreeing that the plaintiff recover of the debtor a certain sum, orders that his "mortgage be recognized and affirmed on the property described in the petition," &c., containing no description of the mortgaged property, but merely referring to the petition in the cause, will be insufficient as a re-inscription of the original mortgage. Per Curiam: Inscriptions must be renewed in the manner in which they were first made. C. C. 3333. An inscription of a conventional mortgage must describe substantially the mortgaged property. It must be reasonably accurate and full in itself, so as to inform the public what property is covered, and they must not be referred elsewhere for information which should be patent on the record.

A PPEAL by the defendants and warrantors from a judgment of the District Court of Natchitoches, Olcott, J. Campbell and M. Boyce, for the plaintiff. P. A. Morse, for the defendants, appellants. Sherburne, J. B. Smith, and M. C. Dunn, for the warrantors, appellants. The judgment of the court was pronounced by

SLIDELL, J. This is an hypothecary action, in which the plaintiff prays that a tract of land in the possession of the defendants may be adjudged to be subject to a mortgage executed by Cockerille in favor of plaintiff, and that the defendants be ordered to surrender the property, that the same may be seized and sold to pay the plaintiff's claim. The facts material to the decision of this case are, as follows: On the 10th June, 1834, Cockerille gave Hyde a mortgage on the land, for the sum of \$4,604 16. This mortgage contains no pact de non alienando. It was recorded on the day of its execution. In 1840, Dominique Rachal recorded a judgment rendered in his favor against Cockerille. Upon execution of this judgment the land was sold, and the City Bank became the purchasers, on the 13th October, 1841. It was afterwards sold by the bank to McKnight. In 1842, Hyde obtained judgment against Cockerille for the balance due upon his mortgage claim, with a recognition of his mortgage, which judgment was recorded in May, 1842. The present action was brought in September, 1844.

One of the grounds of defence is, that the plaintiff has lost his hypothecary right, by the failure to re-inscribe his mortgage within ten years. McKnight being a third possessor in good faith, the failure to re-inscribe must, under article 3333 of the Civil Code, be fatal to the plaintiff, (See the case of Shepherd v. Orleans Cotton Press Company, ante p. 100,) unless some of the reasons by which he endeavors to take his case out of the general rule be tenable. These we proceed to consider.

It is in evidence that Cockerille is a discharged bankrupt; and it is said that

HYDE

his bankruptcy relieved the plaintiff from the necessity of re-inscription. Art. 3326 of the Civil Code, and the case of Bethuny v. His Creditors, 7 Rob. 62, are cited. It is unnecessary to enquire what would have been the rights of the parties, if Cockerille had continued to be the owner of the hand when he was decreed a bankrupt. The precise date of the decree of bankruptcy is not shown; but it could not have been before 1st February, 1842, at which time the bankrupt law went into effect. In 1841, Cockerille had been divested of his ownership by the sheriff's sale to the City Bank, and the subsequent bankruptcy cannot be considered as affecting the property.

But it is said that the plaintiff is saved by the institution of his suit against the mortgagor in 1842, at which time ten years had not elapsed from the inscription of the mortgage. The analogy of the rules of law regulating prescription is invoked. We had occasion to censider this subject very carefully in the recent case of McElrath v. Dupuy, ante p. 520, and our opinion remains unchanged, that the institution of suit does not arrest the peremption of the inscription. It is to be observed that the circumstances of the present case are even less favorable to the plaintiff, for McKnight was not a party to the suit against the mortgagor.

The amology derived from the case of a sait for the recovery of land, which defeats an alienation made pending the action so far as concerns the plaintiff, is not sound; nor, if it were, could it apply in the present case, since Cockerille's rights were divested, and the title under which the defendant holds was ac quired, before the institution of the plaintiff's suit against the mortgagor.

But it is contended that the inscription of the judgment obtained by plaintiff in 1842, at which time the ten years had not expired, is equivalent to a reinscription. A copy of the judgment was recorded. Its language is as follows: "It is decreed that the plaintiff recover of the defendant the sum of," &c.; "and it is further decreed that the plaintiff's mortgage be recognized and affirmed on the property described in the petition; for the payment of the above sum and faterest," &c. There is then no description of the mortgaged property; but a mere reference to the petition in the cause. Inscriptions must be renewed, says the Code, in the manner in which they are first made. Art. 3333. An inscription of a conventional mortgage must substantially describe the mortgaged property. It must be reasonably accurate and full in itself, so far as to inform the public what property is covered; and they are not to be referred elsewhere for information, which should be patent upon the public record. See the cases of Jartroux v. Dupeire, ante p. 608. Succession of Falconer, 4 Rob. p. 5. McElrath v. Dupuy, ante p. 520. See also as to the hypothecary action against a third possessor, the case of Brou v. Kohn, 12 La. 104.

It is therefore decreed that the judgment of the court below be reversed, and that there be a judgment in favor of the defendants, with costs in both courts.

PEROT et al. v. CHAMBERS, Tutor.

Where an act of sale is inscribed among the notarial records in the office of a parish judge, but not registered in the separate volume kept by him for the inscription of mortgages, the privilege of the vendor will not be preserved. C. C. 3238, 3351, 3353.

PEROT.

A PPEAL from the District Court of Natchitoches, Taylor, J. Campbell, for the appellants, contended that the act of sale, under which plaintiffs claim a privilege, was properly registered, citing 6 Mart. N. S. 118. 2 La. 275. 7 La. 478. 6 Rob. 58. P. A. Morse, for the defendant. The judgment of the court was pronounced by

KING, J. The plaintiffs mortgaged to the Exchange Bank a tract of land and several slaves, to secure the re-payment of a bond given by them for a loan of \$2,800. Subsequently they sold the land to Brazeale & Sewell for \$2,000, by a public act passed before the parish judge, in whose office it was duly recorded in the book of alienations. The purchasers assured the payment of the mortgage to the bank, and received from the plaintiffs \$800, the difference between the price of the land and the mortgage assumed. On the day following the sale Brazeale & Sewell disposed of the land to Lenoir, by an act of exchange. Brazeale & Sewell having failed to make the stipulated payment for the land, the bank obtained an order of seizure and sale, in virtue of which all the mortgaged property was seized. Pending the seizure the plaintiffs paid \$500 to the attorney of the bank, which sum was credited on the writ. An additional sum was paid by Brazeale & Sewell, and, some time after. Brazeale sequired the bond at a sale of the bank's assets. Upon the exhibition of this bond to the recorder of mortgages, the mortgage was erased. The defendant, being a judgment creditor of Lenoir, issued a fieri fucias, in virtue of which the land in question was seized. The plaintiffs thereupon instituted this proceeding, which is a third opposition, claiming the vendor's privilege upon the land for the \$500 paid by them towards the extinction of the mortgage debt due to the bank. Their claim was rejected in the court below, and they have appealed.

It is contended that the sum advanced by the Perots is a part of the price of the land, which remains still unpaid to the vendor. If this be conceled, the privilege of the plaintiffs can only take effect to the prejudice of third persons from the date of its due registry in the mortgage office. It is urged that the inscription of the act of sale from which the privilege results on the notarial records of the parish judge, before whom the act was passed, was a sufficient registry to preserve and give effect to the privilege. The decisions to which we are referred in support of this position were reviewed in the matter of Falconer's Succession, 4 Rob. 5, and shown to have been made under the operation of laws which required no separate books to be kept by parish judges for the inscription of mortgages. Subsequent legislation directed a separate book to be kept for the inscription of mortgages, and only gave effect to such encumbrances, to the prejudice of third persons, from the date of their inscription on the records kept for that purpose. C. C. 3351, 3353, 3238. It appears, in the present instance, that books, distinct from the notarial records, were kept, in which mortgages were inscribed; and in those the act, from which the alleged privilege results, was not inscribed. It has not, therefore, received the publicity which the law imperatively requires, to give it effect against third persons. It is not material to enquire whether the inscription in the book of alienations of the parish judge's office would have been a sufficient registry. if that officer, in violation of his duty, had kept no separate book for the inscription of acts importing mortgages or privileges. Separate books were kept, and the inscription of the privilege in them was indispensable to preserve and give it effect. The object of the inscription is to give publicity to the encumbrances with which

PRROT 9.

property is charged. A registry in books not resorted to for the purpose of ascertaining the existence of such encumbrances, though kept in the same office, is not more effectual in giving notice of a mortgage or privilege, than if the act were recorded in a different office.

Judgment affirmed.

LEMEE, Syndic v. Bosley.

An appellant who desires to have his case examined on the merits, must bring up a sufficient statement of the evidence on which it was tried. If he fail to de so, he cannot take advantage of his own omission.

A PPEAL from the District Court of Natchitoches, Taylor, J. P. A. Morse, for the plaintiff. M. C. Dunn, for the appellant. The judgment of the court was prenounced by

SLIDELL, J. Bosley has appealed from a judgment rendered against him upon confirmation of a default. The suit was upon notes purporting to be signed by Bosley. The note of the evidence, upon which the cause was tried ex parte, contains the following statement: "Greneaux sworn, proves the signature of Bosley." The defendant now argues that this is a deduction of the judge, and that this court is not informed what the witness said; that therefore there is no proof of the signature, and that the judgment must be reversed. An appellant who desires to have his cause examined on the merits, must bring up a statement of the evidence on which the cause was tried. If he fail to do so, the examination cannot be made. It is the appellant's own fault that he did not bring up a sufficient statement of the evidence, and he cannot take advantage of his own omission.

The plaintiff acknowledges that there was a mistake made in the amount for which the judgment was rendered, and assents to its correction. We will amend the judgment accordingly.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment in favor of the plaintiff for the sum of \$1,326 36, with interest at the rate of eight per centum per annum from 14 June, 1846, until paid, with costs of the suit in the court below; those of this appeal to be paid by the plaintiff.

WHITTON v. JONES, Sheriff, et al.

The seizure of property belonging to a third person, under an attachment, will not subject the officer to damages in all cases. The circumstances of the case may exempt him from liability.

A sheriff is responsible to the owner for any damage resulting from his neglect to take proper care of property taken into his possession under an attachment.

A PPEAL from the District Court of Caddo, Campbell, J. Roysdon, for the plaintiff. Crain, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This case revolves itself, under the evidence, into a claim for damages against the sheriff for the seizure of a carriage belonging to the plaintiff, under an attachment against her son-in-law, *Hunter*. The jury gave a verdict of \$125 damages against the sheriff, and he has appealed.

We should not confirm the verdict of the jury for any damages whatever in consequence of the taking of the carriage, under the circumstances attending the seizure; but we consider the sheriff liable for the manner in which the carriage was kept after the seizure, on the authority of the case of Parrish v. Hozey, 17 La. 578. The damages assessed appear to us to be evidently too high, and must be reduced accordingly. Smith v. Hozey, 14 La. 281.

The judgment appealed from is therefore reversed, and entered for the plaintiff for the sum of \$50, and costs; the appellee paying the costs of this appeal.

WHITTON V.
JONES.

HUGHES v. BOYCE.

Where an attorney at law consents to release a judicial mortgage in favor of his client in consideration of a payment of a part of the debt, and of having a certain note, made by a third person, placed in his hands, as collateral security, it being stated in the receipt given by him, "that the proceeds of the note are to be first applied to satisfy the remainder due on said judgment, and the balance to be paid over to the party depositing it," he will not be liable, in the absence of any proof of an undertaking on his part to put the note in suit in case of non-payment at materity, for any injury which the owner of the note may sustain by the failure to sue on it in time.

A PPEAL from the District Court of Natchitoches, King, J. O. N. Ogden, for the appellant. Elgee, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. Greeves had obtained a judgment against Bailey; upon execution, certain property had been sold, and Bailey being himself the purchaser, gave his twelve-months' bond, which matured on the 27th June, 1837. On the 3d June, 1837, Boyce, who was Greeves' attorney of record, gave Hughes, the agent of Bailey, a receipt in the following words:

" Dolls, 4500. " New Orleans, June 3d, 1837.

"Rec'd from Mr. D. M. Hughes, of New Orleans, fifteen hundred deliars, in part payment of a twelve-months' bond in the case of John G. Greeves against L. Bailey, being a judgment obtained in the District Court of the parish of Rapides. And it is, in consequence of said payment, agreed by me that I will release the judicial mortgage in consequence of said judgment and the said bond, on having placed in my hands a note made by S. E. Cuny in favor of P. M. Cuny, dated 15th November, 1836, for the sum of two thousand one hundred and sixteen dollars sixty-six and two-thirds cents, bearing interest from date, if not paid on the first of January, 1838 (the time the same will be due), proceeds of said note to be first applied to satisfy the remainder due on said judgment and twelve-months' bond, and the remainder to be paid over to the said Hughes.

H. Boyce, Attorney for J. G. Greeves."

The plaintiff, in his petition, sets forth this receipt; alleges that the note of Cuny was perfectly good at its maturity, and might have been collected with out difficulty, if proper measures had been taken; that Boyce neglected to take any proceedings upon it until the parties had become insolvent, so that the plainBorce.

tiff has experienced a total loss of that portion which was to have been paid over to him according to the terms of the receipt. He asks judgment for \$988 24, and interest, the portion remaining after payment of judgment against Bailey. There was judgment in favor of the defendant, and Hughes has appealed.

The case turns upon the enquiry whether Boyce bound himself personally to collect the note thus placed in his hands, and if so, whether that undertaking has been violated? Before considering the nature and effect of the receipt, it is proper to notice certain acts of the parties which indicate the interpretation they have themselves put upon it, and some other circumstances material to the proper consideration of the case. Although the petition of Hughes would indicate that he relied upon the receipt to show his interest in the proceeds of the note as having been simultaneous with the execution of the receipt, yet it is conclusively shown by his answers to interrogatories that, at the date of the receipt, he was merely the agent of Bailey; that the receipt was taken solely for Bailey's benefit; and that his interest was only acquired by a transfer from Bailey, about twelve or fifteen months before the institution of the present action, that is to say, some time in the fall of 1843.

On the 4th January, 1838, Cuny's note, which Boyce had deposited in bank for collection, was protested, and the endorser was notified. In January, 1839, an execution was issued on the twelve-months' bond, and soon after Bailey obtained an injunction. He alleges, under oath, in his petition that Boyce, as the attorney of Greeves, had released the mortgages created by the judgment and the bond, upon the deposit of the note of Cuny "as collateral security," and that Greeves could not lawfully proceed in his execution without placing this collateral in the sheriff's hands, so that he might have it in his power to deliver it when sale should be made and the debt paid. The prayer was, that the sheriffibe enjoined from proceeding in the execution of the fieri facias, until Boyoc shall deliver the note to the sheriff or bring it into court. The pretension that Boyce had undertaken to collect the note and had been guilty of laches, was not setup by Bailey, in that cause, until May, 1840. In March, 1839, Boyce gave the note of Cuny to Waters, the attorney of record of Bailey, in the injunction suit, a fact which was communicated to Bailey. Boyce, some months afterwards, asked a written seceipt from Waters, who refused to give it, and insisted that he held the note for Boyce's benefit; he acknowledges, however, that Boyce did not tell him not to deliver it to Bailey. Waters also testifies that the object of Bailey in obtaining the injunction was, to obtain temporary delay for the return of Boyce, and that he expected, after his return, to procure a draft from Cuny on account of it, and to a sufficient amount to cover Greeve's claim. The note remained in Waters' possession until it was about to be prescribed, when Waters suggested to the counsel of both parties that a suit should be brought upon it, without prejudice to either party, which was accordingly done. It is also shown that the note might probably have been collected in 1839, and perhaps up to 1840; but that, after that date, the claim became desperate. Boyce was appointed district judge in 1824, and continued such down to the trial of the cause.

Such are the material facts in this case; and upon this state of facts we are of opinion, that the case is clearly in favor of the defendant. Not only was the receipt of Boyce an act done as the attorney of Greeves, but we look in vain either in the terms of the receipt, or the acts of Bailey himself as indicative of his interpretation of that instrument, for any support of the allegation that

Boyce undertook to put the note in suit. It was a collateral security placed in the hands of Greeves' attorney, to be applied, if paid, as stated in the receipt. There was no obligation either, on the part of Greeves, or Boyce, to put the note in suit, at least without a demand to that effect, and a tender of a sufficient sum towards the costs of an action. The note was in law at the disposal of Bailey upon his paying the debt, as collateral security for which it was given. Bailey has, in fact, enjoyed a greater control over the note than he was entitled to, by its delivery to Waters, his attorney; and if any loss has been incurred, it has been the result of his own want of punctuality, and his own laches.

Hughes can of course stand in no better position than Bailey, his assignor, the principal facts which we have stated having occurred anterior to the assignment.

Judgment afirmed.

OVERTON v. RICORD, Sheriff.

Where a sheriff, charged with the sale of property under execution, adjudicates it to a purchaser on condition of his executing a twelve months' bend with surety, and subsequently perfects the adjudication without obtaining any surety on the bond, his neglect will place him in the surety's stead, and render him personally liable for the whole amount of the bond.

A PPEAL from the District Court of Avoyelles, King, J. O. N. Ogden, for the plaintiff, cited Code of Pract. art. 681. H. Taylor and Sweyze, for the appellant, contended that the act or omission of the sheriff is not an offence or quasi-offence. C. P. arts. 29 to 32. 2 La. 429. Civil Code, arts. 2271, 2272, 2294. If there has been a breach of the sheriff's bond, the action should have been on it. If there has been no breach, no action lies. The judgment of the court was pronounced by

SLIDELL, J. The defendant being charged, in his character of sheriff, with the sale of property under execution, adjudicated it to Orr, upon twelve-months' bond. Briggs provised to sign the bond as surety. Three days afterwards the sheriff presented the bond for signature to Briggs, who refused to sign. I he return of the sheriff upon the writ states the adjudication to Orr, and that he had furnished his bond with as surety, but made no mention of the promise and refusal of Briggs, which were exhibited by an amended return, made after the institution of the present suit. The adjudication to Orr was made in October, 1843, and the present suit was brought in 1845. Briggs was considered solvent at the time of sale; he has since died, and his succession, at the time of the trial of the cause, was under administration as an insolvent succession. It is not proved, however, that the liability of Briggs, if obtained, would have been worthless, either at the maturity or the date of the bond, nor that the plaintiff, the creditor in execution, has done any act approving the sheriff's conduct.

The sheriff violated his duty by perfecting the adjudication and returning the writ, without obtaining surety on the twelve-months' bond. His neglect of duty has placed him in the surety's stead, and as *Briggs*, if he had signed, would have been liable for the whole amount of the bond, that amount must be the measure of damages against the sheriff.

Judgment affirmed.

WILLIAMS v. DUNN et al.

A judgment by default made final in eight days after service of citation, must be reversed.

In an action against heirs for a debt due by their ancestor, judgment must be rendered against each for his proportional share in the succession.

A PPEAL from the District Court of Natchitoches, Greneaux, J., presiding.

Sherburne and J. B. Smith, for the plaintiff. M. C. Dunn, for the appellants. The judgment of the court was pronounced by

Rost, J. The record in this case is not certified in such a manner as would authorise us to pass upon the merits of the controversy, but the errors assigned by the appellant have reluctantly brought us to the conclusion that the judgment cannot stand. It was made final against one of the parties eight days after the service of the citation, and rendered jointly against the father and the collateral relations of the deceased, instead of being rendered against each for his proper share in the succession. We will therefore remand the case; but, in so doing, we cannot refrain from expressing our regret, that a claim, such as this, should be made the subject of a protracted litigation.

The judgment is reversed, and the case remanded for further proceedings; the plaintiff and appellee paying the costs of this appeal.

WILEY v. HUNTER et ux.

A married woman will not be bound personally by a note executed in solido with her husband, when at the time a community of acquets existed between her and her husband, and the latter had the exclusive administration of her paraphernal property.

Where there is a community of acquets, and the husband has the exclusive administration of the paraphernal property of the wife, purchases made furing marriage fall into the community.

A PPEAL from the District Court of Rapides, King, J. Elgee and Hyams, for the plaintiff. Waters, for the appellant. The judgment of the court was pronounced by

Rost, J. The plaintiff instituted suit against the defendants on two notes made in solido, secured by mortgage. There was a judgment against the husband, and the property mortgaged was ordered to be sold; but the wife was discharged from all personal obligation under the note sued on. From this judgment she has appealed.

It has been argued at bar in behalf of the appellant, that the sale of the land mortgreed, made to her by her brothers and sisters, was a dation en paicment for her share in the succession of her mother; but she has failed to show what that share was. She has been released from the personal obligation she had contracted, on proof of the allegations of her answer that, at the time it bears date, a community existed between her and her husband, and that he had the exclusive administration of her paraphernal property. It has often been determined that, under that state of facts purchases made during marriage fall

into the community. Dominguez v. Lee, 17 La. 300. Terrell v. Cutter, 1 Rob. 367. Rousse et al. v. Wheeler and wife, 4 Rob. 114.

WILEY V. HUSTER

Neither the loose evidence offered to prove a partition of the succession of the mother of the defendant, nor her resumption of the administration of her paraphernal property after the institution of this suit, can affect the rights of the plaintiff.

Judgment affirmed.

MORRILL, Tutor, v. CARR.

Answers to interrogatories on facts and articles can only be used against the party interrogated, and not against other parties to the action; the latter have a right to insist on a cross-examination of the witness by whose testimony they are to be bound.

The fact that property belonging to a succession was purchased at the probate sale by an agent of the administrator, and afterwards transferred to him, will not entitle the heirs to recover the property against a third person, a purchaser from the administrator, in good faith, without notice.

The powers and rights of an administrator under the common law, are not the same as in this State. By the common law he has the same property in the goods and chattels of the deceased as the latter had when living; he may, without a decree of court, sell the assets, and convert them into money for the payment of debts; and to effect a sale made by him, so as to lot in the claim of the heir, some fraud, collusion, or misconduct between the parties, must be shown.

A PPEAL from the District Court of Natchitoehes, Campbell. J. Hertzog and Tuomey, for the appellant. M. Boyce and P. A. Morse, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This is a petitory action instituted by the tutor of a minor to recover certain slaves which once belonged to Denton, the minor's father. Denton was a resident of Arkansas, and died there in the year 1825. Fowler was appointed administrator of his estate; and, by virtue of a decree of sale rendered by a competent court in the county of Denton's domicil, the slaves were sold at public sale, in 1827, to pay debts of the succession, and Martin became the purchaser. Martin afterwards sold the slaves to Fowler, and, in 1829, Fowler sold to Hyde, the defendant's lessor, and to one Shelton, who afterwards sold his interest to Hyde. The possession of Hyde has been peaceable and public, since the year 1829. The various sales above mentioned were all made in Arkansas, where slaves are considered personal property. Hyde brought the slaves to Louisiana, in 1830, or 1831.

Fowler was called in warranty by the defendant Hyde. The plaintiff propounded interrogatories to Fowler, and at the trial offered the answers of Fowler in evidence, to the admission of which the defendant excepted. We think the court below erred in admitting these answers against Hyde. If Fowler was a competent witness, upon which point it is unnecessary to express an opinion, the plaintiff should have examined him as any other witness, and then the defendant would have been entitled to, and would have had an opportunity to cross-examine. Here the party has thought proper to proceed ex parte, and by way of interrogatories on facts and articles propounded to the absent party under commission; and the answers are only available as between the party interrogating and the party interrogated. See the case of Johnson v. Marsh, ante p. 772.

Monnick Care. The ground upon which the minor's right to a recovery is based is that, although the sale was made to Martin ostensibly at the public judicial sale, yet that in reality Martin was a mere person interposed and was secretly the agent of the administrator himself, to whom he afterwards sold the property. If we exclude the testimony of Fowler, which, as we have seen, is inadmissible, the only evidence to establish the agency of Martin for Fowler, is the declaration of a witness that, at a subsequent period, Fowler and Martin both told him so. If, upon such testimony, we could be permitted to consider the agency as proved, the difficulty sill remains that the good faith of Hyde is unimpeached. The plaintiff appealed to his conscience by propounding interrogatories to him, and his answers distinctly negative all knowledge or notice of the alleged fraud. Even under our system of jurisprudence we would not be prepared to say that a purchaser in good faith could be affected by a latent equity of this suit, however fatal it might be between the heir and Fowler, were he still the owner of the property.

But besides this view of the matter, there is another which appears to us conclusive. The sale, under which Hyde claims and peaceably held the property for more than fifteen years, was made in the State of Arkansas, where the ancestor died, and where his succession was administered. It is proved that the jurisprudence of the common law prevails there, and that in that State slaves are considered as personal property. The powers and rights of an administrator under that system, as is shown by testimony in this cause, and well established by commentators, are very different from those of an administrator in this State. He is there the representative of the deceased as to his goods and chattels, and has the same property in them as the principal had when living. He has authority, even without a decree of sale, to sell the assets, and convert them into money for the payment of debts. To effect a sale by an administrator so as to let in the claim of the heir, there must be some fraud, collusion, or misconduct between the parties. In the present case, there is no ground to impeach the good faith of Hyde; and, if the heir has been wronged, he must look to the administrator. See 2 Blackstone, 511. 1 Story on Equity, § 580. 1 Sugden on Vendors, p. 59.

Judgment affirmed.

ROUBIEU v. MICHEL.

One who purchases per aversionem cannot sue for a reduction of price. C. C. 2471.

The frequent errors committed by the surveyors of the United States in the surveys of lands in this State, are matters of history; and without some other action on the part of the government then the approval by the surveyor general of a survey on which land is designated; as belonging to the United States, the title of a purchaser of the land cannot be considered as disturbed, much less will such an approval be regarded as proof that the land belongs to the public domain.

A PPEAL from the District Court of Natchitoches, Olcott, J. M. Boyce, for the plaintiff. J. B. Smith and P. A. Morse, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. This action was commenced in 1833. It is based on the warranty contained in three several acts of sale, which embraced an entire

Rountev o. Michel

tract which the plaintiff bought from the defendant. The first was dated in August, 1825, and the last in April, 1831; the intermediate act was passed in 1827. The first sale was for one-half the tract of land or plantation, and was made per aversionem, and the land was thus described: "The half of his plantation situate on the right bank of Red River at a place called Les Ecords, in the parish of Natchitoches, bounded above by the crevasse Dorsineau, and below by the bayou which discharges from lake Monet." The subsequent acts do not vary the character of this sale. It was the plantation of the defendant which he had purchased from Cloutier, and which formerly belonged to Landreaux, known as such, which was sold for an aggregate sum, composed of the different prices of each sale, of \$3,900.

The petition alleges that since the purchase the plaintiff has discovered, that the defendant had no title to a considerable portion of the land; that the title to a part of it was vested in the United States, as belonging to the public domain; that other persons, particularly one Nicolas Garcia, pretend to have a title to part of it; by reason of all which he, the plaintiff, is liable to be evicted and exposed to great damage. having made great and extensive improvements on the land. The prayer of the petition is, that the defendant be decreed to pay to him the sum of \$20,000 damages, or that he give security against any eviction, or that the sales be rescinded for such portion of the tract for which a complete title may not be established.

The defendant, Pierre Michel, pleaded the general issue, and cited his vendor, Alexis Cloutier, to defend the suit. By an entry on the minutes it appears that the proceedings against the warrantor were dismissed, on the 8th of May, 1835. In this situation the suit remained, without any action whatever, until April, 1843, when the representatives of the vendor, who had died in the interim, were made parties to the suit under the warranty by the defendant, and judgment prayed for over against them. The case was tried in 1847, and judgment was rendered against the defendant for the sum of \$779 76, without interest, and in favor of the defendant, against the representatives of Cloutier, for the same sum, each for their virile portion. The defendant has not appealed. The parties cited in warranty have taken this appeal; and the plaintiff has appeared, and asks that the judgment may be affirmed. As the case is before us, the action, though it had other alleged objects at its institution, resolves itself into one, for a reduction of the price in consequence of a deficiency in the quantity of land which was the subject of the sale. The Code, article 2471, refuses this action to the purchaser per aversionem.

It is contended that a portion of the land appertains to the public domain, and that the title to it is in the United States; and a copy of a township map, which purports to have been examined and compared with the field notes on file in the surveyor general's office, and approved by the surveyor general on the 30th of October, 1835, is the only evidence offered in support of that position. It is true that on this map a part of the tract is designated as public land; but this, of itself, is no evidence of such a disturbance of the plaintiff's long and uninterrupted possession as will authorize his suit in warranty. The frequent errors in the surveys of lands in Louisiana made by the United States surveyors are matters of history; and, without some other action of the government beside the mere approval of a survey by the surveyor general, it cannot be considered as the disturbance of the title of a proprietor, still less as evidence that the land belongs to the public domain.

Rovered Michel The small portion of land which the plaintiff himself purchased from the United States under a pre-emption claim, which is adjacent to the upper boundary of the tract, gives him no claim against the defendant under the evidence and the allegations of his petition. He does not ask for a rescission of the sales, and has no claim whatever against the defendant. His possession has been uninterrupted except by his acquisition above mentioned, by which his own title is sought unsuccessfully to be impugned; nor is there any evidence of the extent or value of this portion which would serve as a basis for any recourse in indemnity against the parties cited in warranty, or of any damage suffered from any cause for which they are responsible.

The judgment appealed from in therefore reversed, and judgment rendered in favor of the warrantors, with costs in both courts.

DUNBAR et al v. BULLARD.

The accounts current between principal and factor are necessarily provisional until settled, and, even after settlement, may be rectified by either party on account of errors and omissions.

Where a factor sends an account to his principal at the usual time, in which certain imputations are made by the former, and the latter approves it, or receives and acquiesces in it, and no fraud or surprise is complained of, the imputations of payment must be considered as having been made by the authority of the principal, the ratification of the acts of the factor being tantamount to original imputations by the principal, and relating back to the time of the acts which are the subject of the ratification.

The verdict of a jury on a question of fact will not be interfered with, unless it be contrary to the evidence, or violate some rule of law.

The contract by which a particular partnership is formed must be in writing, where any part of the partnership stock is to consist of real estate. C. C. 2807.

Partnership property must be applied to the payment of partnership debts, in preference to those of the individual partners. C. C. 2794.

PPEAL from the District Court of Rapides, Campbell, J. The defendant and Clanton were ordinary partners in the cultivation of a plantation in the parish of Rapides, and Lambeth & Thompson, the real plaintiffs in interest, were, for many years, their factors in New Orleans. In 1836, the defendant and Clanton purchased a tract of land, and, for the last instalment of the price, a note was made by them for \$6,670, jointly and severally, payable to the order of the vendor, Neal, and secured by a special mortgage and the vendor's privilege. This note was transferred before maturity to R. C. Martin. Martin was a debtor of Lambeth & Thompson, who, in December, 1838, wrote to him that: " Bullard, having heard that Neal has passed off the note of B. & C., has called upon us with an urgent request that we would pay it. We must, therefore, take the note of you as cash, the day it is due. You will please enclose it to us by first boat, and it shall be passed to your credit." Martin forwarded the note to Lambeth & Thompson, without any endorsement but that of the original payee, and Martin's account was credited with the amount. Lambeth & Thompson subsequently put the note in circulation, and this suit is instituted upon it by the plaintiffs as holders, against Bullard as maker, and Neal as endorser. Plaintiffs acquired the note after maturity. The judg-

DUNBAR,

ment below, rendered on the verdict of a jury, was in favor of the endorser, but against *Bullard*, as maker. The latter alone has appealed. The other material facts are stated in the opinion of the court.

Dunbar, Hyams and Elgee, pro se. The sole defence is, that Lambeth & Thompson, from whom the plaintiffs received the note sued upon, had been the factors and commission merchants of Bullard & Clanton for many years before and after the maturity of the note sued upon; that they (B. & C.) had shipped their crops to their said factors; and that the note sued on, being the most burthensome debt, the first moneys that came into their hands from said crops,

should have been applied to the extinction and discharge thereof.

To meet this special defence, plaintiffs contend that their transferrers did impute the proceeds of said cotton to the payment of such debts as they had a right to impute them to, to wit, the payment of the drafts of said Bullard & Clanton, and cash, provisions, supplies and other advances made by them in the regular course of business; and secondly, that even if the defendant could at the time have required a special, or other application of the fund, that not having done so, and having for years acquiesced therein, neither law nor equity will now permit him to change the imputation. C. C. 2161. 2 Pothier, Obl. 528, 529. C. N. 1255-7. Duranton, no. 193. Paillette, notes to art. 1256 C. N.

On the trial the defendant opposed the introduction of the accounts of Lambeth & Thompson, and notes signed by him, and the testimony of the witness Edmund Harding, to prove the same, or any other imputation of the moneys received by Lambeth & Thompson than to the notes sued on, on the ground that plaintiffs had not declared upon such accounts or sued to recover the amounts thereof, &c., and because no notice had been given him, that such accounts would be introduced, and that nothing but a receipt accepted by the debtor could be admitted, &c. This reasoning goes to the effect of the testimony, and not to its admissibility. The testimony was legally admitted. The plaintiffs proved the defendants note, and asked for judgment. The defendant shows that at certain times, sums of money had come into the hands of plaintiffs' transferers, which he contends extinguished the note. The plaintiffs, then, by rebutting evidence had the right of showing that these funds were applied to pay other debts of the defendant-and further too, that defendant had acquiesced therein. It being a plea of payment, it was incumbent on the defendant clearly to make out his case (C. C. 2229); and we had the right of opposing to it every legal defence; and there exists no necessity of giving him notice that he owed other debts, which it was his duty to discharge first.

The defendant contends that this was a pure factorage transaction between himself and his merchants, and that it was the same as if he had written an order on them in favor of Martin. He further contends, that, therefore, when they purchased the note, or paid Martin for it, it was a dead piece of paper in their hands, and they only had a right of charging him with so much money laid out and expended for his use; that this view of it must prevail because Lambeth & Thompson took the note from Martin without any express subrogation; and that there was no legal subrogation, as it was taken up at his request, and could only form against him an item in an account-current. To complete the defendant's hypothesis, it is presumed that it will be contended, that being a mere charge in an open account interest ceased on the note, and that his solidary liability was destroyed, and he only bound for half as an ordinary partner. We contend that the transfer to them of the note transferred all the right attached to it (C. C. art. 2615), without the necessity of subrogation.

But the plaintiffs urge that it was not such a transaction as the defendant supposes; and that there is ample evidence to the contrary in the record; and if there was not, that it would result from those grave presumptions, which, in the absence of positive evidence, influence men, and govern their actions in their intercourse with each other. The evidence shows that, at the close of the business season in 1838, Bullard & Clanton owed their merchants a balance of \$12,547 98, for which they executed their two notes, bearing ten per cent interest after maturity, one for \$6,246 37, due 2d and 5th of January, 1839, and one \$6,301 61, due 1st and 4th February, 1839, and that Bullard & Clanton's additional liabilities and payments to be met out of the crop which went to market in the spring of 1839, was some \$14,000, about \$3,000 of which the merchants had also advanced between July, 1838, and 1st January, 1639. It is fair

DUNDAN DE BULLARD.

to presume that Lambeth & Thompson were aware of the position of Bullard & Clanton, and of the heavy debt they had to meet, and that they only consented to acquire the note from Martin because it was solidary and bore ten per cent per annum interest, with the vendor's lien and privilege. This was not intended as a factorage transaction—Bullard & Clanton were heavily indebted to them—they had an interest in preventing others from holding a debt of so high a character, and consented to become the owners because, by taking up the note, they acquired the right of their transferrers; and doubtless that was their inducement and the true understanding at the time. The defendant maintains an affirmative, that he has extinguished a debt by some legal method, and he must make it appear; he has failed in doing so, and he must take the consequences of the conclusion that, in matters of doubt, the construction put upon an act, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its inter-pretation. The imputation made by the creditor shows his view of it, and the knowledge of that fact by the defendant implies his assent thereto. The relations of the parties, the testimony of the book-keeper, showing the regular adjustment and making up of the accounts—their delivery to Mr. Thompson to be delivered to defendant-his frequent visits to their counting-house-his acknowledgment on the record, and production of so much of the accounts of sales as he considered necessary for the establishment of his defence—his silence for four successive crops, and all the surrounding circumstances, leave on the mind not the shadow of doubt of the defendant's knowledge of the imputation of the proceeds of the cottons in the year 1839 to the discharge of other debts of Bullard & Clanton, regularly created in their factorage transactions and so the jury and the court below concluded.

The defendant in order to avoid the effect of a knowledge of the application of the crop in question, denies that he ever acquiesced in the application, by urging that it was enough for him to see that "the account contained the usual reservations of errors excepted," and "that he had no curiosity to look into it, until a final settlement," and "that he never was called upon for such final set-

tlement."

In the case of Bloodworth v. Jacobs, ante p. 24, this court said, in relation to the reception of accounts-current and their effect, that article 2161 of the Civil Code relative to the imputation of payments was applicable, to wit: that when the debtor had accepted a receipt, by which the creditor has made an imputation of money he has received to one debt the debtor cannot change the imputation, unless in case of fraud or surprise. In the case of Milaudon v. Arnaud, 4 La. 545, the court said: "It was the duty of the defendant to have made his objections to the plaintiff in a reasonable time; and the act of receiving the account-current, and retaining it for so long a period without observation or opposition, is an assent to the application which the plaintiff made of the funds of the defendant." If further authority is necessary on this point, it is to be found in the case of Flower v. Jones, 7 Mart. N. S. 143, where the principle is settled, that when one party receives accounts, without making objection to the conduct of the other's acts, it is considered as complete an acquiescence therein as if he had expressly done so. See Merlin, Questions de Droit, verbo Compte-courante, vol. 1, p. 482. Paillette, note to art. 1985 Code Napoléon.

The defendant lastly contends that there had been surprise on his part; that it is not shown that he had any knowledge that Lambeth & Thompson had taken up the note, until the account was rendered; that he had no intimation previously thereto, that the payments made by Bullard & Clanton were imputed in a particular manner. Were this position tenable, it would not avail the defendant after four or five years silence. It was the place of the defendant at once, on the receipt of the account, to have set up his objection thereto, or at least within a reasonable time. Duranton says (vol. 7, No. 193, in commenting on art. 1255, which is the same as art. 2161 of the Civil Code,) where a debtor is deceived in the imputation made by the creditor, it is his duty immediately to set up his opposition to the imputation, otherwise it would be presumed he had acquiesced in ft; and as the law has affixed no prescription within which to do so after having discovered the fraud or surprise, this should be a matter left to the tribunals to judge, according to the circumstances of the case, if there has

been a ratification or not of the fraudulent imputation.

H. A. Bullard, pro. pers. and Roselius, for the appellant. I. The note

having been paid by the defendant's agents and factors, at his request, was by that fact alone extinguished, and could not be revived and put in circulation, leaving to the mandataries their right to be reimbursed, the note remaining in their hands merely as a voucher in support of that item of their account with

their principals, Bullard & Clanton.

It is clear the note was not received by Lambeth & Thempson in the ordinary course of business, but that it was paid at the request of Bullard. It was paid as the note of Bullard & Clanton, and is so referred to in their letter to Martin. They took no transfer from Martin, no subrogation; they had no interest in paying other than as factors of Bullard & Clanton, in the daily expectation of receiving their crop, out of which this advance would be more than reimbursed. It is a maxim as ancient as the Roman law, and retained as a formal text by Justinian, "Qui mandat solvi, ipse videtur solvere." The payment, therefore, made by Lambeth & Thompson, was a payment by Bullard & Clanton. The amount paid was an advance to Bullard & Clanton, which formed a charge against them in the account-current to be rendered by their mandataries or factors. The note, after it had been taken up by order of the maker, ceased to have any force as evidence, per se, of an existing obligation. It had done its office. Could the endorser be again exposed to the risk of paying? Could the note be resuscitated as to him? The defence did prevail as to him, and the plaintiffs have not appealed. Could it be extinguished as to one party, and not as to another? We contend that the only right of Lambeth & Thompson is to recover what they had advanced to take up the note, by the actio mandati contraria.

Duranton, says: "Bien plus, un tiers qui n'est nullement intéressé à l'extinction de la dette peut la payer au nom et en l'acquit du débiteur, sauf ce que nous dirons bientôt en parlant des obligations de faire. Cette disposition a lieu également quoique le débiteur s'oppose au paiement de sa dette : car la maxime "Invito beneficium non dari." n'est point applicable à ce cas, &c. Quand nous disens qu'il est permis à un tiers tout-à-fait étranger à l'obligation, de l'acquitter, nous entendons principalement cela du cas où il agit au nom de ce débiteur, en lui procurant sa libération ; car, s'il agissait en son nom propre, il pourrait bien, à la vérité, payer la dette, mais il ne pourrait, dit cet article, être subrogé aux droits du créancier. Cependant cette dernière disposition a besoin de quelque explication. D'abord il n'en faut pas inférer, par contraire, que si le tiers agissait au nom du débiteur, il serait nécessairement subrogé aux droits du créancier : ce serait une erreur de le croire, lors même que le paiement serait fait du consentement du premier, si les formalités préscrites par l'article 1250,2°, n'étaient pas observées, seulement, si le créancier le veut, il peut, aux termes de la première disposition du même article, consentir à la subrogation, pourvu qu'il le fasse lors du paiement et non depuis; car la dette une fois éteinte ne saurait revivre. L. 76 ff de Solut. Duranton, Paris ed. of 1820, vol. 3, nos. 701 and 702, pp. 61 and 63.

The same author in subsequent paragraphs enumerates several cases in which a third person pays the debt of another. First, when it is done in the name of the debtor and to discharge him, but with subrogation—there is no difficulty; it is in truth a change of creditor under the name of payment. But he proceeds to say, 2dly: "Le paiement fait par le tiers, aussi au nom et à l'acquit du débiteur, mais sans subrogation: alors il y a véritablement extinction de la dette, et le tiers n'a contre le débiteur ainsi libéré, que la simple action de

gestion d'affaire" &c. No. 784, p. 175.

In this case it is manifest, that Lambeth & Thompson paid in the name, and at the request, and as the mandataries of the debtor, and that they took no transfer of the note, much less a conventional subrogation to the rights of Martin, the then holder of the note. Nor had they an interest in paying,

which would operate a legal subrogation.

Let us suppose that, between the time the note in question came into the hands of Lambeth & Thompson and the institution of this suit, the five years from its maturity had elapsed, could Bullard have pleaded the prescription of five years? Most clearly not, according to these principles, because the payment by an agent or a negotiorum gestor creates a new debt against the principal, to be recovered, by what the Roman law terms the actio mandati contraria, or as it is expressed by the French jurists, "laction de gestion d'affaires." See Duranton, no. 787. In the same work, the author treats the question, whether

DUNBAN V. BULLARD. DUNDAR.

if the original obligation contained a special election of domicil, the third person, paying without subrogation, could avail himself of that right? And he decides that he could not, but would be bound to prosecute at the real domicil of the debtor. See no. 786. These are, in fact, but corollaries from the settled principle, that the original obligation is absolutely extinct, and forms nothing more than the basis or consideration of a new indebtedness which dates from the payment. These principles would have been applicable, even if this had been the only transaction between Bullard, or Bullard & Clanton, and Lambeth & Thompson. If the former had requested the latter to pay their note, and they had consented to do so, that alone would have created the relation of mandatary and principal between them in relation to that transaction, and the payment by them would have been a payment by Bullard & Clanton to every legal intent. See Pothier, Mandat. A fortiori, when that relation already existed—when they were in the habit, and had been for years, of acting as the general agents and factors of Bullard & Clanton, and admit in their letter to Martin, that their intention was to pay the note for the drawers. This being the case, how could they legally, or with any propriety, after holding the note for several years, again put it in circulation? How could they revive an obligation to pay a sum of money to the order of Neal, which had been extinguished by their own act, and when they were not holders as the endorsers of Neal? How could they revive the obligation of Neal, the endorser? It is true. as it may be contended, that a note endorsed in blank by the first endorser, passes by mere delivery; but in this case the whole evidence repels the idea that Lambeth & Thompson received the note in that way. There never was any privity of contract between them and Neal, or between them and Martin. They took the note from Martin as cash, on the day it fell due, and he regarded the transaction as a payment made by Bullard & Clanton, through their agents; and we repeat the old maxims: "Qui mandat solvi, ipse solvere videtur," and " Qui facit per alium, facit per se."

Towards Lambeth & Thompson, Bullard, as a partner, never was liable for more than one half of the amount due to them by the partnership; and although, as to Neal, the parties were originally bound in solido, yet for any advances made to the firm by Lambeth & Thompson to pay the note, the partners were bound only each for one half. The putting of the note in circulation by Lambeth & Thompson, was contrary to their duties and obligations as the mandataries of Bullard & Clanton, and charged by them to pay the debt. Story says, in so many words, that an agent employed to settle a debt, cannot purchase it for his own account, and he cites the case of Reed v. Norris, 2 M. & Craig, 361, 574, and his own Equity Jurisprudence, vol. 1, § 321, 322. He adds: "Indeed it may be laid down as a general principle that in all cases where a person is either actually or constructively an agent for other persons, all profits and advantages made by him in the business, beyond his ordinary compensation, are to be for the benefit of his employers." Story on Agency, § 211, p. 250.

II. Even supposing Lambeth & Thompson to have been the holders of the

note when it fell due, and subrogated to all the rights of the original payee, it was extinguished within three months, by imputation of payment, by the

proceeds of cotton sold by Lambeth & Thompson for the makers.

It was the most onerous debt due by Bullard & Clanton to that house. It was secured by mortgage and vendor's privilege, on a valuable part of their plantation, and bore an interest at ten per cent after maturity, if not punctually paid. It was besides, first due. It ought to be premised, that the open account between Bullard & Clanton, and the house of Lambeth & Thompson, commencing in July, 1838, when the last settlement took place, was neither due nor liquidated in January, 1839, when the mortgage note fell due, nor at the time. the remittances were made, which we contend ought to have been, and were by operation of law, imputed to the payment of the note. The dealings of Bullard & Clanton were, from year to year, and all supplies and advances were made on that term of credit.

The doctrine of imputation of payments has undergone little or no change since the publication of the Pandects. It is now, by our Code, precisely what it was in the age of Justinian. The principles are few and simple. The general rule is, that the debtor of several debts equally due, when he makes a payment, has a right to apply it to whichever debt he thinks proper. When no direction is given by the debtor, the creditor has a right, at the time of pay-

DONBAR BULLARD

ment, to impute it as he thinks proper, and the debtor will be bound by such application, if he accepts a receipt, showing such special appropriation, given at the time of the payment, in re agendá, in re presenti—statim atque solutum est. If no such special application is made and accepted, expressly, or tacitly, then the law imputes the payment to the debt which the debtor has the greatest interest in paying.

Article 2161 of our Code declares that, "when the debtor of several debts has accepted a receipt by which the creditor has imputed what he has received to one of the debts specially, the debtor can no longer require the imputation to be made to a different debt, unless there has been fraud or surprise on the part

of the creditor."

Art. 2162: "When the receipt bears no imputation, the payment must be imputed to the debt which the debtor has the greatest interest in discharging,

of those that are equally due."

Toullier, in treating upon the corresponding articles in the Code Napoléon, says: "Si le débiteur ne fait pas l'imputation, le créancier a le droit de la faire, pourvu que ce soit fait à l'instant même du paiement et dans la quittance. Il ne pourrait la faire depuis: comme aussi le débiteur qui n'aurait pas fait l'imputation au moment du paiement, ne pourrait plus la faire arbitrairement sans le consentement du créancier. C'est encore la rêgle ancienne." In a note he quotes the Digest: "Permittitur ergo creditor constituere, in quod velit solutum..., sed constituere in re præsenti, hoc est statim atque solutum est." "Mais lorsque le débiteur a consenti à l'imputation, en recevant la quittance, en pleine connaissance de cause et sans surprise, il ne peut contredire cette imputation, quoiqu'elle lui soit préjudiciable, suivant la maxime, volenti non fit injuria." 7 Toullier, nos. 176, 177. Pothier is to the same effect. Treatise

on Obligations, nos. 528 and 529.

To apply these principles to this case: A receipt is nothing more than a written acknowledgment of payment; whether couched in the form of a letter missive, or an account of sales, showing the amount received, is immaterial. The two letters of Lambeth & Thompson, acknowledging the receipt of proceeds of cotton sold and placed to the credit of Bullard & Clanton, the one of \$6,708 and the other of \$2,325, making together nearly \$9,000, and dated in March, 1839, about two months after the note fell due, are undoubtedly receipts given at the time, for that amount, and contain no special imputation. The law, therefore, co instanti, made the imputation to the most onerous of the debts then due by Bullard & Clanton. If those letters had informed Bullard & Clanton that the amounts thus received had been applied by the house to discharge an open account, rather than the notes then due, and no objection had been made at the time, they would have been bound by that application of the fund. But the law having fixed the appropriation in the absence of any such special imputation, it cannot afterwards be changed without the express consent of the debtor. The debt was extinguished, and could not afterwards be revived by any mercantile arts in the mode of stating the accounts between the parties.

But the plaintiffs contend, in the teeth of these well settled principles, that accounts rendered long afterwards, showing a different disposition of those funds, and not objected to within a reasonable time, conclude the defendants. To this we reply that no such accounts ever were rendered to Bullard, although they may have been to his partner Clanton, and that even if Clanton had expressly assented to that mode of stating the accounts and applying the funds, it would not have bound his partner. They were ordinary partners, and neither could bind the other without special authority either in the articles of partnership or otherwise. How then could he bind him by implication? One half of the funds belonged to Bullard, subject to his exclusive control and disposition. The testimony is far from showing that Bullard ever saw the accounts as rendered. But after all, what do the accounts show? In an account-current, a note held by Lambeth & Thompson at the time, is not charged as an item, but at the foot of the account is a remark, that they are holders of the note. Here then the account itself shows the existence of two debts, one by note and the other by account. What had the note to do with the running account of supplies for the platation? The account shows precisely that state of things which gives the debtor a right to choose which he will pay. The account was clearly not due at the time the money came into the hands of Lambeth & Thompson. It was not due until July, 1839. It was unliquidated, and consequently they

DURBAR BULLARD. had no right to make the imputation. But the account does not show any express imputation to the account independently of the note. The credit is general, and the note was referred to as an existing debt due at the time.

According to article 2161 of the Code, the debtor is precluded from insisting on the imputation to the most onerous debt, when he has accepted a receipt by which the creditor has imputed what he has received to one of the debts special. No the converse of this proposition must be true, that until such receipt is accepted showing a special imputation, he may insist upon and require the proper imputation. Nothing of the kind is shown here. The account, we repeat, does not show a special imputation, but shows on its face that the

higher debt was then due to Lambeth & Thompson.

But the rule upon which the plaintiffs appear to rely, has no application to accounts rendered between debtors and creditors. This court is surely not prepared to infer the correctness and justice of an account rendered, merely because no objection was made to it at the time it was rendered. The rule applies only between merchant and merchant, in relation to their dealings with or

for each other. It is stated by Judge Story in the following words:

"In respect to silence, whether it operates as a presumptive proof of ratification,may essentially depend upon the particular relations between the parties, and the habits of business and the usages of trade. In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of the one party receiving a letter from the other, to answer the same within a reasonable time, and if he does not, it is presumed he admits the propriety of the acts of his correspondent, and confirms and adopts them." Story

on Agency, § 248.

Greenleaf on Evidence, to the same effect, lays down the doctrine of acquiescence in the following explicit terms: "Admissions may also be implied from the acquiescence of the party. But acquiescence, to have the affect of an admission, must exhibit some act of the mind, and amount to a voluntary demeanor or conduct of the party. And whether it is acquiescence in the conduct, or in the language of others, it must plainly appear, that such conduct was fully known, or the language fully understood, by the party, before any inference can be drawn from his passiveness or silence. The circumstances, too, must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated." 1 Greenleaf, p. 229, no. 197.

The case of Bloodworth v. Jacobs, is clearly distinguishable from this. In

that case, a third person, without any allegation of fraud, complained of the improper imputations of payment made by a common debtor. Several years had elapsed from the time the payments were made, and there was evidence of a settlement with Hunter, and his acquiescence in the disposition of his funds. The whole fund belonged to him. In this case one-half of the fund belonged to Bullard as an ordinary partner, and no settlement had taken place. At the time the proceeds of the cotton were received by Lambeth & Thompson, the account for provisions for the current year was not due. The course of dealing was from year to year. There had been a settlement in July, 1838, and the funds arose from the sale of the crop of that year, which was sold in January, February and March, 1839. If the fund in the hands of Lambeth & Thompson, the factors, is to be regarded as a trust fund, according to the idea of the court in the case alluded to, it could not be disposed of by them contrary to the wishes and interest of the owner of that fund; and, even if there had been a settlement, it would have been liable to be opened on showing error. In the case of Bloodworth, the court seems to have regarded the account rendered as equivalent to the first receipt spoken of in the Code, which was received without objection and therefore conclusive on the debtor. But in this case there was a previous step, to wit: the rendering accounts of sales, and letters acknowledging the receipt of the money, and which do not make the least allusion to a particular appropriation of the fund, and which fund was consequently, by operation of law, applied, co instanti, to the extinguishment of the most onerous debt then due, that is to say, the three notes held by Lambeth & Thompson. After receiving these accounts of sales and the letters of Lambeth & Thompson, the appellant supposed the proceeds would be by law imputed to the discharge of the most onerous debt, and that it could not afterwards be changed without his consent.

"These accounts," says the court in Bloodworth's case, " were necessarily provisional until settled; and, even after settlement, may be rectified by either party on account of errors or omissions, subject to which every settlement is held to be made."

DUNBAR BULLARD.

Texts of the Roman law in relation to payment.

"Tollitur autem omnis obligatio solutione ejus quod debetur; vel si quis, consentiente creditore, aliud pro alio solverit. Nec interest quis solvat, utrum ipse qui debet an alius pro eo; liberatur enim et alio solvente, sive sciente, sive ignorante debitore." In. lib. 3, t. 30, De Solutione.

"Qui mandat solvi ipse, solvere videtur." Dig. lib. 46.
"Si pro me quis solverit creditori meo, licet ignorante me, adquiritur mihi actio pignoratitia." Ib.

Frost and O. N. Ogden, on the same side.

The judgment of the court was pronounced by

EUSTIS, C. J. This action is brought by the holders of a promissory note, drawn by the defendant, and James Clanton by the defendant as his attorney in fact, for the sum of \$6,670, to the order of Thomas Neal, and by him endorsed; it is dated on the 17th of October, 1836, and payable on the 1st of January, 1839; it bears ten per cent interest, if not paid when due, and the promise to pay is joint and several between the debtors. There was the verdict of a jury in favor of the plaintiffs in the court below, and the defendant, Bullard, appealed from the judgment rendered upon it.

The cause was argued before the late Supreme Court, in October, 1844, and a decree was made, by which the verdict of the jury was set aside, and a new trial ordered. The defendant applied to have the decree set aside and a rehearing granted, on the ground that the court had not settled the questions raised by his bill of exceptions, which had been taken at the trial to the admission of certain evidence on the part of the plaintiffs. He insisted, in his petition, on his right to have those questions determined by the court, whose decision was to serve as a rule to the court below, as to the admissibility of the evidence, on the new trial, which had been ordered by the decree. In this position we took cognisance of the cause at the last term, and the question then before us was, whether a re-hearing should be granted or not. As the parties in whose favor the decision of the court had been made, themselves applied for a revision of it, we examined the whole case, and, under the deference which we were bound to extend to the opinions of the court which had preceded us, we came to the conclusion that, on the grounds which the defendant assumed, the re-hearing could not be refused. It would be a vain thing in the administration of justice, for an appellate court to award a new trial without deciding on those questions in which it was alleged error had been committed on the first trial, and to determine which the appeal had been taken. But the decision of this court on those points might have a conclusive influence on the final decision of the cause; they might control it; and, notwithstanding the inclination of this court to maintain the decision which awarded a new trial, the view it might take of the questions of law presented by the bill of exceptions and which the facts themselves required to be determined, might prevent its concurrence in that decision. A re-hearing was accordingly granted and the whole case was opened, and has been argued at bar, and by the defendant in person in a printed brief, which we shall consider as presenting the grounds of the defence.

The present plaintiffs are to be considered as nominal, and the controversy as being between the mercantile firm of Lambeth & Thompson, of New Orleans, and the defendant. The occasional use of a different social name for the plaintiffs, makes no change in the relations of the parties. As we have not been able DUNBAR F. BULLARD.

to adopt the conclusions to which our predecessors arrived, it is proper that we should set forth our grounds of dissent in a more extended form than any intrinsic difficulty in the case would otherwise warrant. Every point has been elaborately examined, and we have the means before us of determining this litigation in a manner which will do full justice to the parties.

Bullard & Clanton, the signers of the note sued on, were partners in the cultivation of a cotton plantation in the parish of Rapides. It was a particular partnership, and the business of the firm appears to have been conducted in the social name of Bullard & Clanton; the partners were not bound in solido for the debts of the partnership. Lambeth & Thompson were the factors of the partnership in New Orleans, sold the crops, made advances and paid for supplies; and we may assume that the relations subsisting between them were of principal and factor, which had existed for several years preceding this controversy. There is nothing in the evidence which establishes any other relation between them.

The bill of exceptions taken on the trial of the cause was to the admission of certain evidence, and is thus stated: Be it remembered, &c., the plaintiffs offered in evidence sundry accounts of Lambeth & Thompson, and of W. M. Lambeth & Thompson, with Bullard & Clanton, and offered Edmund Harding, a witness, to prove the correctness of the same; and offered further certain notes purporting to be signed by H. A. Bullard; and also offered further, to prove by the said Harding a different imputation of the moneys received by W. M. Lambeth & Thompson, from sales of cotton of Bullard & Clanton, than to the extinguishment of the debt sued for. To all of which the defendants, by their counsel, objected, on the ground that the plaintiffs have not declared upon said accounts, or sued to recover the amount alleged to be due thereon; and have given the defendants no notice that such accounts would be introduced, or proof offered in relation to the same; and on the further ground that, no evidence of a different imputation than to the most burthensome debt can be admitted, except that established by the 2161st article of the Code, to wit: the acceptance of a receipt by the debtor, in which the creditor has imputed what he received to one of the debts specially, that imputation being different from that established by law; and that, consequently, when the law has established a particular mode of proof no other testimony can be resorted to, unless the absence of legal proof is accounted for. But the court overruled the whole of said objections, and ordered the said testimony to be received; to all which the counsel except, &c.

The argumentative part of this bill of exceptions, it is unnecessary to notice. As to the questions of law it presents, they are attended with no difficulty whatever in their solution.

It is the duty of the factors to keep accounts of the transactions of their principals, and it was necessary to prove that they were kept, and kept correctly; and the whole evidence was admissible under the issues presented in the defendant's answer. None of the grounds of objection taken to the evidence are tenable. They go to the effect, rather than to the admissibility, of it. It is all before us, and is strictly legal and pertinent to the cause, under the defence assumed by the defendant. We have given our decision on the points set forth in the bill of exceptions itself, and not, as erroneously stated, in the petition for a re-hearing.

The first point made by the defendant in his printed argument is: "That the

DUNBAR U. BULLARD.

note having been paid by the defendant's agents and factors, at his request, was, by that fact alone, extinguised, and could not be revived and put in circulation, leaving their mandataries their right to be reimbursed, the note remaining in their hands merely as a voucher in support of that item of their account with their principals, Bullard & Clanton." The proof of the fact of payment, on which this argumentative proposition rests, is said to be contained in a letter from plaintiffs to Martin, who at the time it was written was the holder of the note. The letter runs thus:

"New Orleans, December 29, 1838.

"R. C. Martin, Esq., Dear Sir:—Judge Bullard, having heard that Mr. Neal has passed off the note of B. & C., has called upon us with an urgent request that we would pay it. We must therefore take the note of you as cash the day it is due. You will please enclose it to us by steamboat, and it shall be passed to your credit." It closes with remarks about the scarcity, &c.

On the 6th of Jan. following, Martin transmitted the note to the plaintiffs, at their request, and his account was credited with its amount.

This letter is held to be proof that the plaintiffs paid the note on the defendant's account, and gave up the securities of the endorsement, the solidarity, and the mortgage which the note carried with it, becoming the simple creditors of the defendant, or of the partnership of Bullard & Clanton. We think otherwise. The note was not yet due; the defendant undoubtedly requested the plaintiffs to pay it. It would have been to the defendant a very advantageous conversion of an onerous debt into a demand against him in account-current; but we have no evidence that the factors assented to it. They paid the note to Martin, because they could not get it otherwise. As to him, as he did not endorse the note, payment was made—the business was closed; but the drawers and endorser were entirely unaffected by any thing contained in the letter, or transaction with Martin.

The conduct of the plaintiffs and defendant is conclusive as to the character of this transaction, if it were susceptible of any doubt in its origin. Nay, the very answer and argument of the defendant refutes this pretence. The answer expressly charges that the note, before maturity, was transferred to the plaintiffs, who have, ever since January,1839, until recently, been the holders thereof; that by the imputation which the law itself makes, the note has been paid by the proceeds of the crops of Bullard & Clanton, which the plaintiffs had received since the note fell due, and thus the note has been extinguished by the imputation of these payments. This payment to Martin was not even pleaded; but the extinguishment by reason of the imputation of the proceeds of the crops, was alone charged in the answer, which is under outh. This point of defence has no foundation whatever.

The second is: "That even supposing Lambeth & Thompson to have been holders of the note when it fell due, and subrogated to all the rights of the original payee, it was extinguished within three months by the imputation of payment, by the proceeds of cotton sold by Lambeth & Thompson for the makers." And it is further contended that, if the imputation is not made, the partnership funds must be considered to be in the hands of the plaintiffs unapplied and subject to a final settlement, and that Bullard & Clanton have a right to insist on such an application of it as to stop the onerous interest the note bears, leaving to the plaintiffs their recourse against the partners, each for their one-half, for the balance which may be due on account.

DUNBAR U. BULLARD.

It is contended that no imputation of payment was made by the creditors or debtors, and that in that case the law makes it, that the mortgage note was the most onerous, and that which the debtors had at the time the most interest in discharging; and that it became extinguished by the proceeds of the crops of the partnership, which the plaintiffs had received. It becomes necessary to enquire if no imputation was made. The plaintiffs insist that an imputation was made of the partnership funds to the partnership debts, consisting of advances and supplies for the plantation.

In the case of Bloodworth v. Jacobs, ante p. 24, we had occasion to examine the subject of the imputation of payments, in reference to the ordinary transactions between planter and factor. We considered that accounts between these parties, without respect to any particular agreement, were necessarily provisional until settled, and even after settlement may be rectified by either party on account of errors or omissions. We held that when, at the usual time of rendering his accounts, the factor sends his account to his principal, in which certain imputations of payment are made by him, and the latter approves it, without any fraud or surprise, the payments are considered as having been made by the authority of the debtor himself; and the ratification of the acts of the agent is considered as tantamount to an original imputation of payment by himself, and relates back to the time of the doing of the act which is the subject of the ratification.

The dealings of Bullard & Clanton with the plaintiffs were from year to year, and all supplies and advances were made on that term of credit. There are accounts of each year, which are taken from the books of the plaintiffs, in which the note sued on does not appear ever to have been charged to the partnership. On the contrary, at the foot of each account a memorandum is made to this effect: "N. B. We hold your mortgage note, due 1-4 January, 1839, in favor of Thomas Neal, for \$6,670."

These accounts, showing the disposition made of the partnership funds from year to year, and not objected to within a reasonable time, it is contended, conclude the defendant. To this it is answered that, no such accounts were ever rendered to the defendant, although they may have been to his partner Clanton; but if Clanton had expressly assented to that mode of stating the accounts and applying the funds, it would not have bound his partner.

The verdict of the jury has virtually found the fact that the accounts were rendered to the partnership, and the only ground on which we could interfere with the verdict would be, that it was contrary to evidence, or violated some rule of law. There is no direct evidence of the reception of the accounts by either of the partners, but there is evidence from which the reception on the part of the defendant may be inferred. It is such as produces conviction on our minds of the fact, and fully authorises, nay obliges, men who have consciences, to consider it as established.

Harding, a witness, swears, that the accounts-current offered exhibit the state of the accounts between the plaintiffs and Bullard & Clanton, during the period embraced by them; that the defendant was the business partner of the firm, he attended to the money arrangements, and Clanton attended to the plantation. The defendant frequently called at the counting-house of the plaintiffs, and talked of his accounts. He never, to the knowledge of witness, made any objections to the accounts as they were kept, and are here exhibited. Witness made out for the defendant the original accounts, of which those pre-

sented are copies. Witness did not hand them to the defendant, but they were delivered to Mr. Thompson, one of the plaintiffs, to be handed to the defendant, as he resided in the city. They were made out as in the usual course of business, similar accounts were for the other customers. Has no knowledge that the defendant received the accounts thus made out. When they were handed to Thompson, he took them, went out, and returned without them.

The defendant has made his defence in person, though assisted by counsel, and, in an elaborately prepared argument, filed on the 18th October, 1844, thus treats this branch of the subject: "But the receipt given at the time must be given and accepted without fraud or surprise. Now, I know very little about double entry. I do not know that I yet understand that account. After receiving from Lambeth & Thompson a receipt for the proceeds of the cotton without special imputation, I could not imagine that the account-current rendered afterwards would give a different direction to the funds; and, as the account was with the usual reservation of errors excepted, I had no curiosity to look into it until the final settlement, and I never was called an for such final settlement."

If the jury had before them this argument, and gave to it the sense which its language fairly implies, and considered it as fortifying the testimony which we have stated, they did what they were justified in doing, and which we feel ourselves bound to do. We cannot consider the verdict, in this respect, unsupported by evidence.

No objection having been made to the imputation of payments in the accounts until the institution of this suit, according to the decision in Bloodworth's case, they must be considered as having been made by the authority of the debtor himself. We do not think there is any ground for the complaint against the form of the accounts, as rendering them not easily understood. They are free from complexity, and simple and clear.

Before leaving this branch of the subject, it is proper to add, that the imputations exhibited by the account are such as any man of business would expect to be made of the proceeds of the crops. Bullard & Clanton were constantly drawing on their factors for their immediate wants, such as planters usually have, and of which they appear to have had their full share. The supplies for the plantation must be furnished; its expenses must be paid; the sums required for the partners must be had. Thus there was a continued drain upon the funds in the hands of the parties by the orders and drafts of the partners; and yet it is contended that, in the face of these acts of the parties and their relation as planter and factor, every thing else was to be disregarded in the application of the proceeds of the crops, and they were to be applied to this solidary obligation, secured by mortgage, leaving the factor to the mere joint liability of the planters for even the very advances which had enabled them to produce the crops. Certainly the imputation thus insisted on by the defendant is not such a one as any man of common intelligence and prudence would require or accede to, under the circumstances disclosed by the correspondence and the state of the accounts between the parties. Vide 2 Greenleaf on Evidence, 529.

It is to be observed that the imputations made by the plaintiffs are objected to, solely that they ought to have been applied to the extinguishment of the mortgage note, as being the most onerous. No question is made concerning the right of the plaintiffs in making the imputation on any other ground, and no distinction is made as to any of the debts paid, or advances made, by Lambeth & Thomp-

DUNBAR D. BULLARD.

son, and charged by the partnership; and as we differ widely in our conclusions from the court before which this appeal was first argued, we add another view of the subject which is to us obvious, and decisive as to the law of the case, as it is presented by the facts.

The note is, on its face, not a note given by the partnership of Bullard & Clanton, but by the two persons, H. A. Bullard and James Clanton. They bind themselves in solido, and not as partners. It is alleged in the answer, that the note was given as part of the price of a tract of land purchased by them jointly, as partners in the planting business; but the act of sale purports to convey the property not to Bullard & Clanton as partners, but to Henry Adams Bullard and James Clanton.

In order to give this defence the semblance of validity, it was necessary that this note should be a partnership note, and it was so pleaded; but the fact has not been proved. There is no evidence of it. If any real estate was included in this partnership, the contract of partnership must be in writing, according to the rules prescribed for the conveyance of real estate. Civil Code, art. 2807. And in order to test the legality of the position assumed in the defence, let us suppose the fund to be in the hands of the plaintiff unappropriated, and at the disposition of the court under the respective rights of the parties.

It is in vain to attempt to disguise the result, if this defence succeeds. It is that the creditors of the partnership of Bullard & Clanton are to be left unpaid, with the partnership funds in their hands, and this diversion of the funds is to be for the benefit of the creditors of the individual partners. What is the note sued on? The joint and several obligation of H. A. Bullard and James Clanton. If that be paid, their creditors are benefited by it for the amount of the debt extinguished, to the wrong and detriment of the partnership creditors. If the debt of the plaintiffs—the plantation or factorage debt, be paid, no one is wronged. Partnership property must be applied to the payment of partnership debts, in preference to those of the individual partners; and Lambeth & Thompson have so applied it. Civil Code, art. 2794. If the fund were now to be disposed of, under the case as it is before us, the imputations of payment would stand in law, and the parties be left in statu quo.

These are the conclusions to which we have come after a careful consideration of the questions presented to us. Those of fact rest upon the verdict of a jury, not of merchants or factors in the capital, but taken from among those who are familiar with the relations of the parties, and have no bias in favor of factors or their interests. Those of law are of so familiar a character, that we should not be authorised in dwelling on them, except for the reasons before mentioned in this opinion.

Judgment offirmed.

Brown v. LAMBETH et al.

Defendants, holders of a note endorsed by plaintiff, gave it up to him, on the latter's executing his own note for the amount, payable at a future period. Judgment was obtained upon the last note, without defence; and the present plaintiff purchased the property seized under execution against him, and gave a twelve-months' bond for the price. An order of seizure having been issued on the twelve-months' bond, plaintiff enjoined it on the ground that he had executed his note in error, not having been aware at the time that he had been

Brows v. LAMBETH.

discharged from all liability as endorser by the *lackes* of the defendants, but he made no tender of the note on which he was endorser: *Held*, that the injunction must be dissolved, the plaintiff having no right to require the second note to be cancelled without restoring the original note received from the defendants.

Under sec. 3 of the stat. of 25 March, 1831, fees of counsel may be allowed to the defendant on dissolving an injunction, without proof of their having been actually paid by him, where they do not exceed twenty per cent of the amount of the judgment enjoined, and no other damages are allowed. Per Curiam: The judge is authorised, on the dissolution of the injunction, to allow damages to the amount of twenty per cent en the judgment enjoined, without proof.

A PPEAL from the District Court of Rapides, King, J. Ryan, for the appellant. O. N. Ogden, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The petitioner avers that, he was endorser on the note of William Brown, due in 1837; that, in 1840, having been applied to as endorser by the defendants, then holders of the note, he took up William Brown's note by giving his own note payable in 1841; that he was afterwards sued on this latter note, and sufferred judgment to go against him; and that, upon execution, certain property belonging to him was sold, of which he became the purchaser on twelve-months' bond, upon which bond a seizure has issued. He further avers that in all these matters he has acted under error; that in fact he had been discharged as endorser of the original note by the lackes of the holders in not giving him notice of protest, of which discharge he was ignorant. Upon these allegations an injunction was obtained, which the defendants moved to dissolve.

There is clearly no equity in the petition. Besides the fact that judgment was obtained upon the new note, without defence, the validity of which judgment was recognised by the purchase and execution of the twelve-months' bond, a course by which the plaintiff probably precluded himself from relief, there is another consideration which fully justifies the dissolution of the injunction. The plaintiff gives no account whatever of the note of William Brown, which he received, and for which he substituted his own, and does not produce and tender it. If the new note is to be cancelled, how can he ask this equitable relief without restoring the defendants to their original rights? Non constat that the plaintiff may not have collected the note from the maker, or otherwise disposed of it.

The court below, in dissolving the injunction, gave judgment in favor of Lambeth & Thompson, for \$150, "special damages, for counsel fees, sustained by them." It is said by the plaintiff that in this there is error; that counsel fees cannot be allowed as special damages, unless it be proved that the fees have been paid.

The statute of 25th March, 1831, s. 3, declares that, in case the injunction is dissolved, the court, in the same judgment, shall condemn the plaintiff and surety, jointly and severally, to pay to the defendant interest at the rate of tenper cent per annum on the amount of the judgment, and not more than twenty per cent as damages, unless damages to a greater amount are proved. In the present case, the sum of \$150 was the only amount allowed to the defendants. As it does not exceed twenty per cent upon the judgment enjoined, and as up to that amount the judge was authorised to grant damages without proof, we see no reason to disturb the judgment.

Judgment affirmed.

New ORLEANS AND CARROLLTON RAILROAD COMPANY v. MILLS et al.

To entitle the holder of a promissory note to recover against an endorser, on the ground of a promise to pay made after the latter had been discharged by failure to protest, the plaintiff must show that the promise was made by the endorser with full knowledge of his discharge.

A PPEAL from the District Court of Avoyelles, Boyce, J. Genéres, for the appellants. Waddell, contra. The judgment of the court was pronounced by

Kino, J. The defendants are sued as the maker and endorsers of a promissery note. The maker and first endorser made ne defence to the action, and a judgment was rendered against them, of which there is no complaint. Briggs, the second endorser, pleads in defence that he has been discharged from his liability, in consequence of the failure of the plaintiffs to cause the note to be protested, or to notify him of its dishonor. The demand against him was rejected in the court below, and the plaintiffs have appealed.

The note on which the suit is brought bears date the 3d of November, 1843, and was made payable twelve months thereafter. At its maturity it was not protested, but, on the 8th of November, 1844, several days after maturity, Briggs, at the request of the maker, gave the following written waiver: "Mr. N. Durand and I are the endorsers on a note executed by Thomas Mills in the Carrollton Bank, and have agreed to waive a protest on the same." This waiver, it is contended, is equivalent to a promise made by the defendant subsequent to his discharge to pay the note. If under the evidence this could be considered as a subsequent promise to pay, it was incumbent on the plaintiff to show that it was made by the defendant with a full knowledge of his discharge. Story, on Prom. Notes, § 361. 12 La. 468. No such proof has been adduced; but, on the contrary, we are satisfied from the evidence, that Briggs was ignorant of his discharge at the date of this waiver, and made it under the belief that the note had not yet matured. The fact of his making a waiver of protest, instead of a direct renewal of his obligation, would, of itself, in the absence of other testimony, be a strong circumstance to show that such was the impression under which he acted. Judgment affirmed.

VITRAC v. REY, Curator.

Where a slave, parchased and paid for by the wife before marriage, is sold during its continuance, and it is not shown that the wife had the separate administration of her property, no proof will be necessary to charge the husband with the amount.

A PPEAL from the Court of Probates of Avoyelles, Baillio, J. Edelen and Waddell, for the appellant. Taylor and Swayze, for the defendant. The judgment of the court was pronounced by

VITRAC V. Rev.

Rost, J. The widow of the insolvent, Eleazer G. Paxton, made opposition to the homologation of the proceedings had in a meeting of his creditors, fixing the terms and conditions of the sale of the property left by him. She afterwards instituted a suit against the administrator of the succession, in which she claimed various slaves and sums of money as dotal and paraphernal property. The suit and the opposition were consolidated, and the widow having died, the administrator of the succession intervened and prosecuted her claims. The court below gave judgment in her favor for two of the slaves, subject to a charge of \$225 in favor of the succession of Paxton, and dismissed the opposition for the balance of the claim. The plaintiff appealed.

Eugénie Vitrac, the original plaintiff, married Paxton, in 1822. Their marriage contract states that the future wife brings into the community \$2,100, in slaves and money. The slaves are not named in the act, but the evidence adduced on the trial shows that, at the time of her marriage, Eugénie Vitrac was in possession of four slaves, to wit: Clarisse, Marie, Jenny and Margaret. Clarisse had been purchased and paid for by her before her marriage, and was sold during its continuance, with another slave, for the aggregate sum of \$975. It is contended that the evidence adduced to prove that Paxton had received this sum was inadmissible. We think it was properly admitted; and moreover, we consider that, as it is not shown that the wife had the separate administration of her property, no proof was necessary to charge him with the amount. A short time after the sale, the purchaser sold Clarisse for \$450, and, in the absence of other evidence, we will take that sum to have been her value at the time she was sold by Mrs. Paxton. The slave Marie, for whom and her increase, the court below gave judgment in favor of the plaintiff, is the daughter of Clarisse, and the reasons upon which the judgment rests entitle the plaintiff to recover the sum for which Clarisse was sold.

The slaves Jenny and Margaret were purchased by the wife shortly before her marriage for the sum of \$850, which was paid by Paxton after the marriage; and as there is no evidence to the contrary, the law presumes that the payment was made out of the funds of the community. These two slaves, together with another who cost \$650, were sold by Paxton and his wife for the sum of \$1,700. The difference between these two sums may fairly be considered as the price obtained for the slaves Jenney and Margaret; and, after deducting from it \$550 paid by the community for them, there will remain a balance of \$200 in favor of the plaintiff.

The court below considered that the claims of the plaintiff for funds belonging to her, received by Paxton during marriage, and for payments made by her out of her separate estate, were not sufficiently proved. A careful examination of the record has brought us to the same conclusion. A recompense was improperly allowed to the community for the rearing of the slave Marie; she was over nineteen years of age when Paxton died, and the value of her services had fully compensated the expenses of rearing her.

The judgment is therefore reversed; and it is ordered that there be judgment in favor of the plaintiff for the slave *Marie* and her increase; and further for the sum of \$650, the proceeds of paraphernal property alienated during marriage, with a legal mortgage for \$450 thereof from the 24th day of December, 1824, and a legal mortgage for \$200 from the 18th day of December,

VITRAC V. REY. 1825. It is further ordered that the judgment be classed and paid in the course of the administration of the succession of Payton, and that said succession pay the costs in both courts.

CRAWFORD, for the use &c. v. JONES.

A party may proceed by a motion to dissolve, in case of a sequestration. Per Curian: A sequestration is a harsh remedy, and, if sued out without cause, the party whose property is unlawfully taken from him should have a summary redress.

A PPEAL from the District Court of Avoyelles, King, J. Bishop and Edelen, for the appellant. Taylor and Swayze, for the defendant. The judgment of the court was pronounced by

Rost, J. The plaintiff, alleging that he held a mortgage on a slave belonging to defendant; sued out a writ of sequestration, on the ground that he had reason to believe, and did believe, that the slave was about to be removed out of the State, before he could exercise his right of mortgage. The defendant moved to dissolve the sequestration on the ground, that the facts alleged in the petition were untrue, and that the plaintiff had no interest in the claim secured by the mortgage on the slave in his possession. Several witnesses were examined on behalf of the defendant, without opposition; and the judge, after hearing the evidence and the argument of counsel, dissolved the sequestration. The plaintiff has appealed. His counsel contends that motions to dissolve are unauthorised by law in cases of sequestration, and that the only way in which property sequestrated can be released is by giving bond, or by the judgment of the court on the merits.

Sequestration is a harsh remedy, and if it is sued out without a just cause, it is consonant with every principle of justice that the party whose property is unlawfully taken from him should have a summary redress. The former Supreme Court considered that he had. See the cases of Vanwinckle v. Flecheaux, 12 La. 150. Segur v. Sorel, 11 La. 443.

On the merits of the motion, the judge who tried the cause had a much better opportunity than we have to ascertain the credibility of witnesses, and we cannot say that he erred in giving faith to the testimony. The testimony fully supports the conclusion to which he came. Whether the other ground alleged could be entertained on a motion to dissolve, is a question which it is not necesary to determine.

Before the trial of the motion to dissolve, the plaintiff asked that a day be fixed in order to allow the defendant sufficient time to summon witnesses; the judge desired the plaintiff's counsel to fix any day during the term. The counsel having refused to do so, the judge had the case fixed in conformity with the general practice of the court. No affidavit having been made for a continuance, and no information having been given to the court that the plaintiff had any witnesses to summon, the motion was tried in its turn. The proceeding was in every respect regular, and the plaintiff has no just ground of complaint.

Judgment affirmed.

VANCE v. BOYCE.

The right of an endorser, who has put his name on a note on the faith of the signature of the maker, and who has been compelled to pay the amount by a party by whom it was discounted before maturity, to recover against the maker, cannot be effected by the fact of the latter's being creditor of a prior endorser at the time of his endorsement.

A PPEAL from the District Court of Rapides, Brewer, J., presiding. O. N. Ogden, for the plaintiff. Boyce, appellant, pro se. The judgment of the court was pronounced by

EUSTIS, C. J. This action is brought by the plaintiff in her own right as surviving wife, and as executrix of the last will, and tutrix of the minor children, of the late Gilbert Vance. She alleges herself to be the owner of a certain promissory note, dated at New Orleans on the 1st May, 1834, payable five years after date, and drawn by the defendant, in favor of Thomas Barrett, for the sum of \$4,600, with ten per cent interest after maturity until paid. The note was payable at the counting house of Thomas Barrett & Co. in New Orleans, and was protested for non-payment. It bears the endorsement of Thomas Barrett, and Thomas Barrett & Co. in liquidation. There was judgment for the plaintiff, and the defendant has appealed, and has argued his case, orally and in writing, in person.

It appears that the note was discounted by the Merchants Bank in New Orleans, which acted as agent of the Bank of the United States, and the proceeds were carried to the credit of Gilbert Vance, who was the last endorser. This appears by the discount record. The witness examined for the defendant thinks that the proceeds of this were used, with the proceeds of other notes discounted for Vance, in taking up paper, held for the account of the Bank of the United States, of which T. Barrett & Co. were the drawers, and Gilbert Vance, the endorser; but the witness, not having access to the books of the bank, cannot speak positively as to how the proceeds of the note were used.

On the trial of the cause the defendant made an affidavit for a continuance, in which he stated that he expected to prove that Gilbert Vance was an accommodation endorser, and designated the commissioners who have charge of the books of the bank, as having the means of ascertaining the fact, by affording access to the books, and thereby showing the relation in which Vance stood to this paper. The court below held that the defendant was not entitled to a continuance, but required the plaintiff to make certain admissions, one of which was that the commissioners of the Merchants Bank would swear that, from entries made in the books of the Merchants Bank in their possession, it appears that Gilbert Vance endorsed the note sued on, as an accommodation endorser for Thomas Barrett & Co. in liquidation. To this decision the plaintiff, as well as the defendant, excepted, and this admission must be considered as part of the evidence on which the suit was tried.

The books of the Merchants Bank could only show the disposition made of the proceeds of discounts, and the apparent relations of parties as exhibited by the notes and bills in which the bank operated. The theory of accommodation paper the commissioners might not be sufficiently conversant with, to enable them to state with precision what state of facts creates the relation of an acVANCE v. BOYCE. commodation enderser. Such enquiry might depend on a question of law; and, at all events, the books of a bank, unless they were the record of all the necessary facts on which the relation depended, would not prove a party to a note discounted to be an accommodation party. In giving, therefore, the defendant the whole benefit he is entitled to from this admission, which was exacted from the plaintiff under an application for a continuance, we may admit, what the witness, Mr. Frazier, thought the books would prove, that the proceeds of this note, and others discounted for Gilbert Vance, were used in taking up paper held for account of the Bank of the United States, of which Thomas Barrett & Co. were the drawers, and Vance the endorser. Judgment for the sum of \$4,392 60 was rendered against her at the suit of the receivers of the Bank of the United States, with interest and costs of protest, which judgment was paid by the plaintiff.

The defence urged against her right to recover is that, before the note fell due, the defendant was, and still is, a creditor of Thomas Barrett and Thomas Barrett & Co., for an amount greater than that of the note sued on, which the defendant pleads in componention of the note; but the allegation is of such a character that under it no court of justice could award to him a sous; * and if it were true, would be no defence against the recovery of the amount by the widow and heirs of Vance, who put his name on the note on the faith of the aignature of the defendant. Neuman v. Goza, ante p. 642.

The defendant has endeavored to bring into this defence matters which relate exclusively to the concerns of the Bank of the United States and the Merchants Bank, and which can have no connection with the controversy between the present parties; and, in relation to the other points which have been presented by the defendant in his written argument, we have examined them all, and find them entirely untenable.

**Judgment affirmed.

VASCOCU et al. v. SMITH.

Where a surviving husband, to whom, after the death of the wife, the community property had been adjudicated, executes a mortgage in favor of the minor children of the marriage, on the real property thus adjudicated, but afterwards sells it, and dies without having settled his wife's succession, or satisfied the claim of the minors, who accept his succession with benefit of inventory, the minors cannot require payment of any portion of their claims from the last purchaser until the successions of the husband and wife are finally settled. The husband is the warrantor of the purchaser; and it is only in case of his succession being insufficient to pay the claim of the minors, that the purchaser can be made liable for the deficiency.

After pleading the general denial, a defendant may avail himself of an exception taken by a party cited by him in warranty.

A PPEAL from the District Court of Natchitoches, Olcott, J. Hertzog and Tuomey, for the appellants. Campbell, for the defendant. Sherburne J. B. Smith, for the warrantors. The judgment of the court was pronounced by

The answer alleged that "before the note fell due defendant was, and still is, a creditor Thomas Barrett and Thomas Barrett & Co., for an amount exceeding that of the note sued on," without specifying the amount of the credit.—R.

Rost, J. The plaintiffs are the legitimate children of Marie Aspasic Vascocu, who died in 1824. After her death the property held in common between her and her husband, Jean Baptiste Vascacu, was adjudicated to the latter, at the price of appraisement, and he gave a mortgage in favor of the minors on the real property thus adjudicated. He subsequently sold that property, and the title of the defendant is derived from that sale. Jean Baptiste Vascocu, died without having settled his wife's succession, or satisfying the the claim of the plaintiffs. It is admitted that his succession is still unsettled, and has been accepted by the plaintiffs under benefit of inventory. They now call upon the defendant to pay them one-half of the amount of the adjudication of the community property, with legal interest from its date; and, in default thereof, they pray that the land held by him be seized and sold under their mortgage, to satisfy their claim. The defendant filed a general denial, called his vendors in warranty, and asked against them any judgment which might be rendered in favor of the plaintiffs against him. The warrantors appeared, and excepted to the plaintiffs' action, on the ground that, it could not be maintained until the successions of their mother and of their father were finally settled. The court below having sustained the exception, dismissed the petition, and the plaintiffs appealed.

There is no error in the judgment. Adjudications of common property to the surviving parent are generally made without taking into consideration the charges of the succession of the deceased, and their gross amount does not of itself make proof of the shares of the heirs; but if it did, the father in this case is the warrantor of the defendant, as far as the assets left by him will go. His succession appears fully sufficient to pay the plaintiffs' claim; and if it is not, the only right of action they can have against the defendant is for the deficiency which may be found to exist on the final settlement of the succession; that deficiency to be calculated on the capital only, as it is evident that the income of the minors was not sufficient for their support and maintainance. It is argued that the defendant, after filing a general denial, could not avail himself of the exception taken by the warrantors. We think otherwise. The objectof calling in warrantors is to let them take the defence of the suit. After their appearance the defence rests with them; and their pleas will avail the defendant, unless he objects to them, and insists on defending the suit at his peril and risk.

Judgment affirmed.

NEW ORLEANS AND CARROLLTON RAILROAD COMPANY v. Armstrong, Syndic.

Where the endorser of a note, after discharge, gives a written promise to pay the debt, and the note and written promise are subsequently lost, no recovery can be had but upon proof that the loss of the written promise had been advertised within a reasonable time, and proper means taken to recover possession of the instrument. It is not enough that the loss of the note was duly advertised. C. C. 2259.

A PPEAL from the District Court of Avoyelles, Farrar, J. Génères, for the plaintiffs. Taylor and Swayze, for the appellant. The judgment of the court was pronounced by

CARROLLTON RAILROAD COMPANY

NEW ORLEANS KING, J. Briggs was an endorser on a promissory note made by Orr, of which the plaintiffs were the holders. At the maturity of the note no steps were taken to fix the liability of the endorsers. Briggs, after having been informed of his discharge, gave a promise in writing to hold himself liable for the ARMSTRONG. payment of the note. Both the note and the written promise of Briggs were subsequently lost. The loss of the former only was duly advertised. This suit is instituted against the defendant, as syndic of Briggs, to recover the amount of this lost note. On the part of the defence, it is contended that the written promise of Briggs, made after his discharge, having been lost, the plaintiffs could only recover upon showing that the loss had been advertised. A judgment was rendered in favor of the plaintiffs, from which the defendant has appealed.

We think that the district judge erred. Briggs had been completely discharged from his liability as endorser, and his obligation to pay the note of Orr arose from his subsequent promise, made with a full knowledge of his discharge. That written promise was the foundation of the suit; and it was an indispensable prerequisite to a recovery upon it, that its loss should have been advertised within a reasonable time, and proper means taken to recover possession of the instrument. No such advertisement appears to have been made. C. C. art. 2259. Lewis v. Splane, ante p. 754.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that there be judgment against the plaintiffs as in case of non-suit, said plaintiffs paying the costs of both courts.

NEW ORLEANS CANAL AND BANKING COMPANY v. ESCOFFIE et al.

A surety, who has bound himself in solido with his principal, cannot require the property of the latter to be discussed before recourse is had against him (C. C. 2089, 3014); nor, though the debt be secured by a mortgage on the property of the principal, can the sarety compel the creditor to resort to his mortgage, before calling upon him.

A bank will not be responsible for any injury resulting from the omission to protest notes deposited with it for safe-keeping, and not for collection.

PPEAL by the defendant Boyce, from a judgment of the District Court of Rapides, Cushman, J. Hyams and Elgee, for the plaintiffs. H. Boyce, appellant, pro sc. Thomas, on the same side. The judgment of the court was pronounced by

SLIDELL, J. Boyce is sued upon a bond executed in favor of the plaintiffs by Mrs. Escoffie, formerly Sophia Anderson, as principal, and Boyce as surety, in which, however, the parties also acknowledged themselves as jointly and severally indebted to the plaintiffs, and expressly bind themselves in solido.

Boyce in his answer sets up various grounds of defence, which we will separately state and examine.

I. He pleads that he is merely the surety of Sophia Anderson, and as such is entitled to the benefit of discussion. He points out, in his plea, certain property of Sophia Anderson, and makes a tender of a sum for costs to carry on the discussion. The plea cannot be sustained. The Code is clear and conclusive against it. The obligation of the surety towards the creditor is, to pay him in case the debtor should not himself satisfy the debt; and the property NEW ORLEANS of such debter is to be previously discussed or seized, unless the surety should have renounced the plea of discussion, or should be bound in solido with the debtor, in which case the effects of his engagement are to be regulated by the same principles which have been established for debtors in solido. Civil Code, art. 3014; see also art. 2089. Smith v. Scott. 3 Rob. 260. Duranton, lib. 3, tit. 14, § 332.

BANKIN COMPANY ESCOFFIE.

II. He pleads that the bank has granted delay to the principal debtor, without his consent; also that the bank postponed the sale of certain property mortgaged by Sophia Anderson to secure the bond, and granted unnecessary delays in the execution of the writ of seizure and sale, until, in the mean while, the property became greatly depreciated in value, when it was sold on execution, and bought by the bank. Some delay did occur in the execution of an order of seizure and sale, which was attributable partly to the written request of the defendant himself, and partly to the sheriff's inability to obtain a mortgage certifieate, by reason of the absence of the parish judge, and the subsequent vacancy in that office. We find no evidence of any act done by the bank to the detriment of the defendant in the prosecution of their mortgage; nor are we aware of any rule of law which compelled them to resort to their mortgage rights at all, before calling upon Boyce, the debtor in solide.

III. The defendant pleads that the bond was given in settlement of a debt due to the bank by Wm. R. Anderson, deceased, and by Sophia Anderson, his widow in community: That Brewer, the executor of Anderson, as an inducement to the defendant to sign the bond, transferred to him four notes drawn by Mrs. Escoffie, and endorsed by Brewer individually, and as executor, and by Culbertson, payable at the Canal Bank's office at Alexandria, as a collateral security to indemnify the defendant against the consequences of signing the bond: That before the notes matured they were deposited in the office of the Canal Bank's branch at Alexandria, for the benefit and security of the defendant, and to be collected and proper measures taken thereon, which the bank was bound to do; but that, when the notes fell due, the bank neglected to have the notes protested, or any demand made, or notice to endorsers given, whereby he has sustained damage to the amount of the notes, which he pleads in reconvention.

The facts material to the consideration of this branch of the defence are: that the Canal Bank originally held Culbertson's note, endorsed by W. R. Anderson and by Boyce, which was protested at maturity, and Boyce was notified. The present bond was given in payment of that note, upon which, by protest and notice, Boyce had become unconditionally liable, and upon which suit had been brought against him. Before Boyce signed the bond, Brewer, as executor of Anderson, promised to give Boyce the notes as collaterals for his indemnity. The bond bears date on the 21 December, 1841. On the first of March, 1842, Brewer, as executor, by notarial act, transferred the four notes to Boyce as " collateral security," and "to indemnify Boyce from all loss that he may sustain on account of the suretyship on the bond." This act was not notified to the bank till 1846; but on the day of its execution, Brewer went with Boyce to the office of the bank, and stated to the cashier their agreement that the notes should be a collateral security for Boyce, as the surety on the bond. The notes, with other assets of Anderson's estate, had been left by the executor at the bank for safe keeping, in a bundle or envelope. The four notes were taken out of the package and put in a separate envelope, upon which was endorsed a

COMPANY ESCOPPIE.

NEW ORLEANS memorandum that they had been transferred by the executor to Boyce, as his CARAL AND collateral security for his averatishin on the hand of Stational Security for his averatishin on the hand of Stational Security for his averatishin on the hand of Stational Security for his averatishin on the hand of Stational Security for his averatishin on the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the hand of Stational Security for his average in the historian security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the hond of Stational Security for his average in the high security for his average in the hond of collateral security for his suretyship on the bond of Sophia Anderson. On the back of the notes are pencil memoranda over the initials of Chew, cashier, stating as to one: "No funds"; and as to the other: " Not protested by request of Brewer, and no funds." The cashier states that notes were very often deposited at the bank for safe keeping, and without having any connection with the business of the bank; that if they had been deposited for collection, they would have been entered on the books of the back; that no entry in the books was ever made; that the agreement between Brewer and Boyce had no connection with the execution of the bond, so far as the bank was concerned; that he never was authorised to receive, and never did receive, the notes as security for the bond; and that it was a mere deposit for safe keeping at the request of the parties; that when Brewer originally deposited them for safe-keeping, he said there was no necessity for protesting them, as he was first and last endorser; that Boyce never asked him to have them protested; and that when notes are brought for safe-keeping they are not protested, unless it be requested. In 1846, Boyce exhibited his notarial act of transfer from Brewer to Chew, the cashier of the bank, who gave him the notes. There are several other circumstances tending to show that the bank had no connection with, nor interest in the notes, as collaterals; and that in fact Chew, personally, was considered as the friendly depositary of the parties, Brewer and Boyce. Among them the most prominent are, that Brewer brought suit in 1844, against Chew, individually, to compel him to give up the notes, which Chew refused to do without Boyce's consent. This suit was dismissed at Boyce's instance, and a written agreement was signed by Brewer, as executor, that the notes should remain in Chew's hands. So when Boyce twice received the note from Chew, he receipted to him individually, and not as cashier. Both the suit and these receipts were long after the maturity of the notes; and no complaint appears to have been made by either Brewer or Boyce, about the omission to protest, until it was set up in the present action. It is quite clear, under this state of facts, that there is no liability upon the bank by reason of the non-protest of the notes, and the omission to notify the endorsers. In the most favorable view for the defendant, and considering the bank, and not Chew, personally, as the depositary, it was a mere deposit for safe-keeping, and not for collection; and the notes were not a collateral security to the bank, but merely to Boyce, as between him and Brewer, the executor. Chew's testimony as to the usages of banks, and the mode of depositing for collection, is in accordance with experience. There is no ground whatever to charge the bank for any loss which may have resulted from the omission to protest.

Judgment affirmed.

KERR v. WELLS et al.

Where the certificate of a notary, dated on the day on which the protest of a note was made, recites, that the parties have been duly notified of the protest thereof, by notices put into the post-office in time to go by the first mail, after the protest &c., it must be understood as certifying that the notices were mailed on the day of protest, and that they had been mailed at the time the certificate was signed.

Kenn Walts.

Where the endorser of a note unites with the maker, in mortgaging to the payes property which they owned jointly, to secure its payment, a subsequent discharge of the endorser, by the lackes of the holder, will release the endorser from any personal liability for the debt; but the holder of the note will be entitled to the benefit of his mortgage.

A PPEAL by T. J. Wells, one of the defendants, from a judgment of the District Court of Rapides, Cushman, J. O. N. Ogden, for the phintiff. Elgee and Hyams, for the appellant, contended that the notice of protest in this case was insufficient to bind the endorser, eiting Mechanics Bank v. Walton, 7 Rob. 452. Palmer v. Lee, 7 Ib. 538. Marsoudel v. Jacobs, 6 Ib. 283. Harris v. Allnut, 12 La. 467. The judgment of the court was pronounced by

SLIDELL, J. This is an action against J. T. Wells, as the endorser of several promissory notes. The respective certificates of notice are as follows: "I do hereby certify that the parties to the above note have been duly notified of the protest thereof, by notices to them by me addressed, dated on the day of said protest, and served in the manner following, viz: Menfort Wells, the drawer, and Thos. J. Wells, the endorser, at Alexandria, and at Cheneyville, Louisiana, having sent each two notices, which I put into the post-office of this city, in time to go by the first mail after said protest. In faith whereof, I have hereunto signed my name, together with A. C. Ainsworth and William Shannon, witnesses, at New Orleans, this twentieth January, 1845." Then follow the signatures of the witnesses and notary. All are in the same terms, except that in one is used the equivalent expression 'thereafter,' instead of 'after said protest.' In every case the date of the certificate of notice is the same day as that of the maturity of the note, with a single exception, which will be hereafter noticed.

The objection made is that, under the statute, the notary should state at what time he put the notice into the post-office, so that the court may judge whether the notice was timely; and that as to the notice being in time or not for the first mail, a simple declaration of the notary to that effect is not sufficient. It is very true that the notary should state the date at which he mailed the notice, but the enquiry is, has he done so in this case ? The certificate is to be considered, in all its parts. The date of the protest and the date of the certificate are the same. In certifying, on the 20th January, 1845, that the endorser had been notified of a protest made on that day, the notary undoubtedly certifies that the notice was mailed on that day. When he makes and signs his certificate, the act of mailing has been done. He certifies an act done, and not an act to be done. To dispute this, and say that the notice may not have been mailed until after the certificate was signed, is to declare the certificate false. The certificate is unimpeached by other evidence, and we consider it as showing that this notice was mailed on the day of protest. As to the argument that the notice eaght to have been mailed the day after the protest, if it be meant to object to the notice as being given too early and too diligently, we can only say that we cannot believe such a point to be put seriously.

As to one of the notes there has been lackes. It was due on the 20 December, 1844, and was not protested, nor notified, until the 20 January, 1845. The personal liability of the endorser is therefore discharged; but as he united with the maker in a mortgage of certain property, of which they were joint owners, to secure the payment of this note, the plaintiff is entitled to the benefit of his mortgage.

Kenn Walls It is therefore decreed that so much only of the judgment appealed from be reversed, as condemns the appellant, Thomas J. Wells, personally, to pay the sum of \$2,205 91, with interest from 20 December, 1844, being the amount of the promissory note of said M. Wells, endorsed by said Thomas J. Wells, for \$2,205 91, dated August 31, 1842, and payable 17-20 December, 1844; and that upon so much of the plaintiff's claim against the said defendant personally, as is founded on said note, there be judgment in favor of the said defendant, Thomas J. Wells. And it is further decreed that so much of the said judgment as recognises a mortgage in favor of the said plaintiff upon the property mortgaged by the said M. Wells and Thomas J. Wells be amended, only as to the allowance of interest upon the note herein above described, so as to allow said interest only from the 20 January, 1845, upon the said sum of \$2,205 91. And it is further decreed that, in all other respects, the judgment appealed from be affirmed; the plaintiff paying the costs of this appeal.

Brown v. Brown.

Dotal property is inalienable during marriage. Where a husband has sold paraphernal property of the wife's during marriage, and the action of the wife to recover it would give rise to a claim in warranty against him, prescription will be suspended during the marriage.

C. C. 3491.

A PPEAL from the District Court of Rapides, Cushman, J. Flint, Mc Waters and Ryan, for the plaintiff. Waters, for the defendant and appellent. Evans, Gordon, O. N. Ogden and Edelen, for the parties cited in warranty, who also appealed. The judgment of the court was pronounced by

Rost, J. The plaintiff claims from the defendant one hundred arpents of lind, given-her by her father in a marriage contract, and subsequently sold by her husband. The defendant claims under a regular chain of conveyances ascending to the husband; pleads the prescriptions of ten, twenty, and thirty years; and has cited in warranty the legal representatives of John Harris Johnston, his vendor. These last have cited in warranty the legal representatives of Josiah S. Johnston, who have themselves cited James Byers.

There was judgment in favor of the plaintiff against the defendant for the land, and a consent decree was entered in favor of the defendant against the legal representatives of John H. Johnston, for the sum of \$500. A judgment was entered for the like sum in favor of each of the warrantors, against his immediate vendor. The defendant and the warrantors have appealed.

There is no error in the judgment so far as the plaintiff is concerned. If the property was dotal, it could not be alienated during marriage. If, as we are inclined to believe, it was paraphernal, the husband sold it during marriage, and the action of the wife to recover it would have given rise to a claim in warranty against him. Whenever this is the case, prescription is suspended during marriage. C. C. 3491.

Under the compromise entered into between the defendant and the legal representatives of John H. Johnston, judgment was properly entered in his favor against them; but no judgment should have been rendered against the

subsequent warranters. The defendant, Brown, had previously held the land, and all the parties cited in warranty claim under him. He could not maintain an action of warranty; and the fact that his last vendors saw fit to buy their peace cannot affect the right of the other parties to the suit.

It is therefore ordered that the judgment be amended, and that there be judgment in favor of the legal representatives of Josiah S. Johnston against the legal representatives of John H. Johnston, and also in favor of James Byers against the legal representatives of Josiah S. Johnston. It is further ordered that the judgment as amended be affirmed, with costs.

BROWN.

Union Bank of Louisiana v. Brewer et al.

Where a note appears on its face to have been altered in a material part, the amount and place of payment being written over erasures, rendering the note suspicious. in an action on it by a bank by which it had been discounted, against an accommodation endorser, not shown to have delivered the note to the bank, plaintiffs must prove that the alterations were made under circumstances which will render the note available. Erasures in a note will be presumed to be false.

A PPEAL by the defendant Chambers, from a judgment of the District Court of Rapides, Cushman, J. Taylor and Swayze, for the plaintiffs, contended that an endorser warrants the genuineness of the instrument, and that it is incumbent on him to prove that any alterations in the instrument, apparent on its face, were falsely or fraudulently made. Waters, for the appellant, cited Chitty, 212; Bailey, 98, 99; 19 Johnson, 391, to show that it was incumbent on the plaintiffs to prove that the note was altered under circumstances to render it available against the parties. The judgment of the court was pronounced by

SLIDELL, J.* The defendant Josias Chambers is sued as endorser of a promissory note made by Brewer, to the order of, and endorsed by, Ralph Smith, by Chambers, and by Spurlock. The defendant pleaded the general issue; and also that, since he endorsed, a material change has been made in the instrument apparent on its face, and that such alteration has destroyed his liability. The defendant asked for a trial by jury, which was refused. The case was tried by the court, judgment was given for the plaintiffs, and the defendant Chambers has appealed.

The note has been brought up in original for our inspection. It is in these words:

"\$1500. Alexandria, October 31, 1840.

"Twelve months after date I promise to pay to the order of Ralph Smith, the sum of fifteen hundred dollars, for value received, payable and negotiable at the office of discount and deposit of the Union Bank of Louisiana, at Avoyelles

F. W. Brewer.

"Credit the drawer.

Endorsed, R. SMITH.

" J. C.

JOSIAS CHAMBERS.

J. D. S.

JAMES D. SPURLOCK."

In the body of the note between the words "of" and "hundred dollars," the word "fifteen" is written on a grossly palpable erasure. The surface of the

^{*} Eusris, C. J., did not sit, having an interest with the plaintiffs.

Union Bana Brawer. paper has been abraded, and the letters composing the word are spread or blotted. At the head of the note the figure "1" has the appearance of being crowded between the mark "\$" and the figures "500." After the words "payable and negotiable at the office of discount and deposit of the Union Bank of Louisiana at," there is a palpable abrasion and crasure, over which is written the word "Avoyelles."

Three cashiers of banks have been examined, who all state that they would not have discounted a note having such an appearance. They concur as to the evident alteration of the note. The purport of their testimony as to the handwriting is, that the whole body of the note, except the month and day of the month, is in the hand-writing of Brewer; also the words "credit the drawer" at the foot of the note; and that the endorsements are genuine. One of these witnessess states that he believes the initials under the word "credit the drawer," to be in the proper hand-writing of the endorsers. It was admitted by the plaintiffs that the words "October 31" were written by Coco, the then cashier of the Union Bank, at its branch at Avoyelles. This cashier was examined by the plaintiffs under commission. He states that the note was discounted for the credit of Brewer, and in renewal of a note of the same amount given the year previous with the same endorsers, with the exception of Smith, who was not a party to the farmer note; that the praceeds of the discount were placed to the credit of Brewer; that there has been no erasure or obliteration in any part of the note since it came into the bank's possession; that if any alteration was made, it was done before its being discounted, and that it has remained in the bank's possession ever since the discount. It is to be observed that the plaintifis' interrogatories to their own agent, and his answers, are entirely silent as to any direct communication of himself with Chambers, at the time of the discount. In the absence of any statement by the cashier upon this subject, and looking to the face of the note and the nature of the transaction, the inference is reasonable that the note was not brought for discount by the endorsers, or any of them-at all events, not by Chambers, the second endorser; and that Brewer, for whose account it was discounted, and to whose credit the proceeds went, brought the note to the cashier in the condition which it now presents. It is also in evidence that Brewer has left this State and is living in Texas, under the name of Paschal.

In our opinion the court below erred in giving judgment against Chambers. The alteration in a substantial part, which is grossly patent on the face of the instrument, detracts from its credit and renders it suspicious; and this suspicion the plaintiffs, claiming under it against an accommodation endorser, who is not shown to have delivered it to the bank, were bound to remove. In such a case, it is for the holder to prove, and not for the defendant to disprave, that it was altered under circumstances which will make it still available. The bank has failed to do so. It has failed to interrogate its cashier as to who brought the note for discount, and that agent has been silent on this point, leaving uncontradicted the reasonable inference that it was placed in the cashier's hands by the maker. It is also a suspicious circumstance that the bank should have slumbered on its claim for four years, before bringing this action. We think this a proper case for the application of the principal recognised in McMicken v. Beauchamp, 2 La. 291. See also Greenleaf on Evidence, § 564. Chitty on Bills [*212], and the cases there cited.

The judgment of the court below is therefore reversed, and judgment is given for the defendant Chambers, with costs in both courts.

THE STATE v. FANT.

The jurisdiction of the Supreme Court in appeals in criminal cases being confined by the constitution, art. 63, to questions of law alone, the judge of the inferior court is not bound in any case to make a statement of facts. The questions for the decision of the Supreme Court must be presented by bills of exception or assignments of error. The stat. of 30 May, 1846, soc. 8, which provides that, in certain criminal cases, "an appeal may be taken on behalf of the accused, returnable to the Supreme Court as in civil cases," does not alter in any respect the method of trial or rules of proceeding in the inferior court, merely providing for bringing the case before the Supreme Court by appeal, in contradistinction to the proceeding by writ of error.

It is no objection to an indictment under the stat. of 2 April, 1832, against a person for selling intoxicating liquors to a slave without the consent of his master, that the accused is described as a "trader in goods, wares, and merchandize, and spirituous ar intoxicating liquors."

An indictment under the stat. of 2 April, 1832, against a person for selling intexicating liquors to slaves, which charges that the accused "did unlawfully sell, give, and deliver in payment, and cause to be sold, given, and delivered in payment" spiritous or intexicating liquor, is not defective on the ground of repugnance or duplicity in the allegations. Per Curiam: The allegations are merely cumulative. A general verdict of guilty on such an indictment would be sustained by proof of any one of the acts charged.

A PPEAL from the District Court of Rapides, Cushman, J. Barry, District Attorney, for the State. O. N. Ogden and Ryan, for the appellant. The judgment of the court was pronounced by

King, J. The defendant was indicted under the act of 1832, (Acts, p. 162,) for selling spirituous and intoxicating liquors to a slave, without the consent or authorisation of the owner, or other person having lawful charge of the slave. Upon conviction, the maximum punishment annexed to the offence by the statute was awarded by the sentence of the court, and the defendant has appealed.

An application has been made by the defendant for a mandamus ordering the district judge to make a statement of facts, to which it is contended he is entitled as on appeals in civil cases. The act of 1843, (Acts, p. 60, § 2,) creating a Court of Errors and Appeals in Criminal Cases, conferred on that tribunal appellate jurisdiction, with power to review questions of law, which questions the statute required to be presented by bills of exception taken to the opinion of the judge of the lower court, or by the assignment of errors apparent on the face of the record. This statute was repealed by the act of the 26th May, 1846; and the act of the 30th of May of the same year, (Acts, p. 100, § 8, 9,) provides that, in criminal cases in which appeals are allowed, they "may be taken on behalf of the accused from such judgment, returnable to the Supreme Court, as in civil cases." The defendant contends that the only statute requiring that the questions of law to be raised by the appellate court should be presented by bills of exception or assignments of error having been repealed, and provision having been made that the cause is to be brought up by an appeal as in civil cases, he is entitled, as an incident to the appeal, to a statement of facts as a means of enabling this court to review the questions which he desires to present. We do not understand this statute as altering in any respect the method of trial, or rules of proceeding in criminal cases in the inferior court, previous

BTATE V. FART. to judgment. It provides alone for bringing the case before the appellate court for revision, which is to be done, as in civil cases, by an appeal, in contradistinction from a writ of error. By the well known rules of criminal proceedings, the evidence introduced on the trial before the jury is not reduced to writing, and, if it were, we would be without authority to pronounce upon it. A statement of the facts proved on the trial would be only a substitute for the evidence itself, which we are not permitted to examine. The constitution confers appellate jurisdiction on this court "in criminal cases, on questions of law alone." Art. 63. Those questions should be presented by bills of exception or assignments of error. The practice, in this respect, stands unaffected by the repealing statute of 1846, and the necessity for observing it results as a necessary consequence, from the constitutional limitation of the jurisdiction of this court to questions of law alone. The application for a mandamus is therefore refused.

Several objections were made to the sufficiency of the indictment, on a motion for an arrest of judgment. The first is, that the defendant is averred to be a "trader in goods, wares, and merchandise, and spirituous and intoxicating liquors," no such person being known to the law. 2d. That there is no allegation that the offence was committed against the consent of the owner of the slave. 3d. The indictment charges in one and the same count, and as one substantive offence, that the defendant "did actually sell, give, and deliver in payment, and cause to be sold, given, and delivered in payment," spirituous and intoxicating liquor, all of which constitute distinct offences.

I. Among the different persons to whom the prohibitions of the statute extend, "traders" are enumerated. It is no objection to the averment in the indictment, that it specifies the particular class of traders to which the defendant belonged.

II. The averment in the indictment is a sufficient answer to the second objection. It is alleged, in the language of the statute itself, that the defendant sold &c., "without the consent and authorisation therefor of the said Mrs. Henrietta Hooper, the owner of said slave," &c.

III. There is no repugnance or duplicity in the allegations of the indictment. They are merely cumulative; the offence charged is the same. A general verdict of guilty on such an indictment would be sustained by proof of any one of the acts charged. A count charging that the defendant published and caused to be published a libel, has been held not to be pleading double, the offence being the same. So when the indictment charged the defendant with composing, printing, and publishing a libel, it was held that he could be convicted of the printing and publishing only. 2 East, P. C. 515, 516. 1 Starkie on Ev. 336. Archbold, Cr. Plead. 30.

THE STATE v. BOGAN.

Decision in State v. Fant, supra, affirmed.

A PPEAL from the District Court of Rapides, Cushman, J. Barry, District Attorney, for the State. O. N. Ogden and Ryan, for the appellant. The judgment of the court was pronounced by

King, J. The defendant has appealed from a judgment rendered against

him on a conviction for selling spirituous and intoxicating liquor to a slave, in violation of the act of the 2d April, 1832. • Sess. Acts, p. 162. He has applied for a mandamus directing the district judge to make up a statement of facts, to be used on the trial of this appeal. In the case of The State v. Fant, just decided, we determined that on appeals in criminal cases the accused is not entitled to a statement of facts, as a means of enabling this court to review the questions of law which he desires to present. The mandamus is, therefore, refused.

The objections made to the sufficiency of the indictment in this case are the same which were urged in the case of *The State* v. Fant. For the reasons assigned in that case, they must be overruled. The indictments in both cases are substantially the same.

Judgment offirmed.

INGRAM v. RICHARDSON et al.

To support a plea of litispendance, the parties, and the objects of the action, must be identical:

Proof of the pendency of proceedings against executors to enforce a sale of the assets of the succession to pay the claim of a plaintiff, will not support a plea of litispendance, in an action to establish the personal liability of the widow, and the liability of the beneficiary heirs, by reason of their acceptance of the succession and community, and of their having taken the property in their possession. C. P. 335.

A widow in community, who has taken the property of the succession into her possession, was suable in courts of ordinary jurisdiction under the organization of the courts anterior to the constitution of 1845; and an action might have been maintained in those courts against minor heirs, represented by their tutrix.

Acceptance of service of a petition and waiver of citation, made by the attorney at law of a defendant, are sufficient.

The word "attorney" in art. 177 of the Code of Practice means attorney at law, and not attorney in fact.

Where, in an action against beneficiary beirs, judgment was rendered against them "as the children of the said R. W. deceased," the whole context of the judgment must be considered in interpreting it; and where, so interpreting it, its legal effect is that of a judgment against them to be satisfied out of their patrimonial estate, it will be considered as such.

A PPEAL from the District Court of Rapides, Cushman, J. Elgee and Hyams, for the plaintiff. The atterney at law of an executor may accept service of petition and waive citation. C. P. 177. 8 Mart. N. S. 233. The minors, being properly represented on the trial of the cases in which judgments were obtained, their only remedy was by appeal. 4 Mart. N. S. 415. 5 Ib. N. S. 165. 8 Ib. N. S. 233. 7 La. 17, 223. 3 Rob. 69. Flint and Mc-Waters, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff alleges that, in the year 1842, he obtained judgment against the estate of Richard Winn, represented by Moore and Neal, executors, upon debts contracted by the deceased; that since the rendition of the judgments the executors have delivered up all the estate of Winn to his widow, now Mrs. Richardson, and her husband Richardson, in their own right and as tutrix and co-tutor of Winn's minor children. He prays for judgment against the minors in solido, and against the widow in community, for the amount of the judgments above mentioned, and for general relief. There was a judgment for plaintiff in the court below, and the defendants have appealed.

INGRAM W. RICHARDSON.

The first appearance of the defendants in the cause was by way of exception, They declined answering to the merits, and prayed to be dismissed, on two grounds: first, that the District Court was wholly without jurisdiction of the suit; and, secondly, the pendency of a suit in the Court of Probates, brought by the plaintiff against the executors, to enforce the payment of the same judgments. The suit in the Court of Probates, to which reference is made in the above exception, was a proceeding in which Ingram prayed for an order of that court to the executors, commanding them to sell sufficient property of the succession for cash to pay his claim, and to render an account of their administration. In that suit the executors answered that they had been discharged from their executorship by a decree of the Court of Probates, had rendered an account to the widow and heirs, and in obedience to the decree of the court had surrendered all the property of the succession to them. Upon these issues the Court of Probates dismissed the suit, stating as the ground for its decree that, it appeared to the satisfaction of the court that the executors had been discharged as such, and had surrendered all the property and effects of the succession to the widew and tutrix. From this decree Ingram appealed, and the appeal was still pending when this suit was brought.

The exception of littspendance is not well taken. The parties, and the object of the actions, are not identical. In the former case it was a proceeding against the executors, to enforce a sale of assets of the succession to pay the plaintiff's claims. In the present, the plaintiff seeks a judgment decreeing the personal liability of the widow, and the liability of the beneficiary heirs, by reason of their acceptance of the succession and community, and of their having taken its property into their possession. See C. P. 335.

As to the jurisdiction of the District Court, it is too clear to admit of any discussion, that the widow in community, who had taken the property of the succession into her possession, was suable in a court of ordinary jurisdiction; and upon the authority of the case of Saunders v. Taylor, 6 Mart. N. S. 521, the suit could also be maintained there against the minors represented by their tutrix. We may remark that in the present case this question of jurisdiction is practically a mere question of costs; for although the exception was heard and overruled in 1845, the trial of the cause on the merits took place in 1847, before the District Court as organised under the constitution of 1845, and clothed with plenary jurisdiction over minors and successions.

The exception having been overruled the defendants answered. The answer contains no plea of general denial, but is a special plea of the nullity of the judgments obtained in the Probate Court, upon the following grounds: That no citation ever issued to, or was served upon, either of the executors; that neither of them ever authorised any person to acknowledge, or waive, service of citation; and that neither of them ever entered an appearance, or joined issue, in those suits.

The facts material to the decision of the issue thus made are, that Brent & Ogden, licensed attorneys and counsellors at law, signed a written acceptance of service and waiver of citation, upon the original petitions of record in those suits. This would of itself suffice. The 177th article of the Code of Practice authorises an attorney to acknowledge service. It is erroneously argued that by "attorney" is there intended an attorney in fact. The french text sets all doubt at rest, by using the expression "avocat." We had occasion in the case of Conrey v. Brenham, 1 An. Rep. 397, to say that, an acceptance of service

INGHAM

BICHARDSON.

by the atterney of record of a citation of appeal, will be presumed to be authorised by his client, in the absence of contrary proof. We considered the rule as warranted by a consideration of the dignity of the profession, and the necessity, for the convenient administration of justice, that great confidence should be reposed in members of the bar. It is to be remembered, too, that what is done by an attorney at law is done under the solemnity of his eath of office; and the allegation that he has violated his professional duty, by acting for a party without authorisation, ought not to be lightly made.

In the present case, the plaintiff has not thought proper to rest the matter solely upon the acceptance signed by Brent & Ogden, but has offered evidence which shows that those gentlemen have not been guilty of a breach of professional duty. Mr. Brent, being examined as a witness, says he thinks he spoke to Moore, the executor, and that he authorised him to waive service. That if he had no special authority, he had a general authority to represent the executors in all matters connected with the interests of the estate. The testimony of this witness, and of another, satisfies us also that Mr. Brent was present when the causes were tried, and the judgments taken, in the Court of Probates. Moore, the executor, swears that Brent & Ogden, "were fully authorised by him to exercise their own discretion in all legal matters brought either in favor of or against the estate;" that he had entire confidence in them; and that whatever was done by them, in the capacity of attorneys, received his sanction, although he does not recollect if he gave them special authority to waive service in these particular cases. This witness also states his belief that he promised to pay these judgments; and this statement is corroborated by another witness, who declares that Moore, as executor, often promised to pay the judgments; but begged indulgence until a crop could be made. At his solicitation suits were brought, and judgments obtained, against the parties primarily liable upon the obligations endorsed by Winn, and upon which the judgments against his succession were obtained. Richardson also solicited that execution should be issued against those parties.

As to the objection that the judgments were rendered without appearance or issue joined by the executors of Winn, it is entitled to no weight. Judgments by default were duly entered, and the causes were tried in the presence of the counsel of the executors. If there were any informalities on this score between citation and decree, the decrees cured them. We cannot now look behind the decrees to discover informalities, which, if they existed, should have been examined by appeal.

We are clearly of opinion that the grounds of nullity set forth in this answer, are not only untenable, but frivolous.

There was an amended answer which, like the first, contains no general denial, but a mere special plea, in which a further ground of nullity is alleged. The plea in substance is, that the note and draft upon which the two judgments were obtained, were merely collaterals, or means of payment of a note of Wright & Robert, endorsed by Briggs and by Winn, due in 1839; that the knowledge of this fact rested only with the plaintiffs, after Winn's death, and was fraudulently concealed from the heirs and representatives of the succession. The evidence on this point is that, when the new note and draft were given to Ingram, the old note, by the agreement of Ingram, Robert, Wright and Winn, was deposited in the hands of Ingram's attorneys, as a collateral security, "not to be given up until the draft and note were paid." A receipt setting forth-the

INGRAM P. BICHARDSON.

amount was given at the time to Ingram by his attorneys, and the old note was retained in their hands as a collateral security. If the parties chose to put the old debt in the new form of a note and draft, and make the old note a collateral security instead of a principal obligation, they had a right to do so, and must be bound by their agreement.

The charge of fraud and malpractice made in this amended answer, is unsupported and unjust: If any one has a right to complain in this litigation it is the plaintiff, who has been struggling for so many years to collect a just debt, and whose efforts up to the present time have been unavailing.

The question is put by the defendants in argument, whether a judgment rendered against executors constitutes evidence against, and is binding upon, the widow in community and heirs. But this question is not raised by the answer, and cannot be considered. The defence was placed in the answer solely upon the nullity of the judgments, setting forth the special grounds of nullity.

Objection is made to the form of the judgment, being, it is said, an absolute judgment. If it be absolute against the wife for one-half of the debt, it is properly so; for she has accepted the community and taken it into her possession, to an amount far exceeding the plaintiff's claim. As to the minors, we do not consider it absolute. It is against them "as the children of the said Richard Winn, deceased." The whole context of the judgment must be considered in interpreting it. So interpreting it, its legal effect is a judgment against the minors, to be satisfied out of their patrimonial estate.

Judgment affirmed .-

HOPKINS et al. v. JOHNSON.

Where on the dissolution of a partnership one of the partners parchases the "other's interest in the partnership books and accounts," making the books the basis of the settlement and purchase of that interest, and it appears from entries in the books made by the latter before their sale; that a third person, to pay a debt due by whom a note had been executed by the selling partner in the name of the partnership, had advanced to the partner ship a sum of money a little less than the amount of the note, and that the partnership had assumed to pay the debt, the facts will amount to a ratification of the act of the partner by whom the note was executed, and the parchaser of the partnership books and accounts will be bound for the note, though not originally liable, as it was executed without his authority, and not in the business of the firm.

A PPEAL from the District Court of Rapides, Cushman, J. Elgee and Hyams, for the plaintiffs, cited Civil Code, art. 2845. 1 La. 390. 13 La. 197, 488. Waters, for the appellant, relied on Kent's Com. vol. 3, p. 40 et seq. The judgment of the court was proneunced by

SLIDELL, J. Johnson is sued upon two notes, signed by Johnson & Hazard, to the order of plaintiffs. He resists the action upon the ground that, the notes were signed by Hazard without his authorisation, and not in the business of the firm.

At the date of these notes the defendant and Hazard were partners in the business of druggists, at Alexandria, under the firm of Johnson & Hazard. The notes were signed by Hazard, at New Orleans, and were given to the plaintiffs in settlement of a debt due by Preston & Bleakley, to the plaintiffs.

Horgins o. Johnson.

The only information with regard to the origin of this matter is derived from the commercial books of Johnson & Hazard, offered in evidence by the plaintiffs, and from an admission made by Johnson at the trial. It appears, according to the books, that Preston had advanced a sum of money, a slittle less than the amount of these notes, to Johnson & Hazard, who assumed to pay Preston's debt to the plaintiffs. The entries, which were made by Hazard, appear to have been made irregularly, that is to say, nearly a year after the date of the notes. The admission at the trial was, that Hazard had really borrowed the money from Preston, and promised to take up the debt due to plaintiffs; but this admission only went to Hazard's liability, and not to acknowledge that Hazard had told Preston, at the time, that he borrowed the money for the account of his house, and that his house would assume the debt due to plaintiffs.

It is unnecessary to determine whether the firm of Johnson & Hazard was originally bound. We are of opinion that the subsequent conduct of Johnson precludes him from contesting the liability of the house, and of himself, as a commercial partner. After these entries were made in the books, exhibiting the loan by Preston, and the assumption in favor of the plaintiffs, who were formally credited, Johnson, upon the dissolution of the firm, bought out, to use the language of the witness, "Hazard's interest in the partnership books and accounts," and took the books and partnership assetainto his possessession. Having taken the assets, and made the books, as we may fairly infer from the evidence, the basis of his settlement and purchase of Hazard's interest, he must be bound by them. The execution of the notes in the name the of house established a prima facie case against the firm; and conceding that the evidence, which has been offered to contradict that presumption, may create a doubt as to the authority of Hazard to bind the firm at the time, yet the case exhibits a subsequent approval and ratification by his partner.

Judgment affirmed.

LYNCH v. KITCHEN et al.

A jundgment of non-snit will not support a plea of res judicata.

Land subject to a mortgage was sold by the mortgagor to defendants, who sold to a third person, by whom the land was sold to a fourth, who was evicted by a sale at the suit-of the mortgagee. Plaintiff having acquired at a judicial sale the claim of the last purchaser against his vendor, this vendor subrogated the last purchaser to all his rights of warranty against defendants, and the last purchaser subrogated the plaintiff to all his rights of action against his vendor, and against defendants. Held, that plaintiff action cannot be defeated on the grounds, that defendants' vendee had no cause of action against them until he was himself injured by eviction, and that he could not assign a right-which he had not. Per Curiam: We see no objection to the subrogations under which plaintiff claims; they promote the ends of justice, and tend to prevent a multiplicity of suits.

Creditors can exercise all the rights and actions of their debtors, except those reserved in arts. 1986, 1987 of the Civil Code. The reservation does not embrace actions of warranty. Where an act of mortgage contains the pact de non altenando it is not necessary that the party

in possession abould be apprized of the seizure, nor is it necessary that the latter should notify his warrantors, in order to preserve his recourse against them. Per Curiam: The defence which warrantors can make against an action of mortgage is not such as would in any case release them from their warranty. C. C. 2494.

LYNCH P. KITCHER. One subregated to the rights of a purchaser who has been evicted, is entitled to recover from his warrantors any part of the price which the purchaser had paid at the time of his eviction.

Where a husband joins in an act of sale of real property made by his wife merely for the purpose of authorising her, the purchaser, in case of eviction, can recover judgment only against her.

A PPEAL from the District Court of Rapides, King, J. O. N. Ogden and Thomas, for the the appellant. Flint, Dunbar, Hyams and Elgee, for the defendants. The judgment of the court was pronounced by

Rost, J. This is an action of warranty. The plaintiff having obtained judgment for a portion of his claim only, against *Harriet Kitchen* and her husband jointly, has appealed. The defendants ask that the judgment be reversed, and that if the plaintiff's claim is maintained for any amount, they may have judgment for the like sum against *Philip M. Cuny*, their warrantor.

In 1834, Philip M. Cuny mortgaged to the Canal and Banking Campany a tract of land and some slaves, to secure a loan of \$3000. Shortly after he sold the land to the defendants, who, in 1836, sold to P. J. Hunter, who in his turn sold to Wm. L. Gray, in 1838, and while in the latter's possession the land was, in 1842, bought at sheriff's sale by the Canal Bank, under an order of seizure obtained on the mortgage given by Philip M. Cuny. After the sale Wm. L. Gray instituted an action of warrants against his vendor, Hunter. Hunter called in warranty the defendants, who excepted to the form of action, and prayed that it might be dismissed, without requiring them to answer to the merits. The exception was sustained, and the plaintiff having subsequently failed to appear to prosecute the principal action, it was dismissed at his costs. In December, 1842, the plaintiff in the present suit acquired at sheriff's sale all the interest, right, title, claim and demand of Wm. L. Gray against P. J. Hunter, in warranty or otherwise, by reason of, or arising from, a sale of the land purchased by the bank, made to him by the said Hunter, on or about the 23d of March, 1838. On the day of sale, Hunter executed in favor of Gray, a deed, subrogating the said Gray to all his rights and actions of warranty against the defendants. Subsequently Gray subrogated the plaintiff to all his rights of action against Hunter and his vendors.

The defendants excepted to the plaintiff's action on the ground, that his vendee, *Hunter*, had no cause of action against them until he was himself injured by eviction, and could not assign a right which he had not. They further alleged that there had been a judgment in their favor on that point in another suit, which was res judicata between them and the plaintiff.

We are of opinion that this exception was properly overruled. The main action never went to trial in the case of Gray v. Hunter, and the decree was nothing more than a judgment of non-suit. When the plaintiff failed to appear Hunter could not proceed with the suit, and orders previously made have not against him the force of the thing adjudged. We see no legal objection to the subrogations under which the plaintiff claims; they promote the ends of justice, and tend to prevent a multiplicity of suits. We are not prepared to say that there was no privity between William L. Gray and P. J. Hunter, by virtue of which the defendants might be reached. Creditors can exercise all the rights and actions of their debtors, except those reserved in articles 1986 and 1987 of the Civil Code. The reservation does not embrace actions of warranty.

The defence on the merits cannot avail the defendant Harriet Kitchen. The act of 1824, authorising parish judges to grant orders of seizure in certain Kitches. cases, does not appear to have been repealed for the parish of Rapides; and the fact that the order issued for one year's interest too much, cannot affect the validity of the sale. The defendants' counsel expressly admit in their brief, that the land was bought by the Canal Bank. It is so stated in the sheriff's return on the writ, and the agent of the bank swears that the bank now holds it, by virtue of that purchase. Under that evidence, we must take that fact as true. without regard to the mode in which the adjudication was made. The act of mortgage under which the eviction took place containing the pact de non alienando, the possessor was not necessarily apprised of the seizure, and could not be required to give notice of it to the defendants; if he had done so, the defence which warrantors can make against an action of mortgage is not such as would in any case release them from the waranty. Civil Code, art 2494. Carter v. Caldwell, 15 La. 472.

The defendants have asked that if judgment be rendered against either of them, they may be authorised to satisfy it by returning the land. It is proved that William L. Gray has ceased to occupy the land, since the adjudication to . the Canal Bank. The eviction is complete, and the rights of the parties are fixed. Had the land been tendered to the plaintiff, we could not compel him to accept it. But it is proved to be still the property of the bank, and the application of the defendants has nothing to rest upon. William L. Gray has been evicted, and, under the decision in Carter v. Caldwell, which we believe to be correct, his assingnor is entitled to recover any portion of the price which Gray had paid at the time of the eviction.

The act of sale from Hunter to Gray establishes the fact that the latter paid \$3,258, cash; nothing in the record shows the balance of the price to have been paid, and no damages are proved, except those due in the shape of interest on the price since the eviction.

The defendant, Harriet Kitchen, alone purchased the land from P. M. Cuny; her husband had no title to it, and could convey none; he joined in the act of sale to Hunter to authorise his wife, and the judgment should have been rendered against the wife alone. We are of opinion that she is entitled to the judgment claimed against her vendor, Philip M. Cuny.

It is ordered that the judgment in this case be reversed; and that there be judgment in favor of the plaintiff against the defendant, Harriet Kitchen, wife of Casar J. Cuny, for the sum of \$3,258, with legal interest from the 6th day of August, 1842, till paid, and costs in both courts. It is further ordered that Harriet Kitchen recover from Philip M. Cuny the sum of \$3,258, with legal interest from the 6th day of August, 1842, till paid, and costs in both courts. It is further ordered that there be judgment in favor of Casar J. Cuny.

WEATHERSBY v. HUDDLESTON et ux.

Where a party is required to answer interrogatories in open court. a day must be appointed for that purpose, and he must be notified thereof unless present at the trial or when the order was made, or, in case of failure to answer, he cannot be considered in default, nor can the interrogatories be taken for confessed. C. P. 351.

WEATHERSBY A clerical error in the name of a plaintiff, in whose favor judgment was rendered in an inferior court, may be corrected on appeal.

> PPEAL from the District Court of Rapides, Cushman, J. Leckie and Elgee, for the plaintiff. Q. N. Ogden, for the appellants. The judgment of the court was pronounced by

> Kine, J. The defendants, who are husband and wife, are sued as the joint and several makers of a promissory note. The plaintiff annexed to his petition interrogatories, addressed to the wife, the object of which was to elicit from her an acknowledgment of her signature, and that the consideration of the note was a separate debt due by herself. The prayer was that the interrogatories should be answered in open court, and, on motion of plaintiff's counsel, a day was appointed by the court for that purpose; but of the time fixed she received no notice. The interrogatories not having been answered on the day named were taken as confessed. A judgment was rendered against both of the defendants in solido, from which they have appealed.

> When a party is required to answer interrogatories in open court, unless he be present at the trial or when the order is made, a day must be appointed for him to appear, and of that day he must be notified, before he can be considered in default, and the facts unanswered be deemed confessed. A different rule would expose parties to surprise, more particularly in cases when no appearance has been made, as occurred in the present instance. C. P. art 351. 2 La. 73. 7 La. 335. 10 La. 416. Spears v. Nugent, ante p. 11.

> No other testimony was offered in support of the claim against P. Huddieston, the wife. As to her, the judgment must be reversed; and on the authority of the case of Fink, Executor, v. Martin, 1 Ann. Rep. 117, we will not render a judgment of non-suit, but remand the cause for further proceedings. The demand against Isaac Huddleston is fully proved; but it is objected that the name in which the plaintiff sues is George M. Weathersby, and that the judgment is rendered in favor of John M. Weathersby. This is clearly a clerical error, which may be corrected in this court.

It is therefore ordered that the judment of the District Court, as far as rerelates to the defendant, Polly Huddleston, be reversed, and that the cause, as to her, be remanded for further proceedings according to law. It is further ordered that, as regards Isaac Huddleston, said judgment be amended by rendering the same in favor of George M. Weathersby instead of John M. Weathersby; and, in other respects, that said judgment be affirmed; the plaintiff paying the costs of this appeal.

ROBINETT et al. v. Compton et al.

Where one of two witnesses to an act sous seing prive is proved to be dead, and the other to have become disqualified, since he attested the act, by marriage with one of the parties interested under it, the instrument will be admitted in evidence on proof of the signatures of the witnesses.

Actual knowledge, by a purchaser, of an existing mortgage or title, is equivalent to a notice resulting from a registry of the mortgage or title. Per Curiam: If a party have knowledge of that of which it is the purpose of the law to notify him by causing an act to be recarded, he will be as much bound by his personal knowledge as if his information were derived from an inspection of the record.

In all forced alienations of property under the authority of judicial proceedings, all the delays and formalities required by law must be strictly complied with; under pain of nullity.

The return of a sheriff or other ministerial officer, in relation to sales made by him under execution, is prima facic evidence between the parties. The presumption of law is in favor of the legality of their preceedings; but, like other presumptions, it must yield to contrary proof.

Where a purchaser produces a judgment, execution, and a sale made to him under it, this is prime facie sufficient, and all previous proceedings will be supposed to be correct; the burden of proof will be on the party attacking them.

Previous to the stat. of 18 March, 1820, fixing the jurisdiction of Courts of Probate, the District Courts were not without jurisdiction, rations materia, of an action against the surviving partner of a community, and the tutrix of the minor children of the deceased, to recover a debt due by the deceased.

A sale of immovable property made under execution, on the thirtieth day after the advertisement thereof, was legal under sec. 14 of the stat. of 25 January, 1817. Per Curium: The rule adopted at that time in computing time, was to exclude one day and include the other.

While the stat. of 18 March, 1820, relative to Courts of Probate, was in ferce, an action instituted in a court of ordinary jurisdiction against a curator, executor, or tutor, must have been dismissed, if excepted to for want of jurisdiction; but where judgments have been rendered, under such circumstances, without any exception to the jurisdiction; they will not be treated as nullities.

Before the promulgation of the Code of Practice, an action against a lessee did not terminate by the defendant's citing his lessor in warranty; but the only question which could be tried between the plaintiff and defendant after the lessor had been cited and made default, was that of possession.

PPEAL from the District Court of Rapides, Murray, J. The facts of this A case are stated at length in the opinion of the late Supreme Court, delivered by Garland, J., infré. Dunbar and Edelen, for the appellants. Brent, O. N. Ogden, Thomas, and T. H. Lewis, for the defendants.

GARLAND, J. The plaintiffs represent that they are the heirs and legal representatives of Isaac H., and Elizabeth Robinett, the former of whom died in the month of August, 1817, and the latter in the month of November, 1819. In the month of September, 1817, an inventory of the property in community between said Isaac and Elizabeth was made in legal form, which consisted of lands, slaves, and other property, estimated at the sum of \$67,610, all situated in the parish of Rapides. This estate consisted of a tract of land containing 3,120 arpents, situated on both sides of the bayou Bouf, and of a number of slaves named and described. They further represent that, at the date of the death of their ancestors, they were all minors; that the property to which they succeeded as heirs, could not be sold for less than its estimated value, nor in any other manner than by an order of the Court of Probates, or with their consent after arriving at the age of majority. They say that the said property has been so sold, and that they have never been legally divested of the same, but are entitled to the right and possession thereof. It is further represented, that four hundred arpents of the land, on the lower side of the tract on the left bank of the bayou Bouf, are in the possession of Josiah S. Johnston, who withholds the same, to their damage \$1,000; that another four hundred arpents, adjoining the above, have come to the possession of William Armstrong, who holds the same as agent of John P. Mc Neil, to their damage \$1,000; that another part of the said tract of land, having fifteen and one-half arpents front by the depth of eighty arpents, on the left bank of the bayou Bouf, and ten arpents front on the right bank of said bayou, with such depth as may be

Courton.

found in the survey, have come into the possession of Leonard B. Compton and John Compton, who withhold the same to their damage \$2,000. They further say, that six hundred and eighty arpents of said tract, having a front of seventeen arpents on the right bank of the bayou Bouf, by a depth of forty arpents, have also come into the possession of the said L. B., and John Compton, who occupy, and cultivate the same, and refuse to give up the possession, to their damage \$3,000.

Of the slaves composing the succession of their deceased father and mother, the petitioners allege, that John, Molly, Lucinda, Cornelia, Adeline, Chena, and Seraphine, have come into the possession of Tillman Lanier, who detains them to their damage \$2,000; and that Beckey, Felicité, Mary and Milly, have also come into the possession of said Tillman Lanier, who detains them, to their damage \$2,500. The petitioners therefore pray that the aforesaid defendants may be cited to appear, and decreed each to surrender to them the aforesaid tracts of land and slaves in their respective possession, with the increase of the slaves, and that they pay the damages claimed of them.

The defendants John, and L. B. Compton, and John P. McNeil, for answer to the petition, after a general denial, say, that the land they are sued for, as holders in their own right, they have a good title to, derived from the plaintiffs themselves, or their accestors, under judgments against them, and sales founded on them. They say that the judgments under which they claim title are legal and valid, are unappealed from, and are unreversed. That one of said judgments was rendered in the suit of John, and L. B. Compton, against the widow and heire of Isan H. Robinett, in the District Court of the parish of Rapides, and the other in the case of Davis, Bynum, Johnston, and Curtis, against Elizabeth Robinett. And John, and L. B. Compton, further answering say, as to the tract of land of six hundred and eighty acres, they are only tenants, it belong. ing to the heirs of Henry Clements, of New Orleans, whom they pray may be notified of this demand. These defendants further say, that they have each put valuable improvements on the lands in their respective possession; that they are possessors in good faith, under a just title; and, in case of eviction, are entitled to be paid for their improvements and expenses.

Leonard B. Compton, in a separate answer, says. he is the legal owner of the lands claimed of him and John Compton, and John P. McNeil; that he acquired a title thereto from Nelson Robinett, who obtained a title from Isaac H. Robinett, the ancester of plaintiffs; that his titles are authentic, and of record in the proper effice: wherefore he prays to be quieted in his possession and title.

Josiah S. Johnston answered by a general denial, and further by averring that he holds the land claimed by a good and valid title; that all the proceedings against the estate of Isaac H., and Elizabeth Robinett, which led to his title, are regular and legal. He further says that, as the surety of Mrs. Robinett, he was obliged to pay \$1,250, with interest and costs; that the plaintiffs, as heirs, have taken possession of the estate, and have not legally administered the same, whereby they have become liable to pay all the debts of their deceased father and mother; and he prays to hold them liable in person.

Tillman Lanier for answer says, that the slaves Beckey, Felicité, Mary and Milly, claimed of him, he holds as the overseer of Judge Mathews, who resides out of the jurisdiction of the court, and that he has no quality or right to contest the title; and he asks to be discharged from all responsibility on account of them; and that, as to those slaves, the suit be dismissed. For further an-





HORISETT U. COMPTON.

swor. he says, that he is the owner of the other slaves alleged to be in his possession; that he purchased them at a sheriff's sale, made under a judgment and execution against Nelson Robinett, in favor of the heirs of Henry Clements, which judgment was obtained on a mortgage given by said Nelson to Clements; that the proceedings on said mortgage, and the obtaining of said judgment, and making said sale, were all regular and legal, and his sale is duly recorded. He further says, that the heirs of Henry Clements obtained a judgment for a large sum against plaintiffs, on the original mortgage given to said Clements by Isaac II. Robinett, and that under it the property has been sold to satisfy said mortgage. He further says, that, if the father of plaintiffs ever had any title to the property, he had parted with it in his lifetime; and that it was, at the time of his death, the property of L. B. Compton; and he asks to be dismissed.

In March, 1811, Isaac H. Robinett purchased, by authentie act, of Henry Clements, a plantation and tract of land containing three thousand one hundred and twenty arpents, situated on both sides of the bayou Bœuf, in what was known as the Indian purchase, having twenty-five and one-half arpents front on the left side of the bayou, in descending, by a depth of eighty arpents, and a front of twenty-seven arpents on the right hand side, by a depth of forty arpents; also, thirty-two slaves, of different ages and sexes, together with all the stock of cattle, herses, hogs, sheep and farming utensils, for the sum of \$60,000, payable in ten annual instalments, and a mortgage was retained on all the property to secure the payment of the price. The last instalment became due on the 1st of June, 1821.

On the 1st September, 1814, Isaac H. Robinett, by authentic act, acknowledged himself indebted to Nelson Robinett, in the sum of \$33,398 26, with legal interest thereon, from the 19th February, 1813, in consideration of which sum, he (Isaac) sold to said Nelson the plantation and tract of land before described, with forty slaves, comprising all except two described in the deed from Clements to Isaac; also the cattle and horses, plantation utensils, &c., with a full subrogation of rights, privileges, &c., with warranty and delivery of possession, subject to the mortgage in favor of Clements before mentioned, which Nelson Robinett agrees to pay in full, if the property conveyed to him shall be sufficient. He further stipulates, to pay to Clements all the proceeds of the crops every year, reserving only sufficient to support said Isaac Robinett, his family and establishment. And said Nelson Robinett further stipulates, that if Isaac shall, on or before the 1st day of June, 1821, pay to him the aforesaid sum of \$33,398 26, with interest as agreed, that then, he (Isaac), "his heirs or assigns shall have the right of redemption of the said land and slaves and other property mentioned." and he (Nelson) obligates himself, his heirs, &c. to reconvey the aforesaid property to Isaac, whenever said sum should be paid.

When the aforesaid deed was made, the parol evidence proves that Nelson Robinett was living with Isaac, on the place, and that the former frequently said that the property was his, but that the latter continued to exercise control over it. On the 7th April, 1815, Nelson Robinett executed an act under private signature, in which, after reciting the execution of the act from Isaac to himself, which he calls "a mortgage," he obligates himself, under a penalty of \$60,000, to reconvey all the preperty therein mentioned to Isaac Robinett, when required, and to give him possession, saying that he is not at any time to prevent said Isaac, or his family, from enjoying the property, he (said Nelson) acknowledging that he had been fully paid and satisfied, in cash and property, the afore-

ROBINETT O. COMPTON.

said sum of \$33,398 26. The above receipt or counter letter, it seems, was kept quiet, and Nelson Robinett continued to claim the property after its date, and to reside on the place with Isaac, until the period of his death, in the summer or autumn of the year 1817. Sometime after the death of Isaac Robinett, Nelson had some difficulty with his widow and family, about the sale of some cotton, when he left the place, and went to reside with the defendants, Comptons On the 19th January, 1818; Nelson Robinett, by an authentic act, in consideration of \$6,000 cash, it is said, sold and conveyed to Leonard B. Compton, all the property mentioned and described in the deed of the 1st of September, 1814, from Isaac Robinett, specifying it and reforring to said deed, the said Compton assuming all the responsibilities and stipulations assumed by Nelson Robinett towards Isaac, and also to pay the mortgage to Clements, as far as the property would go towards its payment. The next day after this act was passed, the receipt or counter letter above mentioned was produced and recorded in the office of the register of conveyances. It does not appear that L. B. Compton, under this sale, ever set up any claim to any portion of the property composing: the estate or succession of Isaac Robinett, deceased, until the institution of thissuit. He never took possession or set up a claim to it. He is proved to have been a near neighbor, well acquainted with the property, and intimate and friendly with Nelson Robinett, as he always had been with Isaac and his family; and when the act was passed Nelson Robinett was living with him.

On the 25th February, 1818, an inventory of the property composing the succession of Isaac H. Robinett, deceased, was made by the probate judge, comprising all the property purchased from Clements, and every thing else included in the conveyance from Isaac to Nelson Robinett, and in the deed from the latter to L. B. Compton, to which no objection was made by any one. The amount was \$67,610. On the day this inventory was completed, a probate sale of the property of the succession was commenced, without opposition or interruption on the part of L. B. Compton, who was present, and so far from setting : up any claim to the estate, or any part of it, he and his co-defendant, John Compton, actually purchased at the sale six or seven of the slaves, as appears by the proces-verbal and other evidence. This sale amounted to a large sum, no part of which, so far as the record informs us, was ever claimed by L. B. Compton under his deed from Nelson Robinett, nor has he ever pursued the property in the hands of any one, nor are we aware that he ever resisted paying the price of the slaves he purchased, on the ground that he was purchasing his own property.

Sometime in the autumn of the year 1819, Mrs. Robinett died, and, on the 7th of December of that year, another inventory was made of the property in her possession, being the remainder of what had not been sold at the sale in February, 1818. Leonard B. Compton was one of the appraisers who made this inventory, and he signed it. In the procès-verbal the property is stated as being that of Elizabeth Robinett, deceased; a great deal, if not all of it, is the same property mentioned in the deeds aforesaid; the inventory amounted to \$30,638, and L. B. Compton still made no claim in any manner. On the 10th of January, 1820, the probate judge, at the request of the heirs of Isaae H., and Elizabeth Robinett, as he says, proceeded to sell publicly, at the house of John, and Leonard B. Compton, a number of slaves belonging to their succession, when the Messrs. Compton became the purchasers of all that were sold, being eight in number. To the procès-verbal of the sale of each slave, Nelson

BOBINETT P. COMPTON.

Robinett signed as a witness; and neither he, nor L. B. Compton, intimated having any title to those slaves. On the 30th of November, 1820, another sale was made of a portion of the property of the succession by the parish judge, at which J., and L. B. Compton were again purchasers of slaves; and still no claim was set up under the deed now presented. A subsequent part of the history of this case will show, that John, and L. B. Compton purchased a large amount of other property that formed a part of the succession of Isaac and Elizabeth, without pretending a title to it. We have been thus particular in setting forth all these proceedings, as they will serve to explain our opinion as to the character and effect of the deed from Nelson Robinett to Leonard B. Compton, hereafter to be noticed.

We now come to the particular titles under which each defendant, or set of defendants, claims, which it is contended divested the heirs of Isaac and Elizabeth Rebinett of the property left by them, and vested it in the defendants; and we shall commence with the proceedings that led to the title set up by John, and Leonard B. Compton, to the land claimed of them in the petition. On the 8th of May, 1818, about nine months after the death of Isaac Robinett, and the opening of his succession, John, and Leonard B. Compton, commenced, in the District Court of the parish of Rapides, a suit against Elizabeth Robinett, the widow, in her own right and as tutrix of three of her minor children, and against Nancy Robinett, also an heir, who had been recently married, alleging that they were the assignees of a large debt owing by Isaac Robinett in his lifetime, and that the said widow and heirs had become liable for it. An answer was filed to this petition, by the curator of one of the heirs over the age of puberty, and by an attorney for the widow and tutrix and the married heiress, putting the case at issue on its merits. A judgment was rendered on the 5th of December, 1818, for \$15,262 15, with interest and costs. An execution was issued on this judgment on the 30th June, 1819, which was levied on the land now claimed of J. and L. B. Compton; and it being offered for sale by the sheriff, those defendants became the purchasers, on the 21st September, 1819. The sheriff made a deed to them for the land, and under it and the previous proceedings, they now claim it, saying that it has been taken in payment, to the extent of \$7,600, on their judgment.

We now proceed to state the immediate titles to J. S. Johnston and John P. Mc Neil. Under the aforesaid judgment of J. and L. B. Compton, against the widow and heirs of I. H. Robinett, an execution was issued and levied on eight hundred arpents of land, being the lower part of the Robinett tract, on the left side of the bayou, which, on the 18th June, 1819, was purchased, on twelve months' credit, by Elizabeth Robinett, at the sale made by the sheriff. She gave a twelve-months' bond for the price, \$4,500, and the sheriff made hera deed. Before this bond became due, Elizabeth Robinett died. After her death it was transferred to A. J. Davis, Francis Bynum, J. S. Johnston, and George B. Curtis, who were sureties on it, and had paid it. About the 8th of December, 1820, the last named parties presented a petition to the District Court of the parish of Rapides, stating that they were the assignees of said bond; that Mrs. Robinett, the maker, was dead; that they were subrogated to the rights of the obligees, and entitled to have an execution issued on it; wherefore they pray that said judgment and bond be revived, and made executory against her heirs. The husband of the married heiress, who was curator ad bona of one minor, and tutor of two others, acknowledged service of this petition, and conBOBLESTT W. CORPTON.

fassed that the allegations were true; wheroupon, it was decreed by the court, that the judgment and bond be revived against the aforesaid heirs, and declared executory. There seems to have been but little delay or formality about this matter, and, abount nine months after, an execution was issued in favor of the said Duvis and others on said bond; and under it, in November, 1821, four hundred arpents on the lower side of the tract, on the left side of the bayou, were sold by the sheriff; and, under that sale, Josiah S. Johnston claims the land alleged to be in his possession. The full amount of the aforesaid bond not having been paid by the said sale, another execution issued, in the same form, in March, 1822, and under it another tract of four hundred arpents of land adjoining the last mentioned, on the upper side, was seized and sold by the sheriff, on the 27th of April, 1822, and a deed made to the purchaser, under which Mc-Neil, the defendant, now claims the land he is sued for in this action.

The remaining portion of the original Robinett tract of land, containing six hundred and eighty arpents, claimed of John, and L. B. Compton, who say they have no title to it, but hold as tenants under the heirs of Clements, came to them in the following manner: About the 24th of April, 1822, the heirs and legal representatives of Henry Clements, commenced a suit on the original act of sale and mortgage, passed between Henry Clements, and Isaac H. Robinett, in 1811, in the District Court of the parish of Rapides, against Nancy Robinett and her husband, who was also the curator ad bona of one minor and tutor of the two others, as heirs of their father, claiming a balance as due on the said sale and mortgage, and also demanding \$617 50, as owing on open account by Isaac Robinett, in his lifetime, to Henry Clements. A judgment for the balance due on the mortgage, and for a sale of the property hypothecated, is prayed for and also a judgment for the amount of the open account. The married heir, her husband, the curator ad bona, and the tutor, are prayed to be cited; and it is asked that a curator ad litem may be appointed to represent the minor over the age of puberty; but the record does not show that it was done. The defendants appeared by an attorney, and filed an answer to the merits, and, in May, 1822, a judgment was rendered for the sum of \$8,597 40, with interest at ten per cent from June 1st, 1821, to be made out of the mortgaged property; and a further judgment for \$617 50, with legal interest from judicial demand, the amount of the open account. On this judgment, an execution was issued on the 30th of September, 1822, under which the tract of land of six hundred and eighty arpents was seized, being a portion of the property mortgaged; and, on the 3d December, 1822, it was sold by the sheriff, when an agent of Henry Clement's heirs purchased it for them, for \$5,900; and they hold under that sale.

We now come to the title under which the defendant Lanier holds the slaves claimed of him. On the 16th of September, 1815, whilst Nelson Robinett was pretending to have a title to all the estate, under the deed or instrument passed between Isaac H. Robinett and himself, he mortgaged to Henry Clements, the slaves John, Molly, Betsy. Becky, Mary, Louisa, Chena, Stephey, Adeline, and Seraphine, for purposes in that act mentioned. This mortgage, it is said, was a security for a part of the old debt of \$60,000, owing by Isaac H. Robinnett to Clements, which Nelson Robinett had assumed to pay. Wherefore, on the 8th of November, 1823, the heirs of Henry Clements commenced a suit on this mortgage against Nelson Robinett, claiming a balance due on the old debt of upwards of \$4,000 and interest; they prayed for a judgment against him, and that the aforesaid slaves be sold to satisfy it. Service of this petition was acknow-

ROBINETT S. COMPTON.

ledged, and, in a short time after, a judgment by default was made final for \$4,181, with interest, and a decree made that the slaves mortgaged be sold to satisfy the judgment. An execution was issued on this judgment, and, under it, the slaves mortgaged, with their increase, were seized, and a part of them sold by the sheriff, on the 10th of February, 1824. At this sale George Mathews purchased the four slaves named Beckey, Felicite, Mary, and Milly, now claimed of Tillman Lanier, to whom, he says, he has no title, but has them in possession as Mathews' overseer. The said Lanier, at the same time, purchased the two slaves, Adeline and Seraphine, now claimed of him, and subsequently, under the same judgment, and another execution issued in consequence of the first expiring, he purchased by himself and another person, the slaves John, Molly, Lucy, Cornelia and Chena, and upon the adjudications and sales by the sheriff, he bases his claim to hold the said slaves. This defendant further, to sustain his claim acquired as aforesaid, produces a petition of the heirs of Clements, addressed to the district judge, again setting forth the mortgage from Nelson Robinett to said Clements, and the fact of a judgment being obtained on it, as already stated, and further, that the slaves named had been alienated by said Nelson, and were then in possession of Hampton Cheney, and the nominal title in Leonard B. Compton; wherefore he prays for an order of seizure and sale, after giving ten days' notice to Cheney and Compton. The judge of the district gave the order or decree; but no other process was issued on this petition except what is mentioned, and notice was given to Cheney and L. B. Compton, as the sheriff states in his return.

On this evidence, the judge of the district gave a judgment in favor of all the defendants generally, in May. 1825, when an appeal was taken by the plaintiffs, and it has ever since been pending in this court, a portion of its members being always interested as parties or as counsel.

The first question to which our attention is called, is presented by a bill of exceptions taken by the defendants, to the admission as evidence of the receipt, or counter-letter, given by Nelson Robinett to Isaac H. Robinett. The witnesses to this instrument were W. P. Cannon and Hampton J. Cheney; the former was dead at the time of the trial, which fact, and his signature, were proved; and it was shown that Chency had become disqualified by being married to Nancy Robinett, one of the plaintiffs, and being also the curator ad bona of one of the minors, and the tutor of the others. His signature was proved to be genuine; yet the defendants ineisted that the instrument was not sufficiently proved, and objected to it. We are of opinion that the judge did not err in receiving the document as evidence. It having been proved that Cannon was dead, parol evidence of the genuiness of his signature was all the evidence the plaintiff could give. The man could not be raised from the tomb to testify, and the plaintiffs should not be injured by an event they could not control or prevent. As to Cheney, he had become disqualified by his marriage with one of the plaintiffs; therefore proof of his signature was, in our opinion, sufficient. If the defendants had any doubts as to the genuiness of his signature, they might have interrogated him on facts and articles, or they could have been admitted to prove, by other testimony, that the signature of Robinett, was not genuine, although the signature of the witness was so.

Proceeding to the merits of the case, we shall first dispose of the separate defence of Leonard B. Compton, based upon the conveyance from Nelson Robinett to him, under which he attempts to protect himself, and under which

ROBINETT C. COMPTON. some of the other defendants wish to take shelter. The argument upon both sides has been much more extended on the character, weight and effect of this instrument, than upon all the other points in the case, yet we think it ought not to have any influence in its decision. The defendants contend that, as the receipt or counter-letter from Nelson to Isaac Robinett was not recorded previous to the conveyance from the former to L. B. Compton, he was ignorant of it, and of the character of the transaction between the two Robinetts, and was therefore a purchaser in good faith, without notice, and for a valid consideration, and that consequently the plaintiffs are divested of all title, or claim, by the act of their ancestor.

The doctrine is now well settled, that the actual knowledge by a purchaser of an existing mortgage or title, is equivalent to a notice resulting from the registry. The formality of recording is for the benefit of the public, and for the purpose of giving notice to individuals. 8 Mart. N. S. 140, 246. B. & C.'s Digest, 597. But if a party have knowledge of that, of which it is the purpose of the law to notify him, by causing an act, instrument, or lien to be recorded, the effect is the same, and he is as much bound by his personal knowledge, as if his information was derived from an inspection of the record.

We are fully satisfied that Leonard B. Compton knew perfectly well the character of the transaction between Isaac, and Nelson Robinett, and an impartial examination of the record cannot leave a doubt on any mind, not predetermined to disbelieve it, or to smother the belief under legal technicalities. We have stated the facts, as to the relations between L. B. Compton and both the Robinetts. Nelson came to the country a short time before the conveyance made by Isaac to him; he had little or no visible property or means. Suddenly a debt for move than \$33,000 is acknowledged as due to him; a large amount of property is conveyed to him, over which he exercises little or no control during the lifetime of the party conveying it; and, soon after his death, he leaves the place in consequence of some rupture with the family, and makes a sale, apparently for \$6,000 cash, after which period no one ever sees him with but a few dollars in money, and that, from the testimony, was probably derived from the sale of the cotton, which produced the difficulty with the family. The party, who it is said paid this \$6,000 in cash, and who had promised to pay off a mortgage of \$60,000 more, if the property should be worth so much, never makes any effort to take possession of it; never sets up a claim to it, although living in the immediate vicinity; and in a few weeks after, attends a public auction, when it was offered for sale, becomes himself a purchaser, and permits others to buy, without advancing a claim. He assists at an inventory and signs his name to a public act, which states that the property belonged to the succession, against which he now claims it: and finally, sues the representatives of that succession for a debt owing by it, alleging the fact of the property having gone into the hands of the widow and heirs, whereby they were liable to pay the debt; obtains a judgment; and then has that property, now said to be his, seized and sold to pay it. It is absurd to suppose and too incredible for belief, that a man would seize and sell his own property, to pay his own debt. This the counsel for the defendants call on us to believe that Leonard B. Compton did; and further, that he never made an effort to manage the property by administering it himself, or to have it properly managed by another, so as to pay the martgage debt to Clements' heirs, with as little loss as possible; but on the contrary, he and his co-defendant John Compton, who, it appears, was the agent:

of the heirs of Clements, were forcing sales under executions by the sheriff.

The foregoing statement is a brief recapitulation of some of the leading facts relating to this part of the case; but the record is full of the mest conclusive evidence, that Leonard B. Compton was fully informed as to the true character of the convoyance under which he pretends the plaintiffs have been divested of title; and we are of opinion that he is as much bound by the receipt or counterletter, dated April 7th, 1815, from Nelson to Isaac Robinett, as Nelson himself would be, if he was a party to this suit.

We therefore pass from this branch of the defence, believing it untenable, and proceed to examine the other means by which it is contended that the plaintiffs have been divested of that title which their ancestors had to the property now in controversy. The defendants say, that title has been divested by sales legally made by different sheriffs of the parish of Rapides, under executions insued on regular judgments, obtained in a competent tribunal, to pay debts owing by those ancestors; and that these sheriffs have made regular deeds to them, or those under whom they hold. If these positions can be established, the judgment of the District Court must be affirmed.

Before proceeding to the questions in detail, it may be well to remark that, as a general principle, in all forced alienations of property, under the authority of a judicial proceeding, all the delays and fermalities required by law must be strictly fulfilled under pain of nullity. It is also well settled, by repeated decisions of this court, in relations to sales made by the sheriffs and other ministerial officers under executions, that the return of the officers are to be taken as primal facie evidence between the parties. The presumption of law is in favor of the legality of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions, that in favor of the officer's proceedings; but, like all other presumptions and the sales under execution, that when a purchaser shows a judgment, an execution, and a sale to him under them, made by a proper officer, it is primal facie sufficient, and all previous proceedings are supposed to be correctly made, and the burden of proof is on the party attacking those proceedings. 6 La. 628. 9 Ib. 1542. 8 Martin, 682. 4 La. 473. 8 La. 423.

Keeping the general principles we have stated in view, we will first examine the title set up by John, and L. B. Compton. It will be recollected that they present a judgment of the District Court against the widow Robinett, in her own right, that is, as a surviving partner in the community, and as the tutrix of her minor children, obtained in the year 1816, upon which an execution was issued, and under it a sale was made by the sheriff, in 1819. To this, it is replied: First, that the court that gave this judgment was without jurisdiction and incompetent to give the judgment, as it was against a tutrix and the minors she represented; and secondly, that if the judgment was rendered by a competent court, the sheriff did not proceed legally under the execution, and give the proper notices of seizure, and advertise a sufficient number of days, before proceeding to sell the land in possession of the defendants.

First, as to the jurisdiction of the District Court, to give a judgment against a succession, administered by a natural tutrix, acting in her own right and as the representative of her minor children. Previous to the passage of the act of 18th March, 1820, (Sess. Acts, p. 92) fixing the jurisdiction of the Courts of Probate in the State, it seems to have been settled by various decisions of this court that the District Courts were not deprived of jurisdiction rations

ROBINETT O. CONPTOR.

ROBINETT W. COMPTON.

materia, in such cases. The question was fully considered in the case of Tabor v. Johnston et al. 3 Mart. N. S. 674. 6 Ib. N. S. 548. 7 Ib. N. S. 376. 8 Ib. 241. 8 La. 421. The practice was, we believe, almost universal, to bring suits against successions in the District Court, and we are not prepared to say it was erroneous. We shall speak of the provisions of the act of 1820 under another branch of this case, it having no effect upon the judgment obtained by the Messrs. Compton previous to its passage. The widow and heirs of Isaac Robinett having permitted a judgment to be reddered against them, without excepting to the juvisdiction of the court, having filed an answer to the mevits, we are of opinion that it is not absolutely null, and possibly not relatively so; wherefore we shall hold it valid and obligatory until legally annulled.

As no objection has been taken to the form or manner of issuing the execution, we shall proceed to the mode of executing it. The sheriff received it on the 2d of July, 1819. On the 28th of that month, a seizure was made, and, on the 3d of August, the property was advertised for sale on the 2d of September following, on which day it was not sold; and on the 3d it was again advertised to be be sold on twelve months' credit, on the 21st of September, when the defendants purchased it, in part payment of their judgment, and a deed in regular form was made to them by the sheriff.

The 14th section of the act of 1817 (Sess. Acts, p. 34) relative to the organization of the courts of the State and for other purposes, was in force at the time this sale was made. It provided, "that in no case, except in cases of judgment by default, shall it hereafter be necessary for the sheriff to give notice to the defendant to pay the money due on an execution, before proceeding to levy the same; and no sale of moveable property seized by the sheriff shall be made in less than ten days, nor slaves and immovable property in less than thirty days, from the day of first advertising." The act then proceeds to say that the sheriff shall offer the property for sale on the day fixed, and if no person will give two thirds of the appraised value, it shall not be sold; but shall be advertised for sale on a credit of twelve months, and shall be sold, after fifteen days notice, &c." In this case, there can be no question as to the sufficiency of the time of advertising preceding the sale. It was more than fifteen days, and the only question is, whether the first advertisement was sufficient. The law said, the property should not be sold in less than thirty days. The property was offered for sale on the thirtieth day after the day of advertisement, which we think sufficient under the then existing law. That it would not be legal since the adoption of the Code of Practice, is probably true; but we cannot say that when an act is performed on the thirtieth day from a fixed period, that it is done in less than thirty days. The rule of computation then existing in relation to time, was to exclude one day and include the other; it may be different now, but on that point it is not necessary to decide at present.

We are therefore of opinion, that the judgment in the case of the Comptons against the widow and heirs of Robinett, is not absolutely null. It was not a judgment by default; no notice to the defendant in it, to pay the money previous to proceeding to levy the execution, was necessary under the statute; the term of advertising was sufficient; and the sale therefore legal, and confers a valid title on the defendants.

The defendants Johnston and McNeil claim under the judgment of the Comptons also. An execution having issued on it, went into the hands of the sheriff, on the 27th of April, 1819. On the 30th he made a seizure, and the land was

ROBINATT O. CONPTON.

offered for sale on the 2d of June following. The sheriff does not say on what day he put up the advertisement; but he says, "the said land being advertised for sale agreeable to law, the same was exposed to public sale." This return of the officer the law presumes to be true, until the contrary is shown; and there is no evidence to contradict it. There was more than thirty days from the date of the seizure to the day of sale, and also more than fifteen days between the first and second exposure by the sheriff, who says he again advertised the property, and, on the 18th of June, 1819, Mrs. Robinett became the purchaser on twelve months' credit, and the sheriff made a sale to her. This sale, we think, is so far legal. When the twelve months' bond given by the mother of plaintiffs became due, she had been dead several months, and it was assigned to Johnston, Davis, Bynum and Curtis, who it is understood were the sureties on it, and had it to pay. They commenced proceedings in the District Court, to have the bond, which had the force and effect of a judgment, revived and made executory, and we have seen that it was ordered, on the acceptance of the service of a petition, and a confession of the truth of its allegations, by Hampton J. Cheney, the husband of Nancy Robinett, and the curator of one minor and the tutor of the others. On this judgment of revival an execution was issued, which came into the hands of the sheriff, on the 21st of September, 1821, who gave a written notice, and made a demand of payment, on the 27th of September; a seizure was made on the 3d of October, and advertisement made on the 4th, of the sale to take place on the 5th of November, 1821, when the four hundred arpents of land claimed by J. S. Johnston, were sold, and purchased by him and his co-defendant McNeil, under whom he helds it. The proceeds of this sale, not being sufficient to discharge the amount of the bond given by Mrs. Robinett, another execution was issued, on the 15th of March, 1822, which came into the hands of the sheriff the next day, who, on the 20th, made a demand of payment and gave a written notice, and, on the 25th, made a seizure of the four hundred arpents of land claimed of McNeil, which, on the same day, were advertised for sale on the 27th of April following, when they was sold to John H. Johnston, under whom Mc Neil holds by an undisputed conveyance. In these cases, more than thirty days elapsed from the day of advertising to the time of sale in each case, and there is no sufficient reason for setting them aside, unless the District Court was absolutely without jurisdiction, ratione materiæ, and had no authority to revive the twelve months' bond and judgment it imported, and cause it to be made executory; and we now come to the decision of this question.

The act of 1820 relating to the jurisdiction and forms of proceedings in Courts of Probate, says that those courts "shall have jurisdiction in all cases which relate to the proof and execution of wills, the appointment of curators of vacant estates, absent heirs, minors, and other persons, tutors of minors, the settlement, liquidation and partition of successions, the liquidation and payment of all claims against a succession, either vacant or accepted with the benefit of inventory, &c."; in consequence of which, this court has held, in various cases, that, where curators of vacant estates, executors, or tutors of minors, have been sued in the ordinary tribucals, they could except to the jurisdiction, and their plea would be sustained. The case of Vignaud v. Tonnacourt's curator, 12 Martin, 229, was the first that came up, after the act of 1820; and this court decided against the jurisdiction of the District Court. Similar doctrines were promulgated in the case of McDonogh v. Johnson's executors, 2

ROBINETT W. COMPTON.

Mart. N.-S. -297; and in that of Baillio &t. v. Wilson; 3 Mart. N. S. 73-74, and in some other cases; but we are not aware that, even since the act of 1820, this court has ever gone so far as to decide that a judgment rendered by a District Court against a succession, or minors represented by their tutor or tutrix, without exception or objection, was absolutely null. It is possible such judgments may be annulled, if proper cause be shown; but we are not prepared to declare them absolutely so, particularly when rendered upon the confession of the heirs or legal representatives of the deceased. These views of the case induced us to come to the conclusion, that the title vested in the defendants Johnston and McNell, by the proceedings had under the order or judgment of revival on the twelve months' bond, cannot be disturbed, as that order or judgment has never been reversed or annulled.

As to the slaves in the possession of Lanier, another defendant, the plaintiffs show no other evidence of title to them, than producing an inventory, on which these slaves are placed as belonging to the estate of their father and mother. The slaves were mortgaged to Clements by Nelson Robinett, for a purpose mentioned in the act. They do not appear to be a part of those purchased by Isaac H. Robinett of Clements, and transferred to Nelson Robinett. They are not named in that deed; and nothing shows that Isaac H. Robinett, in his lifetime, ever had such slaves; and the more fact of putting them on an inventory, does not give such a title as can be enforced against a third pessessor and innocent purchaser. It is true the slaves were sold to pay a debt of the estate of Isaac H. Robinett; but they were mortgaged by Nelson, who, at the time, was in some degree bound for the same debt; and if they ever did belong to Isaac H. Robinett, it is not impossible they were the property he gave to Nelson in payment, when he gave him the receipt in 1815. We are of epinion that the court did not err in rejecting this part of the demand of the plaintiffs. as this defendant never set up any title as derived from their ancester, but constantly denied it.

We now come to the chim made against John, and Leonard B. Compton for six hundred and eighty arpents of land, and the improvements thereon, on the right side of the bayou Bouf. In their answer, as we have stated, they said that they had no title to it; that they were tenants of the heirs of Clements, who resided in New Orleans out of the jurisdiction of the court, to whom the land belonged; and they prayed that said heirs might be notified and called on to defend the suit. The court did not order those lessors and heirs to be notified, and give time therefor, as should have been done; but, at the return term of the case, tried and decided it; and, among other things, seem to have decided that the court was without jurisdiction as to those heirs and lessors, as it says "that a free-holder cannot be sued out of the parish in which he has his domicil." This decision was made before any exception to the jurisdiction was made, and as the plaintiffs have not, in their appeal, made the heirs of Clements parties, nor complained of the decision refusing to call them to defend the suit, it remains for us to inquire in what position the parties stand, and what we have to decide on. It certainly cannot be on the title between the plaintiffs and the heirs, because they are not before us; and there is a decree saying they canngt be sued out of the place of their domicil if they are freeholders, of which fact we are not informed. The tenants say, they have no title, and do not pretend to any; therefore no decision can be given upon it that will be conclusive against any one. The question then occurs, what was the issue the court be-

RORINETT V. COMPTON.

low did try between the parties before it? The record does not exactly tell us, but we must presume that it only tried such as the law permitted; and to ascertain what it was, it becomes necessary to ascertain how the case stood after the tenants made their disclaimer of title. If, by the disclaimer and notification of the names of the lessors in their answer, the parties in possession were necessarily discharged, that would be an end to the case, if the court refused to cite those lessors; but that we believe was not the law at the time this case was tried, whatever it may be since the adoption of the Code of Practice. The question whether, in an action against the lessee, the cause terminated by the defendant citing his lessor in warranty, came up in the case of Kling v. Fisk, 4 Mart. N. S. 391; and, after much consideration, it was held, that the action did not terminate, but that the only question that could be tried between the plaintiff and defendant, after the lessor was cited and made default, was one of possession. The same doctrine was maintained in the cases of Eusikier v. Hennen, and Bayoujon's Heirs v. Criswell, 5 Mart. N. S. 71, 232.

The foregoing statement of the pleadings and legal positions being correct, it follows that the only question that could be at issue between the plaintiffs and the Messrs. Compton, was one of possession, and the evidence that was introduced we suppose had reference to it. An examination of that testimony shows that, more than two years before the institution of this suit, the sheriff had made a sale of the land under execution, (whether legally or not, it is not now necessary to decide;) and put the defendants, or their lessors, in possession. If the plaintiffs had wished to put the defendants out of possession merely, the law, as it then stood, afforded a ready means of doing so, when the latter disclaimed title. 4 Mart. N. S. 495. Partida 3, title 2, law 29. But as they thought proper to rely on evidence to establish their right of possession, it seems to us they have not succeeded, and the court below was not in error in giving a judgment for the defendants, so far as it related to that question; and we cannot assume that any other was decided.

To four of the slaves in the possession of Lanier he disclaimed title, and said that he held them for George Mathews of New Orleans, who, he said, was beyond the jurisdiction of the court, and asked that he might be notified. The court below decided in the same way as in relation to Clements' heirs, and a similar result followed. The two branches of the case are similar, in all respects; and our opinion is the same as to both. The inferior judge did not therefore err, in his judgment.

It is therefore ordered and decreed, that the judgment of the District Court be affirmed, with costs; reserving to the plaintiffs any rights they may have against the heirs of *Henry Clements*, or against *George Mathews*, not precluded by this judgment; the plaintiffs paying the costs of this appeal.

Dunbar and Edelen, for the appellants, prayed for a re-hearing-in this case, on the grounds: 1st. That all the property sued for, was, at the time of the respective sales under which the defendants claim, subject to a special mortgage in favor of Clements' heirs for the sum of \$60,000; and that the price bid at none of said sales was sufficient to satisfy the same. 2dly. That in making said sales the formalities prescribed by law were not complied with.

I. The express mention of the fact in the sheriff's deeds is sufficient

I. The express mention of the fact in the sheriff's deeds is sufficient evidence of the existence of the mortgage. Mound v. Williamson, 7 Mart, N. S. 384. The act of 1817, sec. 16, provides that the sheriff, before making any sale on a writ of fieri facias, shall produce the certificate of the register of mortgages, stating whether there be any mortgage on the property offered for sale, and, if any, to what amount. By sec. 17, it is further provided that the proper-

ROBINETT W.

ty shall be sold subject to the payment of such mortgages by the purchaser. The phraseology of this act will admit of but one construction, which is, that to become the purchaser at a sheriff's sale of property subject to a previous special mortgage, it is necessary to assume a personal liability for the mortgage debt. This is the construction adopted by the court in Balfour v. Chew, 4 Mart. N. S. 162, and in the case above cited in 7 Mart. N. S. 384. We are sustained by these two cases, and that of DeArmas v. Morgan, 3 Mart. N. S. 604, in these two positions: 1st. That it is essential to the validity of a sheriff's sale, that the price offered should be sufficient to discharge the mortgages prewiously existing on the property; 2dly, that the purchaser should become personally liable for the mortgage debt. The next question is one of fact. Were these different sales made subject to the payment by the purchaser of Clements' mortgage? Did these purchasers become, or intend to become, personally liable for that mortgage debt? "A bid at a sheriff's sale is a bid for the abso-Inte value of the property; and, when it is encumbered, is not a bid over and above the encumbrances." 4 Mart. N. S. 161. The facts of the case are in conformity with this legal presumption. We find this mortgage is mentioned in each successive deed of the sheriff, until finally, in December, 1822, a purtion of the land subject to it and still belonging to the plaintiffs in this action, is sold to pay the balance due upon it. The sheriff's deed to J. and L. B. Compton sets forth that they became the purchasers for the sum of \$7,600. Nothing is said of its being over and above the special mortgages. Towards the close of the same deed it is said that the land is subject to a mortgage to Clements. The language is the same in all the other deeds. It is obvious, then, that it was never in the contemplation of either the sheriff, or the purchasers, that the latter should become personally liable for the mortgage in question. is true that the price given for the property was applied by the sheriff to the satisfaction of the executions; but this is perfectly consistent with the view, no doubt then entertained, and still entertained by many, even of the profession, that the sale is valid although the sum for which the purchaser becomes absolutely bound be less than the previous mortgage—that sum to be applied to the extinction of the execution; and the land, not the purchaser, to remain subject to the mortgage. This impression is in direct conflict with the language of the act and the decisions above referred to, and all the subsequent decisions on the same subject. If it be true that the purchasers under the different sales offered in evidence in this case, did not become personally responsible for the amount of the previous mortgages, it is scarcely necessary to inquire, whether it is the amount apparently due on the mortgage that it is necessary the price offered should be sufficient to discharge, or that which is really due. That the latter would be erroneous, it is easy to show. The 16th and 17th sections of the act of 1817, were intended to regulate the course of the sheriff on the day of sale. He could then only know what was apparently due on the mortgage, the certificate of the parish judge being his only legal guide. The discovery of what was really due, if less, would necessarily be an event subsequent to the day of sale, and therefore could not influence his action on that day. If, however, we are in error in this, there is no proof in the record of what was the amount really due on Clements mortgage, until May, 1822, after all the sales had taken place.

The sale to satisfy the balance due on Clements' mortgage was in violation of the act of 1817, if the previous sales were made in conformity to the 16th and 17th sections.

The reasons on which the rule is founded that a probate sale frees the property from the mortgages existing on it, are wholly inapplicable to a sheriff's sale, made to satisfy a judgment obtained in the District Court by a creditor in the separate pursuit of his claim. These reasons are set forth in DeEnde v. Moore, 2 Mart. N. S. 336.

II. It is conceded that a sale on the thirtieth day from the day of advertising may not be less than thirty days from the time or hour of the advertisement; as if an advertisement were put up at 12 o'clock on the 3d of August, and the sale was made at 1 o'clock on the 2d September. But in the first place, the words of the act are "from the day of first advertising", which unquestionably excludes the day on which the advertisement is made; secondly, the law takes no notice of fractions of days. The question then seems to be, whether the court should adopt an erroneous calculation because it is a prevalent one.

On the petition for a re-hearing, the court, through Garland, J., endorsed these words: "Granted on the first point alone, which relates to the defendants, the Comptons, and Johnson and McNeil only, and the lands claimed of them. As to Clements heirs, Mathews and Lanier no re-hearing is asked, and the judgment is final."

ROBINETT COMPTON.

SAME CASE-ON A RE-HEARING.

A sale of property, subject to a special mortgage, made, under the laws in force anterior to the promulgation of the Code of Practice, without fraud or collusion, will not be set aside at the instance of the mortgagor or his heirs, though the property did not sell for enough to satisfy the nominal amount of the encumbrance, where the debt had been in fact greatly reduced at the time of the sale, and the mortgage creditor, having been paid by subsequent sales of other property included in the mortgage as liable for his debt, does not complain of any injury therefrom, nor objects to the application of the proceeds to the extinguishment of other debts.

Dunbar and Edelen, for the appellants. The court will find, on an examination of the returns and deeds, first, that at the time of these respective sales there was a special mortgage on all the land, in favor of Clements, for the sum of \$60,000, having a preference over the judgment creditors; and secondly, that these lands were not sold subject to the payment of such mortgage by the purchaser, and that the respective prices for which they were adjudicated

were not sufficient to discharge the mortgage.

The express mention of the mortgage in the sheriff's deed is sufficient evidence of its existence and amount. Mounot v. Williamson. 7 Mart. N. S. 384. The sheriff's return and his deed must be evidence, equally sufficient, of the price for which the property was adjudicated. There is, then, conclusive evidence of the only two material facts: the existence and amount of the mortgage, and the non-assumption of the mortgage by the purchaser, or the insufficiency of the price to satisfy the mortgage debt. It may be contended that the evidence referred to does not prove that the property was not sold subject to the payment of the mortgage debt by the purchaser. If so, we reply, that a bid at a sheriff's sale is a bid for the absolute value, and not a bid over and above the encumbrances. Balfour v. Chew, 4 Mart. N. S. 161. This is the legal presumption in the absence of contradictory proof, and nothing not absolutely conclusive should be deemed sufficient to rebut it. The facts of this case, so far from being incansistent with this presumption, are in perfect conformity with it.

Two opinions have been entertained in connection with this subject, which ought not, perhaps, to be entirely passed by. The first is, that a sheriff's sale of encumbered property is valid, no matter how small the price in comparison with the encumbrance—the land. not the purchaser, to remain subject to the mortgage debt. The other opinion referred to is, that it is sufficient to render a sheriff's sale of encumbered property valid, that the purchaser should make himself by his bid personally liable for the amount actually due upon the mortgage, though greatly less than is set forth in the certificate of the parish judge. Both of these opinions, it is presumed, are wholly erroneous. guage of the 17th section of the act of 1817 is, that "the property shall be sold subject to the payment of such mortgage by the purchaser." This would seem to admit but of the construction, that to become the purchaser at sheriff's sale of property subject to a special mortgage having a preference over the judgment creditor, it is necessary to become personally liable for the mortgage debt. Such is the construction adopted by the court in the two cases above cited, reported in 4 Mart. N. S. 162, and 7 Mart. N. S. 384, and in many others since decided. The language and the objects of the act of 1817 are alike irreconcileable with the second of the above opinions. The 16th section requires the sheriff, before proceeding to the sale, to produce to the bidders a certificate of the register of mortgages, stating whether there be any mortgages on the property offered for sale, and, if any, to what amount? The next section requires that the property shall be sold subject to the payment of such mortgage by the purchaser. The objects of the act in requiring the sheriff to produce the cerROBINETT W.

tificate of the parish judge, must have been, first, to make known to the bidders what was the amount of the debt (if any) it would be necessary for them to assume, in order to become purchasers of the property offered; and secondly, to regulate the action of the sheriff in reference to the sale—to be his guide in determining whether to adjudicate the property or not. If these were the objects, it would be strange if both bidder and sheriff might wholly disregard the certificate, and the sale be altogether uninfluenced by it. If, however, the last opinion we have been combatting was correct, it would be inapplicable to this case, since there is no evidence in the record that any part of the mortgage debt in question had been paid, and it is in proof affirmatively that, on the first of June, 1821, the sum of \$8,597 principal was due, and the presumption is irresistible that up to this date a still larger sum was due. This sum, however, is above the amount which any of the tracts of land sold for, and it remained due until December, 1822, which was subsequent to all the sales from which the defendants derive their titles.

The formallties prescribed by law were not observed in the proceedings on which the defendants base their titles to the land sued for. The first seizure under the judgment of John, and Leonard B. Compton against the heirs of I. H. Robinett, was made on the 30th April, 1819, and the property offered for the first time on the 2d June following, leaving but thirty-two clear days, when there should have been at least thirty-four. In reference to the proceedings under this execution, the court say that "the sheriff does not say on what day he set up the advertisement;" that "there were more than thirty days between the seizure and day of sale" (of the first exposure must be meant), and that an advertisement agreeably to law must be presumed in the absence of proof to the contrary. This presumption is contradicted by the return, if it was requisite to give notice of seizure, and allow for it a delay of three days, in addition to that required for advertising. We think the act of 1805 clearly re-

quires both the notice and delay.

Under the second execution against the heirs of Elizabeth Robinett, the seizure and advertisement were both made on the 25th March, 1822. Under the first writ against the same parties, the seizure was made on the 3d October, 1821, and the advertisement on the next day. Josiah S. Johnston and John P. McNeil derived their title from these sales. J. and L. B. Compton acquired title to the land they hold under a sheriff's sale, made in obedience to a second writ of fieri facias, issued under their judgment. Under this writ the land was advertised on the 3d of August, and exposed to sale for the first time on the 2d September following, not allowing thirty clear days. See McDonough v. Gravier's Heirs, 9 La. 545. The court, in the opinion pronouced in this case, and the counsel for the defendants assert, that the practice of excluding the day of advertising and the day of sale was introduced under the Code of Practice. We are unable to discover any foundation for this position in the words of the article of the Code of Practice, when compared with those of the act of 1817 on the same subject. It is impossible to reconcile the language of the act with a sale on the thirtieth day; a proposition not equally obvious in reference to the 670th article C. P. The language of the act, sec. 14, is that "no sale" of immovable property shall be made in less than thirty days from the day of advertising. The word "from" in its universal acceptation excludes entirely the thing to which it is applied. Exclude then the 3d of August, and it is impossible that a sale on the 2d September should not be in less than thirty days. cannot intervene between the two periods more than twenty-nine days and a fraction. The article referred to (C. P. 670) provides that the sale of immovables can be made "only thirty days after the notice" of sale. Now a sale made at 1 o'clock, P. M. of the 2d September, would be thirty days after a notice given at 12 o'clock of the 3d August. If the court and the counsel meant simply to state a historical fact, we reply in the words of the decision pronounced

in Vignaud v. Tonnacourt, "practice is never permitted to control the law."

This suit was brought, May 3d, 1825. Previous to its institution it had been decided, in Vignaud v. Tonnacourt, 12 M. R. 229; in Dupey et al. v. Griffin, 1 Mart. N. S. 198, and in several other cases, that Probate courts had exclusive jurisdiction of all claims against successions. The correctness of this decision has been recognised in every subsequent case in which the same question has been raised. In the case of Tabor v. Johnson, however, it was decided that sales were not void which were made under the authority of judgments against successions pronounced by courts of ordinary jurisdiction, notwithstanding the

ROBINETT C. CONPTON.

incompetency of these tribunals. This decision was pronounced in June, 1825, and has been followed in every similar case ever since. 3 Mart. N. S. 674. In this case we find the following passage: "Allowing to the Courts of Probate exclusive jurisdiction in causes: which appertain to estates administered by persons deriving authority from them either directly or indirectly, a question then arises whether this exclusion of the court of ordinary jurisdiction exists absolutely, ratione materiae, or ratione personae? We are inclined to think that the exclusive jurisdiction depends more upon the peculiar situation of the parties than on the subject matter of dispute, perhaps somewhat on both," p. 683. In these two sentences we have the grounds of the determination in that case, and in all of those which have followed in its wake. The question would have been more fairly stated, if instead of "exclusive jurisdiction in causes appertaining to estates &c." the court had said "exclusive jurisdiction of claims for money brought against estates," for such is the nature of the case.

Upon this subject we submit the following points: 1. The judgment of a court incompetent ratione personæ is null ipso jure, if the objection to its incompetency either has not been, or cannot be waived. 2. That District courts are without jurisdiction, ratione materiæ, of suits to recover debts from succession. 3. That to be without jurisdiction of claims against successions, is to be incompetent ratione materiæ, and it is unimportant whether the incompetency depends more on the peculiar situation of the parties or on the subject matter of dispute. 4. That in fact the incompetency of courts of ordinary jurisdiction in the cases referred to, does not depend more upon the situation of the

subject matter than of the parties, if not entirely upon the former.

The will of the legislature is equally law, and confers and revokes powers with equal efficacy, whether arrived at by implication or learned from express language. Doubts may exist in one case, which would not arise in the other, in relation to the intention of the legislature, but when that intention is clearly perceived, it must regulate the action of the court and settle the rights of the citizen, although ascertained in either mode. If, as is admitted in the case of Tabor v. Johnson, there are provisions of the Code of 1808 inconsistent with the cognisance of claims against successions by the courts of ordinary jurisdiction, these tribunals are divested of all power to adjudicate upon such claims as effectually as they could be by an express prohibition. That Code (p. 178, art. 137) provides, that curators of vacant estates shall not proceed to the payment of the debts of the estate until they have obtained the authorisation of the parish judge. This is not impliedly but expressly forbidding the payment of these debts, in obedience to the order of any other than the parish judge, and is virtually declaring that no other judge shall have the power to order their payment or authorise the sale of property to effect it. It is well settled that this provision is equally applicable to the representatives of estates not vacant. 1 Mart. N. S. 198. 3 Mart. N. S. 628, 674.

Let us suppose, then, that prior to the judgments on which the defendants base their title, the legislature had enacted, in the language of our Code of Practice, that "courts of Probate shall have the exclusive power to decide on claims for money brought against successions, &c." The case would be in sub-

stance the same as that now before the court.

I. The exclusion of District courts from the cognisance of claims against successions, was not designed as a personal benefit to those who had them in charge. The legislature could not have intended to make it optional with administrators &c. whether claims against successions should be decided upon by District or Probate courts. The considerations which required that the settlement of the estates of deceased persons should be confined exclusively to Probate courts, are altogether irreconcileable with the investment of such a discretion in the representatives of such estates. In Dupey v. Graffin's executors, the court said that, "heirs with benefit of inventory cannot by consent take away from courts of Probate their jurisdiction." 1 Mart. N. S. 200. See also Debuys v. Yerby, 1 Mart. N. S. 381. The omission then of the plaintiffs' tutors to except to the competency of the courts which pronounced the judgments relied upon by the defendants, cannot contribute in the slightest degree to the validity of those judgments. The case before the court differs in no material respect from what it would be if the exceptions had been formally taken in limine litis. The validity of this objectior has been recognised when made for the first time before the appellate tribunal. See 1 Mart. N. S. 381.

Jurisdiction is the power of him who has the right to judge. C. P. 76.

ROBINETT COMPTON.

See 6 Peters, 709. This includes the power to confer upon the party, in whose favor judgment may be rendered, a right to the money adjudged to be due to him-the right to seize and sell the property of the unsuccessful party to satisfy the judgment. The want of jurisdiction is the want of power to hear and determine the cause—the want of the power to authorise a sale of property to satisfy the judgment that may be pronounced. That this is a correct statement of the legal consequences of the want of jurisdiction, so far as this case is concerned, will not be denied, and its truth is wholly independent of the question whether the incompetency is ratione persona or ratione materia. District courts then are without the power to pronounce judgment against successions, and consequently to authorise the sale of effects belonging to them. The sales, therefore, under which the defendants acquired title to the land sued for were made without the authority of the law. Would not the law be inconsistent with itself to recognise as valid that which is done without its authority, and even against its prohibitious? for the interference of District Courts with successions is impliedly, if not expressly, prohibited by the provisions of the Code of 1808, already cited. The sentence of a judicial tribunal derives the force of a judgment solely from the legal power to pronounce it. The only difference between the two kinds of incompetency, on account of the person and on account of the subject matter, is, that a waiver of the former will sometimes cure the defect, whilst that of the latter never will. But if the former is not or cannot be waived, the effect must be the same, that is, the want of power to judge, the want of power to authorise a sale to satisfy a judgment. The sole reason why consent will not render valid the judgment of a court incompetent ratione materiæ is, that such consent cannot give jurisdiction. The ultimate, the only cause of the nullity of such a judgment, is the want of legal authority to pronounce it. This want of authority or jurisdiction may be the effect of different causes, but it is itself the cause of the want of validity in the judgment. In Leonard v. Manderille, 9 M. 489, it was decided that a sale of land, authorised by a probate judge, was absolutely void, because the minor to whom the land blonged, as well as his tutor, was domicilisted in a different parish from that in which the order of sale was made. The incompetency in this case was clearly on account of the person. The court say in that case, that "the whole proceedings are coram non judice, and therefore void." In 1 Mart. N. S. 381 the court uses precisely the same language in reference to a suitagainst a succession brought in the District Court coram non judice, and why not the same conclusion?

II. A court is said to be incompetent ratione personæ when the defendant is not subject to its authority, and incompetent ratione materiæ when it has not the power to adjudicate upon the subject matter in dispute. Now in every case in which the question has arisen, it has been admitted that the ordinary tribunals have been excluded from jurisdiction of claims against successions. The claim is a debt, the subject matter itself of the suit, and to be without jurisdiction of the claim made in a suit, is to be incompetent ratione materiæ. It is travelling beyond the proper limits of the inquiry to investigate the reasons why the court

is divested of jurisdiction of the claim.

The error we are combatting seems to have arisen from applying the phrase ratione materiæ to the subject matter of the suit, instead of the suit itself or

In the former sense it is tautological.

cause. In the former sense it is tautological.

III. The exclusive jurisdiction of the courts of Probate of suits brought to recover money from successions does depend principally, if not entirely, upon the subject matter in dispute. The case of Vignaud v. Tonnacourt, (12 M. 229), is the first in which the question was raised, whether District courts could take cognisance of suits for debt against successions. It was decided against the competency of the tribunal, and the grounds of the exclusion are set forth in detail, but not one of these appertain to the "peculiar situation of the parties." All are applicable to the subject matter of the suit. In the opinion already pronounced in this suit it is said, that "the case of Vignaud v. Tonnacourt" just cited. "was the first that came up after the act of 1820." The court would seem to intimate by this language that this act was the ground of the determination in that case. If they do, they overlook the fact that the act of 1820 is not once alluded to, and that the decision rests entirely upon the provisions of the Civil Code of 1808. In the passage quoted from Tabor v. Johnson, the court admits that the exclusion depends both on the peculiar situation of the parties and of the subject matter in dispute. Should not the conclusion, even upon

of rt son



its own principles and mode of reasoning, have been that the exclusion was both ratione materia and ratione personna? The suggested conclusion would not be the less true, if the grounds of the exclusion which relate to the parties were more numerous or more important than those which apply to the subject matter.

It is not necessary to resort to the doctrines of nullity to determine whether an act, done without the legal power to do it, can have any legal effect. If, however, they are appealed to, they will furnish no support to the position, that the judgments of courts without jurisdiction are valid until reseinded in an action brought for that purpose. The nullity by which they are vitiated is a nullity ipso jure, and not one by way of action. The principal distinction between them is, that the former is extrinsic and apparent, and therefore may be perceived on simple inspection; the latter on the centrary is concealed, and cannot be discovered without an investigation and the introduction of evidence extraneous to the instrument or proceedings which are vitiated by it. Such are error, fraud, violence, &c. Acts or proceedings, therefore, which are tainted by this species of defect, are held valid until declared void by a competent tri-The law recognises no object of a trial but the discovery of facts. Is it not, then, absurd to contend for the necessity of an action, when there are no facts to be ascertained? The extent of the powers of a tribunal is a question of pure law. The incompetency of a court is a radical and apparent vice, and its judgment is therefore stricken with nullity ipso jure. 7 Touil. pp. 614, 615,

In connection with the question of jurisdiction, the rule stare decisis will be invoked and relied upon by the counsel for the defendants. This will be a safer course than to attempt to show by a legitimate deduction from just premises, that the decisions which they will cite against us are correct. The true office of this rule is to incline the scale of judicial opinion when balanced by doubts. In Vignaud v. Tonnacourt, 12 M. 231, the court say, "if our inquiries bring us to the result that the action cannot be maintained, the usage under the statute ought not to affect our decision, as practice is never permitted to control the law, though in doubtful cases it may serve to explain it." If the court, after an investigation of this subject, should still be in doubt, we expect a decision against us. But if it should appear clear to them, as it does to us, that the property of the plaintiffs has been sold without the authority of any tribunal having legal power to authorise its sale, an adherence to the decision in Tabor v. Johnson, and those which have followed it, would be sacrificing, to a comparatively subordinate rule, principles entitled to much higher consideration in the administration of justice-would, in other words, be awarding the property of the plaintiffs to the defendants, in order to preserve judicial consistency in error. If the property, sought to be recovered in this case, was sold under the authority of a court without jurisdiction, the title must still be in the plaintiffs (9 M. 489), and we think it the most imperative, the most sacred of all judicial obligations, to award the property in dispute to the party to whom it belongs. We do not think it comes within the legitimate scope of judicial power, or of judicial, legislative, and executive combined, to give one man's property to another for any purpose whatever.

O. N. Ogden, and H. A. Bullard, for the defendants. 1. The defendants show judgments, executions, and sheriff's sales, covering all the property claimed by them. These proceedings were regular, and create valid titles. 16 Lu. 554. 8 La. 423. 9 La. 592. 19 La. 309.

2. The judgments under which all the sheriff's sales were made, are not

appealed from, and have acquired the force of the thing adjudged. 11 M.

3. The District Court had jurisdiction of the suits against the widow and heirs of I. H. Robinett, ratione materia, and no exception ratione persona was pleaded in limine litis, as it ought to have been, to have any effect. No such exception having been made, the court was obliged to decide the matters presented before it by the contesting parties, and its judgments are valid and binding. 8 Mart. N. S. 241. 3 Mart. N. S. 676. 6 Mart. N. S. 548. 9 Mart. N. S. 378.

4. By appearing, and contesting these suits, as heirs of I. H., and Elizabeth Robinett, on the merits, the plaintiffs rendered themselves personally liable for their debts, and are bound by all their acts. Code of 1808, p. 162, arts. 96,

97. 2 Mart. N. S. 475.

5. The validity of the judgments under which the sheriff's sales were made,

ROBINSTT 9.

cannot be attacked collaterally. A direct action ought to have been brought. 16 La. 440. 11 Mart. 607. 2 Mart. N. S. 292. 2 La. 190.

6. As to the objection that in some of the sales relied on by the defendants, there were not allowed thirty days, exclusive of the day of advertising and the day of sale, we say that the rule for excluding both was introduced by the Code of Practice, long after these sales were made. The rule which prevailed at the date of these sales, was to exclude one day and include the other, and this will

give all the delays required.

As to the objection that the property did not sell for the amount of the mortgage to Clements, we reply: 1st. That the amount of this mortgage debt, ascertained to be due by the judgment of The Heirs of Clements v. The Heirs of Robinett, was only \$8,593 40, all of which was paid by the sale of other property. 2d. That the plaintiffs brought their suit on two grounds of nullity in the alienations made of their property, to which they ought to be confined, to wit: that the property was not sold for its appraised value, and that it was not sold by the Probate court. 3d. That the heirs of Robinett, when sued on the mortgage given by their ancestors to Clements, alleged that nothing was due thereon, and they ought not now to be permitted to argue, against their plea in the suit referred to, that the whole amount was due. 4th. That no issue should be permitted in this court, which was not raised in the court below, and which, if it had been there raised, might have been met with proofs from the defendants. In the lower court, the case turned entirely upon the two questions raised by the plaintiffs; the only questions raised by them, as to the legality of a sale of their property for less than its appraised value, or by any other authority than that of a decree of the Probate court.

If those sales are now to be set aside on grounds never dreamed of until the argument before this court, the most ancient titles in the State will prove the most insecure, because the practice under which they were acquired, in all cases of forced alienations, was precisely that under which the defendants

olaim

The judgment of the court was pronounced by

Eustis, C. J. This case was decided by the late Supreme Court, in October, 1844, in favor of the defendants, in affirmance of the judgment of the court of the sixth district, which was rendered in 1825. On the application of the plaintiffs a re-hearing was granted, on one point only, and for the benefit of the defendants, McNeil, the succession of Johnston, and the Comptons, the judgment being considered as final as to the other parties, against whom no re-hearing was asked. Under the view which the court took of the case, a question arose as to the validity of certain sheriff's sales under which the defendants claimed, and the point on which the re-hearing was granted is thus stated by the counsel applying for it:

"That all the property sued for was, at the time of the respective sales under which the defendants claim, subject to a special mortgage in favor of H. Clements' heirs for the sum of \$60,000, and the price bid at none of said sales was sufficient to satisfy the same."

It is urged that this mortgage had a preference over that of the judgment creditors, and that the property seized was not sold subject to the payment of it, and that the price for which the property was adjudicated not being sufficient to satisfy the amount there was no sale, and the property remained undivested in the original proprietor. The proceedings under which the sales were made were regulated by the laws which were in force previous to the enactment of the Code of Practice, in 1825. The mortgage creditor having been paid by subsequent sales of other property, included in the mortgage, or subjected to the payment of his debt, and never complaining that the sheriff's sales in the manner they were made caused him any detriment, nor objecting to the application of the proceeds to the extinguishment of debts other than that which was secured by the special mortgage, deprives the plaintiffs' demand to set aside

ROBINETT V.

the sales, of all foundation in equity. Though the apparent encumbrance was for the sum of \$60,000, the debt had been reduced by payments, and, at the time of the sales, did not amount to one-sixth of that sum, and the creditor, being perfectly secure, had no interest in preventing another creditor, though having a subordinate mortgage debt, from being paid by a sale of a portion of the property mortgaged. The question which we have to decide is, whether sales under those circumstances, without any collusion or fraud which we are able to detect, can be declared void at the instance of the debtor, under the jurisprudence which prevailed at the time they were made.

It appears that there was a good deal of difficulty in carrying into effect the provisions of an act of 1817, which was then in force concerning sheriff's sales. In the case of Balfour v. Chew, 4 Mart. N. S. 163, the statute underwent a thorough examination by the court, after having been several times under consideration in previous cases. The court, in giving their judgment in Balfour's case, say: "Although such, in our opinion, is the true meaning of the provisions on this subject, a question of infinitely more-importance in the decision of this cause arises, and that is, how must this bid be made? Must it be for the entire value, with the obligation to pay the previous mortgage out of it, or will It be sufficient to bid the value over and above the mortgage, subject to its payment? We think either mode will meet the requisition of the act. The statute provides that the sheriff, or other public officer making the sale, shall only receive from the purchaser the surplus for which the preperty shall have been sold over and above the amount of the special mortgage. On bidding the whole amount, then, no money is paid but that which remains after satisfying the mortgage. In bidding the surplus over the mortgage and with the obligation to discharge it, he only makes the deduction before the sale which he would and must make after. Any other construction, it appears to us, would be substituting words for things. There is no real difference between buying a thing for \$3,450, to be paid the seizing creditor, with an obligation to discharge a previous mortgage for \$6,000, or purchasing it for \$9,450, \$6,000 of which is to be retained to discharge that mortgage, and the balance to be paid to the creditor at whose instance the sale is made. The sum to be paid is the same; the time of payment is the same; the persons to whom the money is to be paid is the same; and the law, in presuming the validity of the contract, must be the same, unless it overlooked facts in pursuit of verbal distinctions." We consider the sales under examination as having been made for the entire value, the price to have been comprised in one sum, with the assent of the mortgage creditor as shown by his subsequent acts, by the execution of the sale, by the delivery of the property sold, and the appropriation of the proceeds to the extinguishment of the judgments under which they were seized.

There is a previous decision in which a contrary doctrine is apparently recognised. De Armas v. Morgan, 3 Mart. N. S. 606. A careful consideration of that case rather fortifies the conclusion to which we have come. The nullity of the sheriff's sale was decreed in the interest of the mortgage creditor. The sheriff was the nominal party who represented all interests. The court in that case, say: "It is of the essence of every sale that there should be a price received, or to be received, by the vendor. Now, in the present case, whether we consider the plaintiff in the fieri facias, or the sheriff, as the vendor, there was no price received, or to be received, by either. The mortgage creditor cannot be considered as the vendor, nor the sheriff his agent, for the sale-was

ROBENTETT U. COMPTON.

made without his participation, consent, or even knowledge. If the law interfered with his mortgage it could only be after securing his payment, and the present sale compels him to be satisfied, if it has any effect, with a part of his claim." In the present case as there was a price, and that price was paid in its appropriation to the reduction of the judgments, and the interests of the mortgage creditor have not been injured, who must be considered as assenting to the appropriation, we cannot pronounce the sales to be void under the established jurisprudence of the times in which they were made. No authority has been shown, nor reason given, on which such a conclusion can be based.

This is the only point on which the re-hearing was granted, and it is a question whether we are at liberty to consider the case as open on any other points. Lawrence v. Young, 1 Annual Rep. 298. We consider it as one rather of judicial propriety, than of power. But it is obvious that a very grave and palpable error must be made out, to authorise our interference with any matter which the previous court has decided, in a case under its own control.

'the other point made by the plaintiffs in their petition for a re-hearing, on which no re-hearing was granted, was this: That in making said sales the formalities prescribed by law were not complied with.

The property referred to was not sold on the first advertisements, not bringing two-thirds of its appraised value, and was offered, after the usual notice, for sule at twelve months. The informality complained of is, that thirty days were not allowed from the day of the first advertising, in the advertisements of the first proposed sale, which preceded that of the adjudication, which was made to the defendants, the Comptons, on the second offering. In relation to this the court considered that the formalities of law were complied with, and that the time allowed was sufficient, and state as a fact that the rule of computation then existing in relation to time, was to exclude one day and include the other. It is admitted to be different since the Code of Practice. From the briefs before us, it appears, that this question was fully argued, and the prevalence of this mode of computing the term in sheriff's sales was asserted by the counsel for the defendants, in his brief, to be universal, before the adoption of that Code. By virtually refusing a re-hearing on this point, the court has again affirmed the existence of this rule. As it relates to a matter of practice under laws no longer in existence, with which that court is presumed to be familiar, we do not feel authorised, at this late day, to call it in question.

Without being called upon to concur in, or dissent from, any other portion of the opinion of the late Supreme Court, we can state that we consider the defendants' rights as resting exclusively on their subsequent purchases at sheriff's sales, and deriving no effect from the pretended sale from Nelson Robinett to L. B. Compton, of date the 19th January, 1818.

The judgment in this case stands affirmed.

TEAR et al. v. WILLIAMS et al.

Where acts of sale under which a title to land is set up have never been recorded in the parish in which the land is situated, and no act of possession is proved to have been exercised by the purchasers, the acts of sale can have no effect, as to third persons, as transferring either title or possession.

Titles to land held under claims reported for confirmation by commissioners of the United States, whose report has been approved by act of Congress, emanating from the sovereign authority, need not be recorded.

Prescription will run in favor of a purchaser of land who has exercised no act of possession, only from the date of the recording of his title in the parish in which the land is situated.

Where an appeal taken by the purchasers of a tract of land, and their warrantors, from a judgment by which the former are evicted, does not stay execution, the judgment in favor of the former against the latter should bear interest from its date.

Fees of counsel, as a part of the expenses necessarily incidental to the defence of a suit by which a purchaser is evicted, may be recovered against his warrantors. C. C. 2482.

A PPEAL from the District Court of Rapides, Boyce, J. Elgee. for the plaintiffs. Dunbar and Hyams, for the defendants and appellants. Edelen, for the warrantors, also appellants. The judgment of the court was pronounced by

EUSTIS, C. J. The plaintiffs claim one-third of a tract of land situated in the parish of Rapides, on the Red river, below the town of Alexandria, as the heirs of the late James Tear, of a part of which the defendants are in possession. The plaintiffs title is founded on a requête and order of survey, dated on the 23d of June, 1802, which was reported for confirmation on the 30th December, 1815, in the names of John, James, and Ignatius Tear, by the board of commissioners of claims for land for the western district of Louisiana. The report was approved by an act of Congress, on the 5th of February, 1825. See United States Statutes at Large, vol. 4, p. 81. There is nothing which shows that the title thus created in James Tear, ever has been divested by any act on his part, or of his heirs or representatives. The defendants rely on the prescription, which they allege has accrued in their favor adversly to the plaintiffs, by reason of the succession of their ancestor having been unaccepted and vacant since his decease, which took place in 1813 or 1814. There was judgment for the plaintiffs, and the defendants and the immediate warrantors, have appealed.

The defendants hold under a sale from Gerard, and François Chrétien, passed before the judge of the parish of Rapides, and recorded in his office on the 24th December, 1835. The act recites the land sold to be the upper part of the tract granted by the spanish government to John, James, and Ignatius Tear, as located and laid down by a corrected plat of survey filed in the land office.

The acts by which the *Chrétiens* acquired title conveyed no interest whatever of *James Tear*, or his heirs, in the land; and as they were not recorded in this parish, and no act of possession is proved to have been exercised by the purchasers, the acts can have no effect in relation to third persons, as transferring either title or possession. *Tulane v. Levinson*, ante p. 787. *Carraby v. Desmarre*, 7 Mart. N. S. 662.

The defendants have no title to the one-third part of the land, which was vested in James Tear in his lifetime, and, by the confirmation of the title, in his children. Their title they were not obliged to record, as it emanated from the sovereign authority; but that of the defendants can only date from its record on the 25th of December, 1834, from which period alone their possession can be considered as commencing. This suit was instituted in 1837, and the defendants have no title by prescription as pleaded by them.

The judgment against the defendants is, therefore, correct. There was judgment against the *Chrétiens* called in warranty, for the proportion of the price of the land from which they were evicted by the judgment, \$2,720, bear-

TEAR V. WILLIAMS. ing interest from the date of the judgment, and for \$300 for expenses in counsel fees. As the appeal did not stay execution, the interest was properly allowed from the judgment. The allowance for the expenses necessarily incidental to the suit, is, we think, justified by article 2482 of the Civil Code.

Judgment affirmed.

TEAR et al. v. CHAMBERS.

Where a judgment against parties cited in warranty, improperly allows interest on the price paid by the parties evicted from judicial demand, instead of giving it from the date of judgment, but the warrantors have not asked for the correction of the judgment, either in the inferior or Supreme Court, it will be affirmed as rendered.

A PPEAL from the District Court of Rapides, Boyce, J. Elgee, for the plaintiffs. Dunbar and Hyams, for the defendant and appellant. Edelen, for the warrantors, also appellants. The judgment of the court was pronounced by

Eustis, C. J. This case does not differ from that we have just decided. The suit is for the recovery of another portion of the land granted to the *Tears*, and the title of the defendant and his possession is that of the defendants in the other case. As we have the whole evidence before us, it becomes unnecessary to decide on the bills of exception.

There was judgment for the plaintiff, and we have been called upon to change the judgment against the warrantors, and allow \$1,000 for the fruits and revenues, and \$200 for counsel fees. Under the evidence we do not feel ourselves authorised in making any change in the judgment. We should not have allowed interest from the institution of the suit, but the warrantors have not asked that the judgment be altered in the court below nor in this court. Grailhe v. Hown, 1 Ann. Rep. 140.

Judgment affirmed.

INGRAM v. MOORE et al., Executors.

In a proceeding by a creditor, who had obtained judgment against a succession represented by executors, instituted against the latter in the Probate Court, to compel them to sell sufficient property to pay his claim and to file an account, proof that their accounts had been homologated and a judgment rendered discharging them and authorising the delivery of the estate to the widow and heirs, where the application of the executors was never advertised, and the proceedings were exparte as to the creditors having been carried on between the executors and the widow and heirs alone, will not authorize the dismissal of the proceedings at the cost of the creditor, though, by the recovery of a judgment against the widow and heirs in a suit against them instituted subsequently to the commencement of the proceedings in the Probate Court, the controversy is important only so far as the costs are concerned.

A PPEAL from the Court of Probates of Rapides, Brewer, J.

Elgee and Hyams, contended that judgments of Probate courts homologating

the accounts of executors, or releasing them from their responsibilities, rendered without notice to creditors, are not binding on any one not notified. Baillio v. Wilson, 8 Mart. N. S. 347. Marchaud v. Gracie, 2 La. 148. Gillespie v. Day, 14 La. 290. Tait v. Lewis, 2 Rob. 351. Succession of Milne, 2 Rob. 386. Carrollton Bank v. Kerr, 9 Rob. 123.

O. N. Ogden, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff having obtained judgments against the succession of Winn, represented by his executors, after waiting a considerable time for payment, cited the executors to show cause why property of the succession should not be sold to pay the plaintiff's claim, and why they should not be ordered to file an account. To this proceeding the executors excepted, that they had surrendered the whole property and effects to the widow in community and tutrix, had rendered an account to her, and that the same had been homologated, and they discharged. At the trial, it was proved that the executors had so delivered the property, and rendered accounts which had been approved. But it was also shown that, although the plaintiff, and several other creditors, had obtained judgments contradictorily with the executors, the application by the executors for the homologation of their account and discharge, and for leave to deliver the estate to the widow and heirs, had never been advertised. Those proceedings were conducted between the executors and the widow and heirs alone, and were entirely ex parte, so far as the creditors were concerned. There was judgment dismissing the proceeding at the plaintiff's costs, upon the ground that the estate had been delivered to the widow and heirs, and the executors had been discharged. From this judgment the plaintiff has appealed.

We have already given judgment in the case of Ingram v. Richardson et al., ante p. 839; and the present controversy, as the plaintiff's counsel has acknowledged in argument, is no further important to his client than as a question of We do not, therefore, think it necessary to express an opinion as to the responsibility the executors incurred by giving up the estate without notifying the creditors, nor as to the effect against creditors of the judgment of homologation. Considering the matter with reference to costs, we are of opinion that the judgment of the court below was erroneous in that particular. There were executors who had been duly qualified and had taken possession of the estate. Contradictorily with them the plaintiff had obtained judgments, which, by the express terms of the judgments, the executors had been ordered to concurrently with other chirographic claims. Never having had any notice of an account or application for discharge, the plaintiff had a right to suppose them to be still in office, and cite them as the representatives of the succession; and when he is informed by their plea that they are discharged, and by the evidence at the trial that the decree of the Court of Probates has been executed by the delivery of the property to the heirs, a matter which did not appear of record, it was incorrect to inflict costs upon him.

It is therefore decreed that the judgment of the court below be reversed, so far as it condemns the plaintiff to pay the costs of suit; and that the said costs, and those of this appeal, be paid by the said defendants.

INGRAM V. MOORE.

Boyce v. Escoffie et al.

A pledge of negotiable instruments belonging to a succession, made by an executor without being expressly authorised in the manner prescribed by law, will be without effect, where the holder is the party to whom they were pledged by the executor. C. C. 3115.

The rights of creditors are fixed at the time of the debtor's death; and no one is permitted by superior diligence, or by dealing with the executor, to get an advantage over others-

A PPEAL from the District Court of Rapides, Cushman, J. Boyce, appellant, prose. Thomas, on the same side. Cumming and Elgee, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. This is a suit brought on the notes of Mrs. Escoffie, which were given to Boyce, by Brewer, the executor of Anderson, for the purpose of indemnity, under the circumstances which we have stated in detail in the case of the New Orleans Canal and Banking Company v. Escoffie et al., ante p. 830. The plaintiff declares upon the notes as holder by endorsement for value, and asks judgment against Mrs. Escoffie for the amount; also against Culberson, the endorser.

The defendants first pleaded an exception to the action, as being premature, which being overruled they answered, Culberson by a general denial; and Mrs. Escoffic by a general denial and a special plea, in substance as follows: That she gave the note as the price of a certain property bought at the succession sale of Anderson, her deceased husband; that by his will she was constituted the usufructuary of his half of the community, and was the owner of the other half in her own right, as surviving spouse; that she was therefore the owner of the notes herself; that if the notes are to be considered as the property of Anderson's estate, Brewer, the executor, had no right to pledge them, and the plaintiff has acquired no right whatever by the transfer.

At this stage of the proceedings, Simon A. Anderson, one of the executors of Anderson's will, intervened in the cause. The intervener alleges that the notes are the property of Anderson's succession; that Brewer, his executor, had no right to pledge them, or transfer them by way of security to Boyce; that the transfer was made without his authorisation; and that there are numerous creditors of the succession who are unpaid. He claimed the delivery of the notes to himself as the executor and representative of the succession.

At the trial of the cause the facts were proved, which we have stated in the case of the New Orleans Canal and Banking Company, and to which we refer as showing the circumstances under which Boyce came into the possession of the notes. It is also proved that there are many unpaid creditors of the succession, and that those notes, with the property of the succession undisposed of, would not more than suffice to pay the remaining debts. Brewer, the executor, is shown to have left the State. There was judgment in the court below against the plaintiff, in favor of Mrs. Escofie, as in case of non-suit; there was also judgment in favor of the intervenor, decreeing the transfer to Boyce null and void, and restoring the notes to the executor.

The question to be examined is the validity of the transfer of the notes to Boyce, as a security, and for his indemnity as surety in the bond given to the Canal Bank by Mrs. Anderson, in payment of Culberson's note, endorsed by

BOYCE v. Escoyfie.

Anderson and by Boyce. The transfer was, in its nature, a contract of pledge. Had the executor, Brewer, a right to make it? The Code is very positive on this subject. Tutors and curators of minors and of persons under interdiction. curators of vacant estates and of absent heirs, testamentary executors, and other administrators named or confirmed by a judge, cannot give in pledge the property confided to their administration, without being expressly authorised in the manner prescribed by law. Civil Code, art. 3115. If we look also to the general principles of our jurisprudence and system of laws touching successions, they lead us with equal clearness to the conclusion that, the act of the executor in this matter, being without any judicial sanction, was invalid. At a man's death the rights of creditors are fixed. Privileges and mortgages rightfully acquired before the death are respected; but with that exception that property of the succession is a common fund, the equal pledge of all the creditors; and one is not permitted, by superior diligence, or by dealing with the executor, who is a trustee, to get an advantage over others. New, in the present case, if it were conceded that Boyce is to be regarded as a contingent creditor of Anderson's succession, the law did not permit him to withdraw a portion of the assets, which are the common pledge of all the creditors, for his separate protection and advantage. He could not have done it, if he had been absolutely a creditor of the succession; still less so as his right to recover against Anderson, as his prior endorser, was contingent and prospective only, that is to say, in case he, Boyce, paid the note. We have looked, for the sake of argument, at Boyce's rights as they stood before the note of the Canal Bank was paid. But his real position is even more disadvantageous. For the note upon which he was endorser was actually paid, not by himself, but by Mrs. Escoffie. She paid the note with her bond, upon which Boyce became the surety. Thus the endorsement of Boyce and the endorsement of Anderson were at an end; or, at least, if there be any equity still left in favor of Boyce against Anderson's estate, it is a very remote one. It is to be observed that Boyce has not yet paid any thing in any stage of this matter.

In deciding that an executor has no right to give negotiable instruments, which are the property of the succession, in pledge, we are to be considered as expressing our opinion on the case before us, where the holder is the party who has received them in pledge from the executor. What would be the rights of a bond fide holder, without notice, of a note illegally transferred by an executor, is a very different question, and one upon which we need not now express an opinion. See the cases of Nicholson, Syndic, v. Chapman, 1 Ann. Rep. 222. Same v. Jacobs, ante p. 666, and the authorities there cited.

Judgment affirmed.

FARRAR v. THE NEW ORLEANS GAS LIGHT AND BANKING COMPANY.

Sec. 29 of the stat. of 1 April, 1835, incorporating the New Orleans Gas Light and Banking Company, authorized any married women of age to bind herself and her property, in any hypothecary contract lawfully entered into by the husband with the bank, as a surety for the bebt due by the husband to the bank.

FARBAR

V.

NEW ORLEANS

GAS LIGHT

AND BANKING

COMPANY.

Under sec. 3 of the stat. of 25 March, 1831, fees of counsel may be allowed to the defendant on dissolving an injunction, without proof of their having been actually paid by him, where they do not exceed twenty per cent on the amount of the judgment enjoined, and no other damages are allowed.

A PPEAL from the District Court of Rapides, Campbell, J. Thomas and Flint, for the appellant. Dunbar, Hyams, and Elgee, for the defendants. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action in which the plaintiff, a married woman, seeks to annul a mortgage given by her to the defendants, on the ground that she bound herself merely as the surety of her husband, the debt being his, and not being due by her, nor having inured to her benefit. There was judgme at for the defendants, and the plaintiff has appealed.

The debt for which the mortgage was given was a debt due by the husbandto the bank, and under its charter the wife could bind her property by mortgage, as a security for its payment. The 29th section of the charter authorises married women of age to bind themselves and their property, in all hypothecary contracts lawfully entered into by husbands with the bank. This section is similar, in respect to the authorization of married women arrived at the age of majority, to the thirty-second section of the charter of the Bank of Louisiana, which was considered by this court in relation to the effect of article 2412 of the Code, which prohibits the wife from being the security of the husband. Bank of Louisiana v. Farrar et ux. 1 Ann. R. 49. The opinion then given we consider as deciding this case. But, independent of that decision, the plaintiff's ease is by no means as strong as that which she presented on the former occasion, for the charter of the Gas Bank was passed in 1835, ten years after the promulgation of the Code. The plaintiffs insists that there is error in the judgment of the District Court, in allowing \$500, special damages, for counsel fees; but under the construction we have given to the act authorising courts to assess damages on the dissolution of injunctions, we think the allowance ought to be sustained, as it is much less than the maximum which the court had a right to-Wilcox v. Bundy, 13 La. 380. Brown v. Lambeth et al. ante p. 822-Judgment affirmed.

BARRETT v. CHALER, Syndic.

Where payments are imputed to certain items, in an account approved by the debtor, at a time not suspicious, and it is not pretended that the object was to secure any unjust preference to the creditor, the imputation cannot be afterwards disturbed.

The privilege granted by sec. 1 of the stat of 23 March, 1843, amending art. 3154 of the Civil Code, "for debts due for necessary supplies furnished to any farm or plantation", attaches to the crop of the current year for supplies furnished during that and the preceding year.

A charge made by a factor of two and a half per cent as commissions for advancing money, must be regarded as interest, and when, added to an amount charged specially as interest, the two sums exceed the rate which the law allows, a contract to pay it will be usurious.

Where a higher rate of interest than eight per cent a year has been paid, the whole amount paid as interest may be recovered within twelve months from the time of payment. Stat. 19 Feb. 1844.

A factor is entitled to legal interest on any advance made by him for his principal, from the date of the advance. C. C. 2994.

A charge of interest at a higher rate than the law allows, in a factor's account, is no bar to the recovery of legal interest.

A PPEAL from the Court of Probates of Natchitoches, Greneaux, J. Pierson, for the appellant. Sherburne and J. B. Smith, for the defendant. The judgment of the court was pronounced by

Kine, J. This action was instituted to compel the defendant, as syndic of the succession of *Maurin*, to approve, and pay in the course of administration, the balance alleged to be due upon two accounts-current. A privilege is also claimed for the entire balance due on the last crop of the deceased. A judgment was rendered in favor of the plaintiff for the greater part of his demand, but rejecting the privilege claimed, and he has appealed.

It appears from the evidence that in 1843, the plaintiff made large advances to the deceased in cash and plantation supplies. The crop of cotton of the deceased produced in that year, was received and sold by the plaintiff. In June, 1844, an account was rendered by the plaintiff, in which the deceased was debited with the several advances made, with eight per cent interest on their amount, and with two and a half per cent commissions on the sums advanced. The deceased was credited with the proceeds of the cotton, which were applied to the entire extinction of the interest and commissions, and towards the payment of the advances for which no privilege is allowed. A balance remained due which, in a recapitulation at the foot of the account, is stated to be for plantation supplies, sums advanced to defray the expenses of a daughter of the deceased at school, and for cash to the deceased personally, and the amount of each fixed. The account, with this imputation, was forwarded to the deceased, who approved it, and for the balance which is exhibited executed two notes, not, as it seems from the evidence, for the purpose of liquidating the account, but merely to enable the plaintiff to use them in business. After the account was thus closed, the plaintiff made further advances in cash and plantation supplies, on the amount of which he also charged eight per cent interest and two and a half per cent commissions. Maurin died without having acknowledged the correctness of this second account.

The defendant contends: 1st. That the charge of two and a half per cent as commissions, and eight per cent as interest, on the sums advanced is usurious; and that under the act of 1844, (Sess. Acts, p. 15.) he has a right to recover back the interest thus paid. 2d. He denies that the plaintiff has a privilege on the crop of corn and cotton produced by the deceased in 1844, and contends that the proceeds of the crop of 1843, upon which a privilege did exist, were more than sufficient to pay that part of the account entitled to the privilege, and ought to have been so applied.

The items of both of the accounts for advances of cash and plantation supplies, are fully proved; and the approval of the first account rendered, in which the proceeds of the sales of the crop of cotton of 1843, were applied to the payment of the commissions, interest, and other advances than those for which the law accorded a privilege, was an imputation made by the mutual consent of the parties. It was made at a time not suspicious; and it is not pretended that the object of the parties was to secure an unjust preference to the plaintiff. The effect of this imputation was to leave the deceased indebted to the plaintiff for plantation supplies, amounting to \$1,217 59, and for other advances.

The act of 1843, (Sess. Acts, p. 46) has extended the privilege established in article 3184, § 1, of the Code, to "debts due for necessary supplies furnished to any farm or plantation." Under the construction given to the article of the Code thus amended, this privilege attaches on the crop of the current

BARRETT V. CHALER.

BARRETT V. CHALER. year for the supplies furnished during both that and the preceding year. The plaintiff's privilege ought, therefore, to have been recognised, for the amount which appears to be due for plantation supplies. 3 Rob. p. 216. 8 Rob. 484.

The two and a half per cent charged as commissions for advancing money must be regarded as interest. Added to the eight per cent charged specially as interest the rate exceeds that which the law allows, and a contract to pay it would be void. 3 La. 393. 1 Ann. Rep. 265. The deceased, as we have seen, paid this usurious interest, by consenting to an imputation of the proceeds of sales of a crop of cotton to its extinction. The act, however, of 1844, a. 2, (Sess. Acts. p. 15) permits sums thus paid to be sued for and recovered, within twelve months from the time of the payment. The defendant filed his plea of usury within the time limited, and, under the provisions of the statute, the charge for interest and commissions for advances in the first account, must be rejected. No contract is shown in regard to the interest charged in the second account. The plaintiff has only claimed a higher rate than the law allows, which is no bar to his recovering legal interest, to which he is entitled on the advances which he has made as a factor. Ante p. 363. C. C. 2994.

The judge below appears to have averlooked the testimony by which the second account was proved. The advances, of which it is composed, should have been allowed, with five per cent interest from the dates when they were made, and with a privilege on the crop of 1844 for the sums expended for supplies.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that the plaintiffs recover the sum of \$1,217 59, with a privilege on the proceeds of the crop of cotton and corn of Lewis Maurin, deceased, produced in the year 1844, without interest; that he recover the further sum of \$206 11, with five per cent interest thereon, from the 30th day of June, 1844, with like privilege on said crop of cotton and corn; that he recover the further sum, as an ordinary debt, of \$2,257 83, of which last named sum only \$150 is to bear interest, at five per cent, from the 11th of September, 1844, and the residue to bear no interest. It is further ordered that said sum be paid by the defendant in due course of administration; and that the succession of said Maurin pay the costs of both courts, to be taxed.

SULLIVAN c. WILLIAMS et al.

A duly authenticated copy of the section of a foreign statute on which a party relies, is sufficient. If the opposite party have reason to believe that other provisions of the statute are favorable to him, he must produce them. If surprised by the introduction of the extract only in evidence, the court will, on a proper showing grant time to produce the entire statute.

Defendants, acting as partners, purchased a number of slaves in another State and re-sold them in a third, in both of which States they were personal property. They subsequently employed plaintiff in this State, as an agent to purchase slaves for them in a State in which slaves were personal property, to be re-sold in this. Purchases were made accordingly in that State, and the slaves re-sold here. Held, that as joint purchasers of personal property for sale defendants were commercial partners, and liable as such, before the employment of plaintiff as their agent (C. C. 2796); that the subsequent purchases for re-sale

here were continued acts of the same partnership; and that the fact of the slaves becoming immovables, by destination of law, upon their introduction into this State, cannot affect the responsibility of defendants.

SULLIVAS D. WILLIAMS

Answers to interrogatories on facts and articles can only be used against the party interrogated, and not against other parties to the action; the latter have a right to insist on a cross-examination of the witness by whose testimony they are to be bound.

The claim of an agent for compensation under an agreement allowing him a certain commission on dispursoments, is not prescribed by three years. Such an agent is not included among the persons enumerated in arts. 3503, 3504, of the Civil Code.

Since the stat. of 20 March. 1839, § 15, repealing art. 554 of the Code of Practice, all sums due on contracts bear interest from judicial demand, though none has been stipulated, and the demand is unliquidated.

A PPEAL from the District Court of Rapides, Campbell, J. Ryan, for the plaintiff. Hyams, for the appellant. The judgment of the court was pronouced by

King, J. The defendants are sued for a balance alleged to be due on an open account with interest, and a judgment in solido against them is prayed for. The cause was tried in the court below by a jury, who gave a verdict for the plaintiff, and from the judgment rendered thereon the defendant, Williams, has appealed.

From the evidence, it appears that the defendants entered into a partnership for the purchase of slaves in Virginia, for re-sale, and that two lots or gangs were purchased and sold. Of those first purchased several were re-sald in the State of Mississippi, and the residue in Louisiana. The second lot appear to have been all disposed of in New Orleans. The plaintiff was employed in Virginia, as the agent of the defendants, in making purchases in that State of the second lot; \$30,000 were placed in his hands, for that purpose; and upon that sum it was agreed that he should receive a commission of five per cent. The plaintiff credits the defendants with the sum of \$20,000 received, and debits them with commissions, and with various disbursements made for the defendants in the purchase of slaves, and in defraying expenses incurred in the execution of his agency. He also charges them with the price of a slave and of a horse, sold to them. The defendants deny that they are commercial partners, and plead the prescription of three years, as applicable to the claim for commissions.

Before proceeding to the merits, it becomes necessary to consider a bill of exceptions, taken to the opinion of the judge admitting in evidence part of two statutes of Virginia, the first declaring slaves to be personal property, and the second regulating the rate of interest, on the ground that the whole of each of those statutes, and not extracts from them, should have been produced. The judge did not, in our opinion, err. It was sufficient for the plaintiff to produce an authenticated copy of those sections only of the statutes of Virginia upon which he relied. 5 Rand. 126. The plaintiff was bound to prove the foreign law on which he relied as a fact; but it would be unreasonable to require of him to produce more of that law than was necessary to establish his right to recover. Inconveniences may no doubt arise from permitting a part, instead of the entire law, to be offered in evidence; but if the party against whom it is offered have reason to believe that other provisions of the particular law are favorable to himself, it is incumbent on him to produce those parts. If he be surprised by the introduction of such extracts in evidence on the trial, the court would, upon a proper showing, grant time for procuring the SULLIVAS 9. WILLIAMS. entire act. In the present instance, it is not pretended that the particular sections offered by the plaintiff, are qualified by other parts of the acts from which they are extracted, and there is no complaint of surprise.

The fact that slaves are personal property in Virginia, is sufficiently proved. But it is contended that the partnership was formed in Louisiana, where the defendants resided; that the slaves were purchased for re-sale in this State; that upon their introduction into this State they became immovable by destination of law; and that no other than an ordinary partnership could exist in relation to them. It is shown that a partnership existed between the defendants prior to the commencement of the plaintiff's agency, and that a part of their common slaves were sold in the State of Mississippi. The subsequent purchases for the New Orleans market were continued acts of the same partnership. As the joint purchasers of personal property for sale, the defendants became commercial partners, and are liable as such to the plaintiff. C. C. 2796.

Two sums have been awarded to the plaintiff by the jury, which we think are not supported by the evidence, and must be deducted from the judgment. The first is a sum of \$500, charged as having been advanced by the plantiff for the use of the partnership. This item is supported alone by the answers of the defendant Sullivan to interrogatories. Those answers are binding only as between the party interrogating and the party interrogated. The appellant, Williams, had no opportunity of a cross examination, and as to him they have no effect. Johnson v. Marsh ante p. 772. Morrill v. Carr, ante p. 807. The second item unsustained by proof is one of \$140, for the price of a horse. There is no evidence showing that the disbursement was for the use of the partnership.

We think that the prescription of three years is not applicable to the plaintiff's claim for commissions. The plaintiff acted in the capacity of an agent, and belongs to none of the classes of persons enumerated in the articles of the Code which treat of the prescription of three years. C. C. 3503, 3504. We do not understand the case of Coole v. Cotton, 5 La. 12, as deciding that salaries due to agents are prescribed in three years, nor that agents employed for the purchase of slaves stand upon a different footing from other mandataries. The court only determined that the plaintiff in that case was a secretary, and that his wages as such were, under article 3503 of the Code, prescribed by three years.

The section of the Virginia statute in relation to interest, which has been affered by the plaintiff, establishes no rate of interest in the absence of an agreement of parties, but merely declares contracts null in which a higher rate than six per cent is reserved or taken. The plaintiff's claim for interest must rest upon our own laws. Previous to the act of 20 February, 1839, s. 15, repealing the 554th art. of the Code of Practice, no interest was due upon unliquidated demands, even from the date of judgment. We have uniformly held that, since the passage of that act, all sums due on contracts bear interest from judicial demand, even where none has been stipulated, and the demand is unliquidated. We consider the plaintiff entitled to legal interest on his demand, which is based on a contract, from the date of the repealing statute of 1839.

It is urged that a charge of \$5,000 in the plaintiff's account, is unsupported by evidence. The proof by which it is sustained is a receipt, signed by Getting, in these words: "Received, 3d January, 1834, of Luther O. Sullivan five thousand dollars, to be accounted for in negroes to the said L. O. Sullivan,

for Warner Sullivan." There is no allegation that the plaintiff was not authorised to employ Getting as a sub-agent, or entrust to him funds of the defendants for insistment; but, on the contrary, the proof is that he had previously been employed by the defendants themselves as an agent; that they were satisfied with him, and desired that his agency should be continued.

After deducting from the judgment of the lower court the two snms which we consider unsupported by proof, there remains due \$1,799 03, for which sum the judgment of the lower court ought to have been given, with five per cent interest, from the 20th of April, 1839. The defendant, Sullivan, has not appealed, and as to him the judgment must remain undisturbed. It is therefore ordered that, as far as relates to the defendant Williams, the verdict of the jury be set aside, and the judgment of the District Court be reversed. It is further ordered that the plaintiff recover of the defendant Williams, the sum of \$1,799 03, with five per cent interest thereon from the 20th day of April, 1839; the plaintiff paying the costs of this appeal, and the defendant those of the court below.

BRAY v. BYNUM.

An appeal from a judgment rendered against a married woman, taken by her without the authorization of her husband or of the court, must be dismissed. C. P. 106, 107, 113. And where it does not appear that she was authorized by either to defend the suit in the court below, and judgment was rendered against her by default, an averment in the petition for an appeal that the petitioner is acting with the assistance of her husband, is not sufficient; nor will an affidavit by her attorney at law that the husband had authorized the appeal, be enough.

A PPEAL by the defendant, a married woman, from a judgment of the District Court of Rapides, Boyce, J. Hyman, for the plaintiff. Waters, for the appellant. The judgment of the court was pronounced by

King, J. A motion has been made to dismiss this appeal, on the ground that it has been taken by appellant, who is a married woman, without the authorisation for husband. It does not appear that the appellant was authorised, either by her husband, or by the judge, to defend the suit in the court below. She made no appearance, and a final judgment was rendered against her on a default. In the petition for an appeal it is averred, that the petitioner is acting with the assistance of her husband; but the latter has not joined in the petition. It no where appears that, at any stage of the cause, the husband has done any act from which his authority to prosecute this appeal can be inferred.* The law is express that a married woman can not stand in judgment, without the authorisation of her husband or of the court. C.P. art. 106, 107, 118. 1 Rob. 230, 468.

Appeal dismissed.

^{*} On the day after the application was filed to dismiss this appeal, the counsel for the appellant filed a statement, sworn to by him before a justice of the peace, that he had been requested by the appellant to prosecute the appeal in this case, and that the husband of the appellant, previously to the taking of the appeal, authorized the proceeding desired by his wife.

Toler v. SWAYZE et al.

Where one who has obtained a judgment against the maker and endorsers of a note, colludes with the parties who were primarily liable on it, for the purpose of screening their property under pretended judicial sales, the liability of the last endorser will be discharged; nor can it be revived by the transfer of the judgment to third persons.

The vendor of a debt or incorporeal right warrants its existence at the time of the transfer, though no warranty be mentioned in the act of sale (C. C. 2616), and that it exists such as the parties understood it, accompanied with all the securities contemplated by the contract

of assignment.

One who sells a judgment obtained against several persons in solido, impliedly warrants that the judgment exists as it purports to do; and if, at the time of the sale, one of the debtors had been discharged, the vendor will be liable on his warranty. Aliter, if the purchaser, at the time of acquiring the judgment, was aware of collusion and frauds between the vendor of the judgment and other parties to it, by which one of the debtors had been discharged.

A PPEAL from the District Court of Avoyelles, Boyce, J. Dunbar, Hyams, and Elgee, for the plaintiff. Waters, for the appellants. Waddelly for the warrantor. The judgment of the court was pronounced by

SLIDELL, J. The defendants, Swayze and Lewis, are the assignees of a judgment obtained by J. L. Garrett against McCrory, Brewster, Stewart, and Toler, in solido. This judgment was obtained upon a note made by Mc Croryand Brewster, in solido, to the order of Stewart, and endorsed by Stewart, and then by Toler. The assignees of this judgment issued execution against Toler for the unpaid balance of the judgment; and Toler then brought the present action, and enjoined the execution. The alleged ground of the injunction was that, Toler had been discharged by the fraudulent collusion of Garrett, with Brewster, and the other parties who were primarily liable, whereby their property was fraudulently covered up, under the pretence of judicial sales, at which the property had been fraudulently sacrificed. The defendants called their assignor in warranty. The court below decreed that the liability of Toler had been completely discharged by the conduct of Garrett, before the assignment to the present defendants. This decree is undeniably correct; and there has not been even an attempt in argument to vindicate the transaction, or dispute the correctness of the opinion of the district judge, who perpetuated the injunction.

As to the call in warranty, the court was of opinion that the warrantor was not bound; that his warranty was of the existence of the principal obligation; that Brewster and McCrory, the principal debtors, were still bound for the balance of the claim uncollected at the time of the transfer to Swayze and Lewis, for aught that appeared to the contrary in the evidence; and that the fact that the liability of Toler had been discharged at the time of the transfer, did not create a liability under the warranty. "I am of opinion," said the district judge, "that the succession of Garrett is not liable on the implied warranty, until it is first established that the judgment does not exist as to any of the debtors."

In this opinion we cannot concur. He who sells a debt, or an incorporeal right, warrants its existence at the time of the transfer, though no warranty be

mentioned in the deed. Civil Code, art. 2616. In the present case the thing sold was a judgment, in solido, against four persons, of whom Toler was one. There was an implied warranty that the judgment existed as it purported to exist; and even if, on the face of the judgment, Toler had been condemned as surety, it would not have varied the warranty. "Quand une créance est vendue avec une hypothèque sur des immeubles déterminés, ce n'est pas assez que la créance existe, il faut encore que l'hypothèque promise soit entière au moment du contrat; et si une portion des biens était affranchie de l'hypothèque, le cédant serait tenu de garantir le cessionnaire qui ne trouverait pas toutes les sûretés sur lesquelles il a compté, et dont l'absence peut compromettre le capital qui doit lui être remboursé." Troplong, Vente, vol. 2, ch. 8, no. 933. When a debt is assigned the warranty is, not merely that the debt exists, but that it exists such as the parties understood it, that is, accompanied and protected by all the securities contemplated in the contract of assignment. If, however, there was knowledge by the assignees, at the time when they took this transfer, of the frauds connected with this claim, upon which question of fact we express no opinion, they can demand no indemnity against the consequences of those frauds.

In revising the judgment of the court below, we shall remand the cause for a new trial by jury.

As to the judgment upon the claim of the sheriff, Ricard, for services in the execution of the writ enjoined, it cannot be examined, he not having complied with the condition of the order of appeal, by giving bond.

It is therefore ordered that, the judgment in favor of *Toler* be affirmed. It is further decreed that the judgment dismissing the claim of the warrantees be reversed, and that the issue made between the said *Swayze* and the said warrantor, be remanded for a new trial, by jury, the said warrantor paying the costs of this appeal.

ELAM v. BYNUM et al.

The appearance of a husband as a co-defendant with his wife in a suit, is tantamount to an express authority on his par for ther appearance; but where an appeal is allowed to a husband and wife on motion in open court, and the husband afterwards abandons the appeal, giving no bond and making no appearance in the Supreme Court, the prosecution of the appeal will be considered, as to the wife, as unauthorised. Affidavits of the husband, or of his attorney, exhibited on the motion to dismiss, to prove the authorisation of the wife, will not be noticed; the case must be determined as it stood at the time of the motion to dismiss.

A PPEAL from the District Court of Rapides, King, J. Flint, for the plaintiff. Hyman and Cumming, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J. A motion is made to dismiss this appeal as to Bynum and wife. The former has furnished no appeal bond, and there is no ground on which he can be considered as lawfully before the court. As to the wife, the motion is made on the ground that she has no authority from her husband, or the court, to prosecute this appeal. The appeal appears to have been taken by the defendants respectively; it was allowed on their motion, in open court.

We have always held that the appearance of the husband as a co-defendant

BLAM U. BYNUM. with the wife in a suit, was tantamount to an express authority on his part for her appearance. The wife must be considered as having taken this appeal with the authority of the husband, in the court below. But he abandoned the appeal, gave no bond, and made no appearance in this court. The wife is then without the presence and without the authority of her husband in this court, no authority having been shown for her appearance. As to the affidavit of the husband and the attorney, exhibited on the motion to dismiss, we are not permitted to notice them. The case must be determined as it stood on the motion to dismiss, without the appearance of the husband as a party to the appeal.

As to the other defendant, Bray, we have been furnished with no argument on the part of his counsel, and from an examination of the evidence we are satisfied there is no error in the verdict and judgment rendered against him.

The appeal, so far as relates to Bynum and wife, is dismissed; and the jadgment against Bray is affirmed, with costs as to the several appellants.

OLIVER v. SIMMES.

Where the ends of justice require it, the court will remand a cause, with leave to the plaintiff to amend his pleadings.

A PPEAL by the plaintiff from a judgment of the District Court of Avoyelles, Farrar, J. O. N. Ogden, H. Taylor, and Swayze, for the appellant. Waddell and Edelen, for the defendant. The judgment of the court was promounced by

SLIDELL, J. In July, 1842, Simmes filed his petition to be declared a bankrupt, and, in May, 1843, he obtained, in the usual form, his discharge and certificate,-pursuant to the act of Congress of 1841. Among the debts due by him at the time of filing his petition to be declared a bankrupt was a note of Simmes, endorsed by Oliver, upon which a judgment had been obtained by the holder, Burgess, against the maker and endorser. This judgment the endorser was compelled to pay after the discharge of Simmes. In 1842, Simmes addressed Oliver a letter, in which, after informing him that he had just filed his petition to be declared a bankrupt, he observese: "The debt of McEnery &. Ford, which is unjust, I wish you to avoid if possible. As to the debt due Burgess, I hope, by another year, to be able to assist you, if not pay it. There is also a note held by Judge Overton, for \$1,500, endorsed by you and Griffin, as security for a note due by me to the Union Bank, which note I have reduced to \$921 and renewed, with which you will never be troubled." In February, 1843, before the discharge and certificate were granted, Simmes wrote another letter to Oliver, in reply to one written by Oliver, which lattor, however, is not in evidence. In this letter Simmes writes as follows: "Your favor came duly to hand, and contents duly noted. I regret my inability to render you the desired aid. My circumstances are familiar to you; consequently minutiæ would be unnecessary. Suffice it to say, I shall, whenever my means will enable me, pay every farthing you may pay for me. At present, without means, without friends, without resources, could I raise funds I would be the greatest financier," &c. The first letter is written apparently in a very friendly tone. In the second he addresses Oliver formally, and concludes in the same formal

manner. The relations of the parties had changed; but whether from the nature of Oliver's letter, or from what other cause, does not appear.

The plaintiff has declared upon the judgment which he had paid as endorser, and a promise to pay after going into bankruptcy, alleging also the ability of Sinnes to pay. The defendant has pleaded his discharge and certificate. There was no replication, impeaching them for fraud or wilful concealment by him of his property or rights of property contrary to the provisions of the bankrupt act, nor any prior reasonable notice specifying in writing such fraud or concealment.

The question has been noticed at bar, and has received the serious consideration of the court, whether the promise above stated, being made before the certificate was granted, is binding upon the party. It has been urged by the counsel for the defendant that the promise in such case must be unequivocal, and relate to some specific debt; and that, in these essentials, the letters of the defendant are deficient. It has also been a subject of serious deliberation with the court, whether, to give validity to such a promise, is consistent with the true policy of the bankrupt law.

Upon this latter point the grounds of our doubts may be briefly stated. Promises of this kind, although volunteered and purely gratuitous, (which the promise in question may or may not have been,) might be made with the view of inducing a creditor, from whom the bankrupt apprehended opposition, to refrain from resisting his discharge. The motive might exist, and the object be attained, without the possibility of proving it. But the act certainly contemplated a free and fair discussion of the bankrupt's previous conduct, and right to a discharge; and all the creditors would be entitled to the benefit of facts and circumstances which might be within the knowledge of a few. Again, the policy of the law was to relieve the honest and unfortunate debtor from all his liabilities, and restore him to the untrammeled exercise of his future industry; to hold him out to the public as one unembarrassed, and with whom new contracts might be made without the risk of interference from former creditors. Upon that assurance new creditors would be considered as acting. Such are some of the prominent considerations which have created in our minds doubt as to the validity of a promise like this, made before certificate.

Our attention was called by the plaintiff to the cases of Truman v. Fenton, Cowper, 594, and Besford v. Saunders, 2 Henry Blackstone, 116. Those cases certainly deserve much consideration, but it must be observed, at the same time, that they have their points of distinction from the case before us. In Fenton's case it appeared that the bankrupt had defrauded the plaintiff by drawing him in, on the eve of a bankruptcy, to sell him a large quantity of goods on credit, at a time when he must have known of his own insolvency, and which the plaintiff had not the smallest suspicion of. The consideration of the new promise was the debt thus contracted, and the agreement of the creditor not to prove under the commission, he also giving up the securities he had received from the bankrupt. The debtor gave his promise, in the form of a new note, amounting to little more than half of the real debt, in satisfaction of his whole demand. The proposal first moved from the bankrupt, and was his own voluntary request, without threats or undue influence on the part of the creditor. Lord Mansfield said the defendant was bound. It is true, he also said, that all the bankrupt's debts were due in conscience, and that this was a sufficient consideration, the debts not being extinguished in fore conscientia, though all legal

OLIVER U. SIMMER. OLIVER O. SINNES. remedy was gone. Aston, Justice, in the same case, seemed to put his concurrence mainly upon the ground that, the waiver of the right to come in under the commission was a benefit to the rest of the creditors. He also observed that, if a bankrupt could not make himself liable by a new promise the provision in the statute Geo. 2, c. 30, by which every security for the payment of any debt due before the party became a bankrupt, as a consideration to a creditor to sign his certificate, is made void, would be totally nugatory. No such provision is found in the act of 1841. The case of Besford v. Saunders has this very essential difference from the one before us, that the bankrupt's promise "to pay when he was able," was made after the certificate.

Although we have stated our doubts, we have not formed conclusively, nor do we express, any opinion as to the validity and effect of Simmes' promise. The conclusion to which we have come, to remand this case, renders it not indispensable to decide that question at present; and we have a further reason in the very serious importance of the subject, and the circumstance that the approaching close of the term, and our present limited means of examination, do not permit us to consider it as fully as it deserves.

We have stated that there was no allegation in the pleadings charging fraud or wilful concealment of property contrary to the provisions of the act, nor prior reasonable notice specifying in writing such fraud or concealment. But the plaintiff's counsel in argument has made these charges, and referred to testimony which was offered at the trial, and not formally excepted to. It appears that a very short time before the bankrupt filed his petition to be declared a bankrupt a judicial sale was made under execution against him. The defendant furnished a list of the property which he desired to be seized, and though it consisted of various objects, such as lands, slaves and an interest in a ferry, he gave a written consent that it should be sold in block, and made the usual waivers. A letter was written to the sheriff by the plaintiff's counsel, authorising him to adjudicate the property to the defendant's brother-in-law for \$1,000, if he should bid that sum. The adjudication was made, for that sum. Soon after another sale was made in block, to the same party. The sheriff states that nobody attended at either of these sales, but the party to whom the property was These and several other circumstances detailed in the testimeny, particularly the continued possession and apparent control of portions of the property after the sheriff's sale, present a case which justifies the exercise of the discretionary power of this court to remand causes for further investigation. We do not feel at liberty to decide the cause on the case as presented, because the act of Congress expressly requires a formal notice in impeaching a certificate; and the justice of the provision is obvious, that a defendant may not be taken by surprise, and may have a full opportunity to explain or defend his conduct, if it be in his power to do so.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded for a new trial, with leave to the plaintiff to amend his pleadings by impeaching the discharge and certificate of the defendant, and to give notice pursuant to the fourth section of the bankrupt act; the defendant paying the costs of this appeal.

TURNER v. LUCKETT.

A judgment obtained against a party on the ground of his illegal interference with the administration of plaintiff's property while the latter was a minor, which allowed a tacit mortgage on the property of the party against whom it was rendered from the date of the interference, not alleged to have been obtained by fraud or collusion, will be prima facie evidence, that the sum claimed was due and that it was secured by a tacit mortgage, in an action against a third person to enforce its execution on property held by the latter, alleged to have been acquired from the defendant in the first suit while subject to the tacit encumbrance recognised by the judgment obtained against him. But where the rate of interest allowed by the original judgment is higher than the law authorises, the judgment will be enforced against the property in the hands of the third possessor only for the amount for which it should have been rendered.

A PPEAL from the District Court of Rapides, Cushman, J. Waddell and Edelen, for the plaintiff. Flint and Harris, for the appellant. The judgment of the court was pronounced by

Kina, J. The plaintiff obtained a judgment against Crain, for \$996, with ten per cent interest from the 28th of December, 1839. The indebtedness of Crain arose from his interference in the administration of the plaintiff's property while the latter was a minor, without having been appointed his tutor or curator. The judgment recognised a tacit mortgage on the property of Crain, resulting from his acts of unauthorised administration, to take effect from the date of the illegal interference. The object of the present suit is to enforce that judgment upon property of the defendant, Luckett, which it is alleged was subject to the tacit encumbrance in the hands of Crain, its former owner. A judgment was rendered in favor of the plaintiff, from which the defendant has appealed.

Several bills of exception were taken on the trial below, to opinions of the judge admitting the testimony of witnesses to prove Crain's acts of unauthorised interference, and to connect the plaintiff's claim with those acts. It does not become important to enquire whether those objections be well founded or not, as, in our opinion, the plaintiff has sufficiently established his right by other evidence. The action is based on the judgment obtained against Crain. That judgment is in evidence. There is no allegation that it was obtained by fraud or collusion, and, while it remained unquestioned, it formed such prima facie evidence that the sum claimed was due, and that it was secured by a tacit mortgage on the property of Crain, as dispensed the plaintiff from the production of other testimony. 17 La. 205. 4 Rob. 335.

It is shown that the property of the defendant, on which the judgment is sought to be enforced, formerly belonged to *Crain*, and that, while he was the owner, the tacit mortgage resulting from his acts of illegal administration attached. C. C. 3283. 8 Mart. N. S. 367.

The defendant, as third possessor, can only be made answerable for five per cent interest, which is the highest rate that the plaintiff could have claimed from *Crain*, in the absence of an express agreement. In this respect the judgment must be corrected.

It is therefore ordered that so much of the judgment of the court below as decrees that the defendant pay ten per cent interest on the amount thereof, he

TURNER ...

reversed. It is further ordered that the plaintiff recover five per cent interest on the amount of said judgment, from the 28th day of December, 1839; and, in other respects, that said judgment be affirmed; the appellee paying the costs of this appeal.

SUCCESSION OF STAFFORD.

Where an incidental contest arose, in the progress of an action for the settlement of a partnership, as to the payment of a note to a receiver appointed by the court, which was cumulated with the main action, but had no connection with the other matters in contest, an extract from the record, containing all the proceedings relative to the note, will be admissible in evidence, though objected to as not being a complete transcript of all the proceedings in the case, where the whole would have been attended with heavy expense, and the nature of the case shows that there was no necessity for producing the whole record. Per Curiam: In mortuary and insolvent proceedings, which are frequently voluminous, and in which all incidental contests are cumulated, the production of the entire record has never them required in practice, and we know of no reason why it should be.

A PPEAL from the District Court of Avoyelles, Farrar, J. Edelen, for the appellant. H. Taylor and Swayze, contrâ. The judgment of the court was pronounced by

EUSTIS, C. J. The question about which the parties to this suit are at law is, whether a note of the deceased, for \$1,418 07, to the order of Conner, Gridley & Co. has been paid? As an issue has been made as to that fact by the pleadings, we do not deem it material to notice any matters which the case presents, except as they relate to that issue. Whitchead, who was a partner of the late firm of Conner, Gridley & Co., is the receiver of the partnership, which is in liquidation, under an appointment of the late court of the first district, and the opposition is filed by him in that capacity. Conner had been receiver before him, and the fact sought to be proved is, the payment of the note by Stafford to him; and a litigation arose between the new receiver, Whitehead, and Conner, concerning the sums with which Conner was chargeable as receiver, he having received certain amounts in that capacity from the debtors of the partnership. Certain proceedings and entries on the minutes, the judgment of the District Court, and the opinion and decree of the Supreme Court on the appeal, which related to this litigation in which Conner was sought to be charged with this note as having received it from Stafford's estate, were offered in evidence on the trial of this cause in the court below, and were not received by the court. There was judgment sustaining the opposition of Whitehead, receiver, by which he was recognised as a creditor of the estate of Stafford for the amount of the note, and the administratrix has appealed.

The first ground on which the evidence offered was objected to was, that the record of the proceedings of the District Court was not a complete record of a suit, but was an extract from the record of the suit of Gridley & Whitehead, and of James B. Conner. This is true; it was not. But the proceedings in relation to this note appertained to his responsibility as receiver only, were cumulated with those of that suit, and had no connection with the rest of the matters of contest which it embraced. The controversy concerning that note was conducted under the title of G. & W. v. J. B. C., which was one of the most contested and involved suits that we have ever wit-

nessed, and the expense of the whole record would be too onerous on a party to require him to produce it. unless there was a necessity for it; and there appears to be none in this case. The objection, therefore, that the copy offered was not of a complete record of the principal suit, and did not show the whole evidence and proceedings had in said case, is not well taken.

SUCCESSION OF STAFFORD.

In mortuary and insolvent proceedings, which are frequently voluminous, in which all incidental contests are cumulated, the production of the entire record has never, to our knowledge, been required in practice, and we know of no reason which requires their production. Greenleaf, in his treatise on evidence, states the rule as we understand it, which is the reverse of that which was acted on in the court below. See that work, vol. 1, § 512.

The second objection was of the same character as the first; it was, that the record of the decree of the Supreme Court was incomplete, and between parties different from those in the present suit. The decree was made in the original suit of G. & W. v. J. B. C., under that title, name, and number; but under it, the litigation concerning the note between Whitehead, the receiver, and Conner, was conducted.

We think the court erred in rejecting the evidence on the objections made, and that the documents D and E, offered by the administratrix, ought to have been received by the court. As to their effect in proving the fact of the payment of the note, or as to the copy of the proceedings containing all that related to the litigation relative to this note, we are not called upon to give any opinion, confining ourselves to the objections stated in the bill of exceptions.

The judgment appealed from is therefore reversed, and the cause remanded for further proceedings according to law; the appellees paying costs.

POLICE JURY OF RAPIDES v. HUIE.

To authorize the collection of the special tax, imposed upon certain lands subject to includation in the parish of Rapides. by the statute of 27 February, 1845, the tax must be imposed at a certain rate upon the assessed value of the inundated lands, the statute authorizing no other basis. And where an assessment was made by two assessors appointed by the police jury, but never advertised, and plaintiffs offer no proof that any notice of the assessment, or of the proceedings in relation to it, was ever given to the owners of the land on which the tax was imposed, the tax cannot be recovered. The assessment roll and the report of the assessors are proof only of the facts that they were made as they appear to be; they are not evidence of notice to the party assessed, nor of any other fact at issue between the parties.

A PPEAL from the District Court of Rapides, Cushman, J. O. N. Ogden, for the appellants. Elgee and Hyams, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. The petition states that, the defendant is indebted to the plaintiffs in the sum of \$624.25, being his proportion of a special land tax of twenty-four hundredths per cent, levied by the police jury of Rapides, in accordance with an act of the legislature of 1845, authorising them to impose a special tax on all lands north of Red river, inundated by the overflowing of the same, the defendant owning in the district in which said land tax was levied 320 acres of cleared land, valued at \$15 the acre, and 1900 acres of woodland, valued at \$15

POLICE JURY

the acre; making the amount due by him the sum demanded in the petition. The answer presents several points of defence, which involve questions of the gravest character. One of them is, that the plaintiffs cannot recover in the present action, because no lawful assessment of the tax has been made. It is on this point that we shall decide the case, which supersedes the necessity of enquiring as to the validity of the others. The jury which tried this case in the court below could not agree, and a pro formá verdict was rendered for the defendant. Judgment was rendered accordingly, and the plaintiffs have appealed.

The statute under which this tax is imposed is to this effect: "That the police jury of the parish of Rapides shall be, and they are hereby authorised to impose a special tax upon all lands inundated by the overflowing of the waters of Red river, for the purpose of constructing embankments across all bayous connecting with said river; the said tax to be imposed upon districts to be laid off by the Police Jury at a rate per cent upon the assessed value of said inundated lands, but no district so laid off shall be taxed for the benefit of another; this act to expire on the 1st of April, 1846. Acts of 1845, ch. 37, p. 16. It is by virtue of this statute that the right to impose this tax by the Police Jury is asserted, and to maintain this right, so as to enable the plaintiffs to recover the amount of the tax against the owners whose lands are subjected to it, a compliance with its provisions must be shown. The tax must be laid at a rate per cent on the assessed value of the inundated lands, the statute authorising no other basis than the assessed value, and limiting the power of the Police Jury to this standard.

It is obvious, then, that an assessment was necessary in order to give any legal effect to this tax. Was the assessment made under the authority of the State, on which the general and state taxes are collected, to serve for this special tax, or was a new assessment to be made by the Police Jury? The latter proposition is maintained by the counsel for the plaintiffs, who contends that under this law the Police Jury has the authority to make it, and that such a one has been made in relation to this tax as complies with the requisites of the law-

The assessment which is before us purports to be made by assessors, appointed by the Police Jury. The assessment was not advertised, and no notice of the assessment, or of the proceedings in relation to it, is proved to have been given to the parties upon whose lands the tax was to be imposed. This issue was directly made under the answer of the defendant, and it was incumbent on the plaintiffs to establish effirmatively, by legal evidence, those facts necessary to enable them to recover the amount in the form in which they have sued. The tax was laid according to the assessment roll made by these assessors, and on each of the several tracts of land maintained therein as subject to inundation.

Confining ourselves to the question as to the validity of the assessment without advertisement or any legal notice, we are at a loss for any grounds on which it can be supported. It is said that the assessment, and the return or report, of the assessors, contains proof of notice, and that, as the ordinance of the Police Jury under which the assessment was made required the assessors to administer oaths to the proprietors of land in the district to be taxed as to the extent of their land overflowed in the year 1844, the report of the assessors as to the fact of their refusal to take the oath, or having taken it, is prima facie evidence of notice. But to this view of the subject we cannot accede. We think

the assessment roll and report prove only that they were made as they appear Police Juny to be, but are evidence of no other fact which is in issue between the parties under the pleadings.

Huir.

To authorise the imposition of a tax, without a previous assessment, or affording to the tax payer an opportunity of contesting its legality in some form, is such a derogation from common right that a court cannot, in a doubtful case, suppose that it was intended by the legislature; still less when the taxing power is granted to a municipal corporation. If, as is contended by the counsel for the plaintiffs in this case, the assessment was to be made by the Police Jury, and no form is prescribed in which it was to be made, it would follow as the most reasonable consequence from this omission that the usual form of assessment required for state taxes should be observed, or at least that the parties to be affected by the tax should have full notice of the proceedings had in relation to it, and that the publicity by advertisement should be the protection of the land-holder against capricious or vexatious taxation. A construction which would confer this arbitrary power on a municipal corporation, of taxation without notice or advertisement, we cannot give to the statute under consideration. The statute considers the contribution to be exacted from the owners of lands inundated as a tax, and requires it to be imposed on the assessed value. It is placed in the category of taxes, and assessment is to be its foundation. It is only a fair and reasonable implication that the legislature intended such an assessment should be made as should conform at least to the principles of the ordinary assessment of taxes imposed by the State on real property, and not according to the arbitrary will of a municipal body.

The mode of assessing the state taxes has been established by positive enactment ever since the organization of our state government, with the object of protecting the citizen, and providing for a just and conscientious distribution of the public burthens. Even the form of the assessment roll is regulated by law, so that the humblest capacity can easily understand it. It is, besides other formalities, required to be deposited in some place designated by previous public notice, for a number of days, during which all objections may be made to its correctness; and the assessors are bound to hear and determine on the complaint of any person who may consider himself injured thereby, making such alterations in the assessment as the evidence exhibited may justify. Our whole legislation is of this character, and if there is an exception to it, it is not within our knowledge. Our jurisprudence has been uniform in its accordance with it. The State Bank v. Seghers, 6 Mart. 724. Hiriart v. Morgan, 5 La. 45. Police Jury v. Hampton, 5 Mart. N. S. 395.

It is proper to notice the facts disclosed by the testimony of the clerk of the Police Jury, by which the principles of the assessment law, as well as of what we consider the common right, have been set at nought in the proceedings of We have stated that we did not consider the that body in relation to this tax report and assessment made by the two assessors, as evidence of the facts which they stated. But if it were otherwise, it would fall far short of establishing a notice to the defendant of the proceedings by which his property was to be reached. In the assessment, the quantity of cleared and wood land, and the value of each, is stated against the name of James Buie, with the appended words, do. do. under an entry made against a preceding name-Refused to . swear. The list of persons to be taxed in headed Assessment Roll.

The clerk of the Police Jury is the keeper of the minutes and records of that

HUIR.

Police Juny body; he resides seven or eight miles from Alexandria; the ordinances of the police jury are advertised in no other way than by publishing them in the Red River Republican; the assessment roll was not advertised by witness; he was not ordered to advertise it; it was not advertised by any one as witness keows; had he been ordered to advertise it, he should have done it; had it been advertised by the authority of the Police Jury, he should have known it. Never saw it advertised in the public papers, or any where else. The assessment roll was returned to the Police Jury and received by them on the 8th December, 1845; subsequently, upon examination, it was found to be defective; it was handed back to the assessors, and afterwards returned by them to the Police Jury. It was in possession of the clerk—the witness whose testimony we are giving from the time it was last received, the 17th February, 1846, until after the institution of this suit, to the best of the recollection of the witness. He did not keep these papers at his residence in Rigolet, but kept them in a room provided by the Police Jury, in the court house, in Alexandria; they were kept in a desk, which had a lock, but no key; the room was locked; witness had one key, and an officer of the police jury had another, but no custody of the papers; neither had he any thing to do with them. Witness has been residing in Rigolet, since 1845.

> The ordinance imposing the tax refers, both as to the value of the lands and those to be assessed, to the assessment made by Meade and Bailey, the assessors, bearing date the 8th December, 1845, and thus makes it part of the ordinance. Indeed it is the whole of it, with the exception of the enacting: clause.

> We have to decide whether, under this state of facts, there is before us legal? and sufficient evidence that the tax mentioned in the plaintiffs' petition has been imposed, at a rate per cent on the assessed value of said inundated lands, and being of opinion that there is nothing before us which establishes that a legal assessment has been made, it follows that the case of the plaintiffs is not

> It becomes unnecessary to notice the other objections which may be made against the right of the plaintiffs to impose and recover the amount of this tax, except to observe that they merit the serious consideration of those who are entrusted with the municipal affairs of this parish.

> The judgment of the District Court is therefore affirmed, without prejudice, and the appellants paying costs.

REYNOLDS et al. v. Rowley et al.

A defendant, who is a mere nominal party, having no interest in the event of the suit, may be examined as witness against her co-defendants.

Acknowledgements and declarations by a person who had been an agent of the party against whom they are offered, made after his agency had ceased, are inadmissible.

The acknowledgment of a debt by one joint debtor will not interrupt prescription as to his codebtor. C. C. 3517.

Declarations of a person examined as a witness in a cause, made under oath while testifying as a witness for one of the defendants in another cause, are inadmissible. The party against whom the testimony is offered cannot be deprived of the right of cross-examining the witness as to the facts sworn to on another occasion.

A defendant cannot deprive a co-defendant of the right to challenge a juror peremptorily. A copy of the proces-verbal of a sale made by a probate judge, is evidence of the sale.

RETNOLDS.

- The testimony of a witness who resides out of the State, taken on a former trial, is admissible in evidence. Per Curiam: It would be oppressive to require his testimony to be taken anew at every trial.
- A report of experts, to whom an account sued on had been referred, not homologated, and which appeared to have been abandoned by both parties, should not be allowed to go to the jury.
- A married woman having, under art. 2361 of the Civil Code, the right to administer personally her paraphernal property, may appoint an agent to act for her in its administration, and she will be responsible for his acts.
- Where a married woman retains the right to administer personally her paraphernal property without the assistance of her husband, her marriage will not revoke the powers of an agent who had been previously entrusted with its administration.
- Though an agent had no authority, under his mandate, to sign notes or draw bills, yet if he receive from a party the proceeds of notes and bills so signed by him, as loans for the use of the plantation with the management of which he was entrusted by his principal, the latter will be responsible for the amount.
- A special power to do acts not coming under the denomination of acts of administration, need not state the specific acts to be done.
- Admissions of any fact, made by an agent during the continuance of his agency, relating directly to the business entrusted to him, are binding on the principal, particularly if the fact so admitted be a thing done by the agent himself, or within his own knowledge.
- Actions by factors on open accounts are not prescribed by three or five years.

A PPEAL from the District Court of Concordia, Curry, J. Elam, for the appellants. Sparrow, T. P. Farrar, Shaw and A. N. Ogden, for the defendants. The judgment of the court was pronounced by

Rost, J. This case was remanded by the late Supreme Court on several bills of exception, and is reported in 3 Rob. 201. On the first trial in the court below, the jury gave a verdict in favor of the plaintiffs; the defendants failed in the attempt to have it set aside, and appealed. On the second trial, there was a verdict in favor of the defendants in reconvention, for one cent; the plaintiffs did not move for a new trial, and appealed.

After a careful examination of the evidence, we have come to the conclusion that we cannot affirm the judgment. 1. The fact that in two successive trials each party has obtained a verdict, neutralises the effect which, under ordinary circumstances, is properly given to the decision of juries. 2. From the manner in which the case went to the jury, we find it impossible to ascertain on what grounds the last verdict was rendered, and whether it was the result of the view the jury took of the law of the case, or of the nature and credit of the evidence adduced in support of the facts. 3. The fact specially pleaded by the defendants of the payment of \$20,000 on the account sued on, and their admission in the answer that the plaintiffs were factors of the Marengo plantation, has created on our minds the impression that there may be a balance due and unpaid on those accounts. 4. Improper evidence was suffered to go to the jury. We think justice requires that the case should be remanded; and in making that disposition of it, we will pass upon the matters contained in the numerous bills of exceptions found in the record, and lay down such rules for the trial of the case as will reduce it to little more than a question of fact, in the hope that such a course will facilitate the termination of this harrassing controversy.

- I. The evidence of Mrs. Francis E. Sprague was properly admitted against the other defendants, she being a nominal party, and having no interest in the event of the suit.
 - II. The acknowledgment and declarations of Sprague, in relation to the

RETROLDS

document marked A, and the document itself, were properly rejected, under the decision of the late Supreme Court. The agency of Sprague was at an end at that time, and the other defendants cannot be affected by acknowledgments made by Sprague and his wife, in their own affairs. This evidence forms no part of the res geste, and the liability of the defendants, being joint, the acknowledgment of the debt by one of them could not interrupt prescription as to the others. C. C. 3517.

III. The document L. L. D. was properly rejected, so far as Mrs. Rowley and the heirs of James Kempe were concerned, for the reasons given in relation to document marked A.

IV. The declarations of Mrs. Sprague, given under oath as a witness for Mrs. Rowley, in the suit of Jane Rowley against Charles N. Rowley, her husband, were properly rejected. Mrs. Sprague is a witness in the cause, and would no doubt have testified to the same facts if called upon to do so. The defendants ought not to be debarred from the right of cross-examining her upon the facts sworn to by her on another occasion.

V. The court erred in ordering the juror, Henry Vidal, to be sworn, after he had been peremptorily challenged by the counsel of Mrs. Rowley. There had been but one peremptory challenge at the time, and Mrs. Rowley could not be deprived of the right which the law gives her, by the request of one of her co-defendants that the juror should be sworn in the case.

VI. The notes marked B. 1, B. 2, B. 3, were properly admitted in evidence. They are acknowledged in the answers of the defendants. The copy of the proces-verbal of the sale of the Marengo plantation by the judge of the Court of Probates, was also properly admitted. It is the evidence of a judicial sale, and does not require witnesses to make it authentic.

The testimony of Charles A. Lacoste, taken down in writing on a former trial, could not be rejected on the grounds urged against its admission. That witness resides out of the State, and it would be oppressive and unjust to require his testimony to be taken anew at every trial. We will, however, observe that his testimony is so loosely taken down, that we think it ought to be taken again, so as to place his evidence before a jury as it really is. He is clearly a competent witness; his position and former connection in business with the plaintiffs, going only to his credibility.

The court erred in permitting the report of the experts, to whom the account sued on had been referred, to go to the jury. That report had not been homologated; both parties appear to have abandoned it, and to have gone to trial as if the reference had not been made. Under those circumstances, the report of the experts had no more value than a statement of the same facts made by any other person. It was not evidence, and should have been rejected.

VII. The letters and account of Remson & Co. were admissible to prove their own existence, and for the purpose of facilitating and completing the proof that the advances charged to Mrs. Rowley had been made; but unless the fact of those advances and the payment of them by the plaintiffs were proved aliunde, those documents proved nothing against her, and the jury should have been so charged. The accounts-current, Nos. 1, 2, 3 and 4, were properly admitted; they were a part of the pleadings in the case, and an indispensable requisite of the action. Their going to the jury did not dispense the plaintiffs from the necessity of proving them; and we have not been informed how they could have been proved, unless they were first produced.

VIII. The testimony of Coleman R. Brown, taken on a former trial, was also properly admitted, the witness residing out of the jurisdiction of the court.

The opinion we have formed on the law of the case, renders the examination of the remaining bills of exception unnecessary. The law by which it is to be decided, we consider to be as follows:

1st. The alleged incapacity in Mrs. Rowley to contract, and give a power of attorney, during the years 1832, 1833, and 1834, based upon the alleged nullity of the judgment of separation from bed and board between her and Francis A. Girault, and her subsequent marriage with Charles N. Rowley, is no defence against any sum which may be found due from her, under the allegations of the petition. If she did administer in her own right and name, and designate Sprague to her factors as her agent in the administration of the Marengo plantation, she is bound in good conscience and on general principles for the consequences of his administration. But besides this her share in that estate was paraphernal, and, under article 2361 of the Louisiana Code, the wife has the right to administer personally her paraphernal property, without the assistance of her husband. What she could do by herself, she could authorise another to do. She had from the beginning, in relation to the administration of that property, all the powers of a feme sole.

The power of attorney to Sprague was not revoked by her subsequent marriage with Charles N. Rowley. According to Judge Story, the reason that, as a general rule, marriage revokes powers of attorney previously given by the wife is, that the power of constituting an agent is founded on the right of the principal to do the business himself, and, when that right ceases, the right of constituting an agent must cease also. Story on Agency, 501. In this case the law gave Mrs. Rowley the right to administer after marriage without the assistance of her husband, and therefore the rule does not apply.

2d. The contracting of debts by Sprague in the name of the Marengo plantation brings those contracts within the power of attorney, provided the advances were reasonable in amount, and made by the plaintiffs under the honest belief that they would be applied according to the true intent and meaning of the mandate. It is necessary that those advances should have been made in good faith for the Marengo plantation, and not on the account of Sprague, or any one else; and if they were so made, the plaintiffs were not responsible for the subsequent appropriation of them by Sprague.

The contracts were not made in *Sprague's* own name, and he was not upon their face responsible for them. They were made in the name of the *Marengo* plantation; and we are of opinion that that name sufficiently designated the persons, or partnership, on whose account the debts were contracted. It may be true that *Sprague* had no right, under the power of attorney, to sign notes and draw bills as he did; but, if he received from the plaintiffs the proceeds of those bills as loans made to the *Marengo* plantation, the owners of that plantation are responsible for the amount so received.

If the ground taken by the defendants' counsel that, under our laws, special powers to do certain acts, to borrow money, for instance, must in all cases mention the specific acts to be done, was based upon recent legislation, the construction contended for by them would receive the serious consideration of the court. It appears to us that article 2966 is not to be construed as an absolute and independent provision, but as framed in illustration of the article immediately preceding it, 2965, which says, "if it be necessary to alienate, or give a

REYNOLDS E. ROWLEY.

REVFOLDS

mortgage, or to do any other act of ownership, the power must be express." But besides this consideration, the universal opinion has been ever since the adoption of the Code of 1808, from which the laws on that subject were transcribed in the Louisman Code, that a special power to do acts not coming under the denomination of acts of administration, need not state the specific acts to be done. Under such powers, the business of our banks and of our merchants has been, and continues to be, transacted, and lands and slaves are daily sold and mortgaged. That popular construction of the law has become a rule of property; it is highly favorable to commerce, and we do not feel ourselves at liberty to disregard it.

3d. The admission of any fact made by Sprague during the continuance of his agency, having a direct relation to the business entrusted to him, is binding on the defendants, particularly if it be a thing done by Sprague himself, or within his own knowledge; but after the expiration of his agency, his admissions cannot prejudice or bind the defendants.

4th. In conclusion we will observe that, this action is brought on an open account, and that the proscriptions of three and five years are not applicable to it.

For the reasons assigned, it is ordered, that the judgment be reversed and the cause remanded for further proceedings, with instructions to the district judge to conform to the rules and opinions expressed in the reasons of this decree; the defendants and appellees paying the costs of this appeal.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

AT

MONROE,

IN

OCTOBER, 1847.

PRESENT :*

Hon. George Eustis, Chief Justice.

Hon. GEORGE ROGERS KING,

Hon. THOMAS SLIDELL,

Associate Justices.

Succession of DAY.

The homologation of a "statement of debts" on which a creditor of a succession is placed as an ordinary creditor, presented by a curator with a prayer for its approval and homologation, is not such a judgment as will prevent the creditor from afterwards claiming the benefit of a mortgage by which his debt was secured. Such a statement presupposes sufficient funds in the hands of the curator to pay all the creditors who have presented themselves (C. C. 1168); and it is immaterial to a creditor what rank is assigned him thereon, as it contemplates the payment of his debt at all events. He is consequently not bound to oppose it, and insist on being classed as a mortgage creditor. It is only upon the presentation of a tableau of distribution among the creditors, according to the order of their privileges and mortgages, that a judgment could have been rendered which would preclude a creditor from subsequently asserting his true rank. C. C. 1169, 1170.

A PPEAL from the Court of Probates of Ouachita, Lumy, J. McGuire and Ray, for the opponent. Purvis and Thomas, for the appellants. The judgment of the court was pronounced by

King, J. On the 11th of January, 1841, Oliver, as curator of the succession of Day, filed in the Probate court "a statement of debts," accompanied by a petition in which he prayed for its approval and homologation. On this statement Ferdinand Sims is set down as an ordinary creditor for three notes, amounting collectively to \$2,335 80. On the 22d of July, 1843, a judgment was rendered by the probate judge, which, after correcting the statement in

^{*} Rost, J., was not present during this term.

SUCCESSION OF DAY.

several respects, concludes as follows: "All the balance of said debts, as set forth by the curator in his statement of debts, are hereby allowed as just debts against the estate, to be paid in due course of administration, and according to the classification therein, after the above corrections." The claim represented by Sims, who is the executor of Mitchell, was not among those adverted to in the previous part of the decree, and consequently falls, as is contended, within the operation of this concluding clause. On the 10th of June, 1839, previous to the filing of this statement, or to the rendition of the decree homologating it, Oliver, as curator, acknowledged in writing the claim represented by Sims to be due, and to be secured by a mortgage and privilege, and stated that he had no objections to paying it. On the 27th of September, 1843, Oliver, as curator, filed in the Probate court, what he calls "a supplemental statement of debta" due by the succession, on which he placed Sims, executor of Mitchell, as ereditor for the same sum which had figured in the previous statement of January, 1841, and classed the debt as being due by a special mortgage, which mortgage is particularly described. This "supplemental statement" was opposed by Fitzpatrick, upon the ground, among others, that the claim of Sims, executor, had been presented in a previous statement of debts which had been finally adjudicated upon, and that it could not be the subject of the further action of the court. Other claims were also opposed by Fitzpatrick. After the filing of this opposition, Oliver, as curator of Day, and Sims, as executor of Mitchell, presented a petition to the Probate court, in which they aver that the claim of Sims, executor, placed on the supplemental statement is the same with that which figures on the first statement of debts; that it was never intended to class the claim as an ordinary debt; that it was thus placed through inadvertance; and that the judgment was rendered in error. They pray that the judgment be annulled, and that the proper rank be assigned to the claim of Sims. The plea of res judicata was sustained by the court below, and Oliver and Sims have appealed.

We understand the position assumed by the appellee to be, that the statement made by the curator was a tableau of distribution, or of classification of the creditors. It is neither. It is what upon its face it purports to be, a mere statement of the debts due by the deceased, which the curator proposed to pay, with the authorisation of the judge. Such a statement pre-supposes sufficient funds in the hands of the curator to pay all the creditors of the deceased, who have presented themselves or made themselves known. C. C. 1168. Upon such a statement it is immaterial to a creditor what rank is assigned to him, as it contemplates the payment of his debt at all events. He is consequently not bound to make an opposition, and insist on being classed as a privileged or mortgage creditor. The only judgment which can be rendered upon such a statement and petition must have reference to the entire payment of all the debts, without regard to the preferences to which the creditors would be entitled, if the estate were insolvent. It seems to be conceded that the estate of Day is insolvent. If this be true, and the curator had funds in his hands, but to an amount insufficient to pay the creditors, it was his duty to present a tableau of distribution of such funds among the creditors, according to the order of their privileges and mortgages. It is only upon such a tableau that a judgment could have been rendered, which would have precluded the appellant, Sims, from subsequently asserting his true rank. C. C. 1169, 1170. No such tableau has been presented, and no such judgment rendered; and Sims has forfeited none

The second "statement," upon which this controversy has arisen, is of the same character with the first. It is a statement of debts. The condition of the succession, as far as we are informed by the record, does not require such a statement; the proceeding is irregular; and the litigation which has arisen upon it can lead to no useful or practical result. We consider it necessary therefore to remand the cause for the purpose of enabling the curator to file a tableau of distribution, in which all the creditors may contradictorily establish their respective claims and privileges. This view renders it unnecessary to consider several other claims which have been opposed by Fitzpatrick.

It is therefore ordered that the judgment appealed from be reversed. It is further ordered that this cause be remanded for further proceedings in accordance with the principles stated in this opinion; the appellee, Filzpatrick, paying the costs of this appeal.

GIRARD et al. v. CITY OF NEW ORLEANS et al.

A testator bequeathed to the corporation of a city "a settlement consisting of one thousand arpents of land, with the appurtenances and improvements thereon, and all the personal estate thereto belonging and thereon remaining, including thirty slaves and their increase; directing that no part thereof should be sold or disposed of for twenty years after his death, should B survive him and live so long, but said settlement to be kept up by B for said term of years as if it were his own, that is, to remain under his sole care and control, all the nett profits thereof to be enjoyed by B for his own use; he rendering annually an account to the city of the state of the settlement, showing its income and expenses, the number and increase of the slaves, and its nett profits; the testator further directed that, at the end of said twenty years, or at the death of B should he not live so long, the land, improvements, slaves, and other appurtenant personal property, should be sold as soon as the corporation deemed it advisable; the proceeds to be applied by the corporation to such uses as it might deem most beneficial to the inhabitants": Held, that the ownership of the property was given to the city, and the usufruct to B; that the occurrence of circumstances preventing the establishment from being kept tegether, will not terminate the usufruct; that the language of the will is merely descriptive of the property, and not restrictive of its future use, pre-supposing the employment of the slaves on the land, but not imposing it as a condition of the usufract; and that the fact of such employment becoming impossible, or so onerous and inconvenient as to make it unreasonable to exact it, could not deprive the usufructuary of the fruits of the ordinary labor of the slaves elsewhere than on the land.

The 1st acc. of the stat. of 17 February, 1805, restricting the right of the corporation of New Orleans to hold real estate, to such as is situated within the limits of the city, does not include slaves.

Slaves are not real estate. They are declared to be immovables by a positive provision of the Code (art. 461); but neither in common parlance, nor in law, are they designated by the term real estate.

The owner of property subject to an usufract has alone the right to call the usufractuary to account.

A PPEAL from the District Court of Ouachita, Curry, J. McGuire and Ray, for the appellants. Garrett, for the defendant Bry. The judgment of the court was pronounced by

Eustis, C. J. This suit is instituted for the recovery of certain lands and slaves which formed part of the succession of the late Stephen Girard, of Phi-

GIRARD W. NAW ORLEANS ladelphia, of whom the plaintiffs are the heire at law. It involves the validity and effect of certain dispositions of his last will, and particularly of one by which the testator gave a tract of one thousand acres of land in the parish of Ouachita, established as a plantation, including the slaves, to the city of New Orleans, and disposed of the usufruct of the land and slaves to Heavy Bry, for the term of twenty years from the decease of the testator, provided the usufructuary should survive him so long.

A question has been raised by the pleadings, and argued at length, as to the city of New Orleans being properly cited and made a party to this suit. After the argument of the case at the last term, we directed the record to be taken to New Orleans, in order that the corporation might become a party to the suit, and have the important interests dependent on it examined and discussed before us. We caused notice to be given to the proper authorities to that effect, but our efferts were net successful; and as the case stands before us, we are bound to decide the technical question as the corporation being properly incourt, and thus leave the material points of controversy, so far as its interests are concerned, to be the subject of future litigation.

The citation is addressed to Henry Bry, as attorney in fact of the city of New Orleans, and was served on him in person, at his domicil in the parish of Ouachita. Bry expressly disavowed his authority to appear for the city of New Orleans, and excepted on behalf of the corporation to the sufficiency of the citation as in any manner binding on the corporation. This exception was overruled, and it is on the validity of this means of bringing the corporation into court that we must first decide. There was no impediment to citing the corporation regularly in this suit; it could have been sued as a party defendant, and ought to have been cited by its proper officers. C. P. 163.

We are not at all disposed to recognise the propriety of citing an attorney in fact, though he may have authority to appear in a court of justice, when the principal is present; and it is, to say the least, questionable, whether a municipal corporation can delegate such an authority. C. P. arts. 112, 198. Civil Code, arts. 429, 420. But this suit was instituted in 1841, and the power to Bry was given in 1832, before the division of the city, which took place in 1836, and the disavowal of his authority on the part of Bry to appear for the old corporation, is conclusive as to the power of the court to act on any matter exclusively appertaining to its interests, without having its representatives under the new municipal organisation cited according to law.

As a matter of practice it is too clear to admit of doubt that the old corporation of the city of New Orleans, not having been properly cited, was not in court; and that the judge erred in overruling the exception to that effect. This being the state of the case, and the parties representing the residuary interests under the will not being before the court, as the plaintiffs insist on a decision of the cause as it is before us, it is obviously our duty to confine our decision to those questions exclusively, by the determination of which the rights of the parties not represented will not be adversely affected, to wit: the ownership and usufruct of the slaves.

The plaintiffs contend that the testamentary disposition, in favor of the city of New Orleans and Henry Bry, of the land and slaves in the 19th clause of the will, is void, for want of a capacity to receive it on the part of the city, which by law had no right to hold lands except within its limits; that the usufruct falls with the failure of the legacy of the ownership; that there has been such a

change in the property that it can no longer be used in the manner directed by Grann the will, and that the usufruct has thereby terminated, it being, as constituted New ORLEANS. by the will, of an entire thing, to wit, of a plantation and slaves to be worked together, and indivisible; and that, for each of these causes, the land and aleves belong of right to the plaintiffs, as heirs at law.

If it be conceded that the plaintiffs' position, in these respects, be correct, another question presents itself, and that is, whether, under the will, the property would in that event belong to them, or fall within the residuary clause, which is in favor of the mayor, aldermen, and citizens of Philadelphia. This question was argued before the Supreme Court of the United States in the case of Vidal v. Girard's Executors, 2 Howard's Rep. 128, but was not decided, the court considering the devise, which was contested, to be valid. It appears to rest upon authorities which are conflicting, and as it is not necessary to be decided now under the view which we have taken of this case, we proceed to examine the grounds on which the legacy of the usufruct in favor of Bry is sought to be defeated. The clause constituting it is in these words:

"All that part of my real and personal estate near Ouachita, in the State of Louisiana, the said real estate consiting of upwards of two hundred and eight thousand arpents, or acres of land, and including the settlement hereinafter mentioned, I give, devise, and bequeath, as follows, namely: 1. I give, devise, and bequeath to the corporation of the city of New Orleans, their successsors and assigns, all that part of my real estate, constituting the settlement formed on my behalf by my particular friend, Judge Henry Bree, of Ouachita, consisting of upwards of one thousand arpents or acres of land, with the appurtenances and improvements thereon, and also all the personal estate therete belonging and thereon remaining, including upwards of thirty slaves now on said settlement, and their increase, in trust, however, and subject to the following reservations: I desire, that no part of the said estate or property, or the slaves thereon, or their increase, shall be disposed of, or sold, for the term of twenty years from and after my decease, should the said Judge Henry Bree, survive me and live so long, but that the said settlement shall be kept up by the said Judge Henry Bree, for and during said term of twenty years, as if it was his own; that is, it shall remain under his sole care and control; he shall improve the same, by raising such produce as he may deem most advisable: and, after paying taxes, and all expenses in keeping up the settlement, by clothing the slaves and otherwise, he shall have and enjoy for his own use, all the nett profits of said settlement: Provided, however, and I desire that the said Judge Henry Bree shall render annually to the corporation of the city of New Orleans, a report of the state of the settlement, the income and expenditure thereof, the number and increase of the slaves, and the nett result of the whole. I desire that, at the expiration of the said term of twenty years, or on the decease of the said Judge Henry Bree, should he not live so long, the land and improvements forming said settlement, the slaves thereon or thereto belonging, and all other appurtenant personal property, shall be sold, as soon as the said corporation shall deem it advisable to do so, and the proceeds of the said sale or sales shall be applied by the said corporation to such uses and purposes as they shall consider most likely to promote the health and general prosperity of the inhabitants of the city of New Orleans. But, until the said sale shall be made, the said corporation shall pay all taxes, prevent waste or intrusion, and so manage the said settlement and the slaves, and their increase thereon, as to derive an in-

come, and the said income shall be applied, from time to time, to the same uses New Onlease, and purposes, for the health and general prosperity of the said inhabitants.

"2. I give, devise, and bequeath to the mayor, aldermen and citizens of Philadelphia, their successors and assigns, two undivided third parts of all the rest and residue of my said real estate, being the lands unimproved near Ouachita, in the said State of Louisiana, in trust, that, in common with the corporation of the city of New Orleans, they shall pay the taxes on the said lands, and preserve them from waste or intrusion, for the term of ten years from and after my decease, and at the end of the said term, when they shall deem it advisable to do so, shall sell and dispose of their interest in said lands gradually, from time to time, and apply the proceeds of such sales to the same uses and purposes hereinafter declared and directed of and concerning the residue of my personal

"3. And I give, devise, and bequeath to the corporation of the city of New Orleans, their successors and assigns, the remaining one undivided third part of the said lands, in trust, in common with the mayor, aldermen and citizens of Philadelphia, to pay the taxes on said lands, and preserve them from waste and intrusion, for the term of ten years from and after my decease, and, at the end of the said term, when they shall deem it advisable to do so, to sell and dispose of their interest in said lands gradually from time to time, and to apply the procoeds of such sale to such uses and purposes as the said corporation may consider most likely to premote the health and general prosperity of the city of New Orleans."

We think by these terms the ownership of the property is given to the city of New Orleans, and the usufruct to Henry Bry, during the period of and on the condition specified; and we do not find that the right appertaining to either ownership or usufruct are restricted, except as to the limitation of the latter as to time, to wit, the term of twenty years, or the survivorship of the usufructuary for that term. We do not perceive that there is any ground for circumscribing the rights of the usufructuary, as is contended for by the plaintiffs, or for confining the usufruct unqualifiedly to the state the property was in at the time of making the will or the decease of the testator, and for holding the usufruct to be determined by the change which prevented the establishment from being kept together. The words made use of in the will are descriptive of the property as it is, and not restrictive of its future use. There is no attempt made . to attach, by a condition, the slaves to the land, or to render it obligatory that they should be employed on it, and in no other way. Indeed, so far from the testator having any disposition to change or modify the condition of the slaves, their sale is expressly ordered by the will on the termination of the usufruct by the death of Bry, or on the expiration of the term of twenty years. The slaves had all been purchased and held in the name of Bry, because the latter very judiciously refused to have any thing to do with their management unless as their absolute owner. He was for many years the agent of the testator, and had the entire control of his property in Louisiana, and had conducted his business to the entire satisfaction of his principal. Hence the provision of the will that the settlement should be kept up as if it was his (Bry's) own. It appears that the greater part of the settlement mentioned in the will was upon lands to which the testator had no title; it had been made outside of his limits, and upon the lands appertaining to the public domain, which had been since purchased by other persons. The slaves became insubordinate, and Bry, believing that they

had set fire to their cabins, which had been destroyed, and that the establishment could not safely be continued, removed the hands from the place. The NEW ORLEANS. land was then leased; the gin was afterwards destroyed; and, it being known that the settlement was upon the lands of the United States, it does not appear to have been afterwards cultivated.

This contingency was far from being foreseen or provided for by the testator, and the rights of the parties depend exclusively on the legal effect of the clause by which the usufruct was constituted. Restrictions on the right of property are not to be left to implication, and we do not feel ourselves authorised to modify the right of usufruct which Bry possesses under the will, or to impose on it any penalties or conditions other than those which the law imposes. The will gave him the usufruct of the slaves; it directed or presupposed their employment on a certain estate, but did not impose it as a condition of the usufruct. Their employment as directed has become impossible, or so onerous and inconvenient that it would not be reasonable to exact it, by reason of the principal part of the land belonginging to a third party, and the improvements being destroyed. We are at a loss to perceive on what principle these causes can defeat the usufruct of the slaves, or deprive the usufructuary of the fruits of their ordinary labor elsewhere. There is no such condition in the will, and the law implies

If the usufruct of the slaves is therefore to be considered separate and apart from that of the remaining portion of the land, what is there to prevent the city of New Orleans from taking the legacy of the ownership of the slaves? The provision of the act of 1805, which the plaintiffs rely upon as restrictive of the right of the city to hold property, has no reference whatever to slaves. The corporation could hold and convey any estate, real or personal, for the use of the corporation, provided such real estate be within the limits of said city. Slaves are in no sense real estate; they are considered as immovables by a positive article to that effect; but neither in common parlance, nor in law, are they designated by the term real estate. The right of the city to take by will or donation, so far as it relates to slaves, rests on the general provisions of the Code relating to corporations. Civil Code, art. 424.

The corporation of the city of New Orleans is therefore the owner of the slaves, and alone competent to call the usufructuary to an account for the causes set forth in the plaintiffs' petition, and alone has the benefit of the termination of the usufruct.

So far as relates to the claim of the plaintiffs to the land which is the subject of the legacy, it can only be determined in a suit in which proper parties are made; and we desire that the questions involved in it should be considered as entirely unaffected by the decision we make in this case, which is final only in relation to the usufruct of the slaves, which is the only interest represented by a party in court antagonist to that of the plaintiffs, and on which we have decided at the instance of both parties.

The suit against the city of New Orleans is therefore dismissed; and the judgment in favor of Henry Bry is affirmed, with costs in both courts.

LIVINGSTON v. WHITE et al.

Where, in the settlement of a succession, two distinct judgments have been rendered, one upon a statement of debts filed by an administrator, and the other upon an account of his administration, and the application for appeal is from the judgment upon the statement of debts, but the bond is given as for an appeal from that upon the account, the appeal must be dismissed.

It is no part of the duty of a clerk to prepare an appeal bond, so as to bring any irregularity in its execution within the 19th section of the stat. of 20 March, 1839, authorising the Supreme Court, in certain cases, to grant time for the correction of errors or irregularities.

An appeal must be dismissed where the appellant had not obtained an order authorising him to appeal.

Parties claiming as creditors or heirs must prove in the lower court that they are such, or they will not be heard as appellants from a judgment relative to the succession.

A PPEAL from the Court of Probates of Morehouse, Temple, J. Richardson and Baker, for the appellants. McGuire and Ray, contra. The judgment of the court was pronounced by

SLIDELL, J. This transcript, and the proceedings exhibited by it, are extremely confused. The transcript is entitled and endorsed as the case of Aaron Livingston.v. Joseph A. White and others. The proper title would seem to be, Succession of John T. White, or Joseph A. White and others v. Aaron Livingston, Administrator. It is evident that there have been antecedent proceedings which have not been comprehended in the transcript, and this omission has tended to increase the perplexity. The transcript commences with a statement of debts presented by Livingston, as administrator, and a petition for its homologation. There are various motions to dismiss, which, after a careful examination of the transcript, we are compelled to sustain.

Aaron Livingston is one of the appellants. There were two distinct judgments rendered. One was upon a classified statement of debts, filed by Livingston, as administrator. The other was upon an account of his administration, filed by him. The appellant, Livingston, moved for an appeal, by a motion in writing, signed by his attorney. In this motion he prayed for "an appeal from the judgment rendered on the trial of the opposition to the statement of debts in said estate," and also prayed "that the amount of a devolutive appeal bond may be fixed for said appeal." At the foot of this written application is a memorandum, signed by the judge : "Bond fixed at \$200." There is also an entry on the minutes stating that a motion for appeal was granted, but not stating who made the motion. The entry would seem, from the context, to refer to other parties. The only bond filed by Livingston, is a bond in favor of Joseph A. White, which recites that, "whereas the above bounden Aaron Livingston has appealed from a certain judgment rendered against him in the Court of Probates for the parish of Morehouse, in the case of Joseph A. White v. Aaron Livingston, Administrator, on opposition to account," &c. There is then a written application by Livingston for an appeal from the judgment upon the statement of debts, and an appeal bond as in case of appeal from the judgment upon the account. The argument presented by the appellant is, "that the judgment upon the account and the statement of debts were both rendered on the same day, and that the clerk, it appears, has not mentioned in the bond the

LIVINGSTON OF WHITE.

judgment on the statement of debts, which is a mere clerical error, though the motion for appeal asks for an appeal from the judgment rendered on the trial of the opposition to the statement of debts." We find nothing in the transcript to establish that the discrepancy between the application and order and the bond, is attributable to the fault of the clerk, nor are we aware of any provision of law which makes it the duty of the clerk to prepare the bond of appeal, so as to bring the inequality in that respect withing the statute of 1839. We are unable to relieve the appellant, and the motion to dismiss must prevail. There is an appeal bond given by A. D. Peck, but we find no order authorising him to appeal. The motion must also prevail as to him. So also as to Charles Perkins, who has given no appeal bond.

The remaining appellants are David White, McMoy, and Joseph A. White. The two former claim as creditors, the later as heir. The claims of the two former were opposed, and were rejected by the judgment of the court below. We find no evidence sustaining their claims as creditors, and they are consequently not before us as parties in interest entitled to prosecute an appeal. Nor does the transcript contain any evidence establishing the right of Joseph A. White as heir, which, in proceedings of this nature, so far as the proceedings are shown by the transcript, he was bound to establish.

It is always with reluctance that we dismiss appeals; but the application to dismiss is insisted upon, and we cannot refuse it without establishing a precedent which would lead to extreme irregularity and embarrassment.

Appeat dismissed.

FARRELL v. YOE et al.

A married woman may bind herself as surety for any other person than her husband, when authorised by the latter, or by the proper judge.

A PPEAL from the District Court of Caddo, Campbell, J. Gilbert, for the appellant. Crain, for the defendants. The judgment of the court was pronounced by

King, J. The plaintiff, her husband, and her brother, were the joint and several makers of three promissory notes, payable to the defendants. To secure their payment, the plaintiff, with the concurrence of her husband, executed a mortgage on several lots of ground, of which she was the owner in her separate right. After the maturity of the last note, the mortgagees obtained obtained an order for the seizure and sale of the hypothecated property, which the plaintiff, Sarah Ann Farrell, has enjoined, on the ground that the debt is due by her brother Lewis E. Farrell; that she became the surety for its payment; and that she is forbid by law from entering into such a contract. The injunction was dissolved in the court below with general and special damages, and the plaintiff has appealed.

There is no error in the judgment appealed from. It is true, as alleged by the plaintiff, that she was only a surety, but the contract was not one which the law prohibits her from making. The debt for which she obligated herself was due neither by the community, nor by her husband. For obvious reasons married women are not permitted to bind themselves for their husbands, nor con-

FARRECE V. You. jointly with them, for debts contracted by the latter, before or during the marriage. Those reasons are not applicable to contracts of suretyship entered into for other persons than the husband, which it is not to be presumed the marital influence would be exerted to induce the wife to make.

Judgment affirmed.

GILBERT v. NEAL.

Where an attorney at law, appointed curator ad hoc to represent an absence and defend an action instituted against him, is afterwards retained by the latter as his counsel, an expante order of the court, made at the time of rendering final judgment in the case, allowing him a certain fee for his professional services, but made without the assent of the counsel, and not subsequently acquiesced in by him, is not a judgment, and cannot be pleaded as resjudicata to an action by the counsel, on his contract with the client, for the compensation due for his professional services. Per Curiam: The order decreeing a sum to be paid to the attorney, who was no party to the action, was not a judgment. There were ne parties before the court between whom such a decree could be rendered.

A PPEAL from the District Court of Caddo, Campbell, J. Gilbert, appellant, pro se. Landrum, on the same side. Crain, for the defendant. The judgment of the court was pronounced by

King, J. The defendant having been sued as an absentee, the present plaintiff, Gilbert, was appointed by the court the curator ad hoc to represent him, and defend the suit. Subsequently the defendant retained Gilbert as his counsel. At the trial of the cause Gilbert was not present, but was represented by other counsel provided by himself.* In the final judgment rendered a sum of fifty dollars was taxed by the court, as a fee to be paid by the defendant to his attorney, for his professional services rendered in defending the suit. The plaintiff, who was not present when the decree was rendered, is not shown to have assented to the sum fixed by the court as his compensation, nor to have acquiesced subsequently in that part of the judgment; but, on the contrary, he appears previous to that date to have commenced the present action by attachment, claiming \$400 as his fee, for his services under his professional engagement. To this claim the defendant opposed a plea of res judicata, averring . that the plaintiff's compensation had been finally determined by a judicial deeree. The plea was sustained, and the plaintiff's claim rejected. From that judgment the plaintiff has appealed.

The order of the court decreeing a sum to be paid to the plaintiff, who was no party to the suit, was not a judgment, and could not be enforced as such. It was an ex parte order, which the judge was without authority to grant. There were no parties before the court, between whom such a decree could be rendered. 9 La. 88. 11 Ib. 267. The plaintiff founds his claim upon his contract with the defendant. The evidence fixes the value of his services at \$250, and for that sum we think he is entitled to a judgment.

The judgment of the District Court is therefore reversed. It is further ordered that the plaintiff recover of the defendant the sum of \$250, and that he have the privilege of an attaching creditor upon the property attached. It is further ordered, that the defendant pay the costs of both courts.

^{*} The evidence shows that Mr. Gilbert was absent from indisposition .- R.

LYNCH et al. v. CRAIN.

Where the parties to an action consent that the testimony taken on the trial shall be reduced to writing by the judge in a certain manner, to serve as a statement of facts in case of appeal, and the mode adopted is as well calculated to secure a fair and accurate statement of the evidence as if the testimony had been taken down by the clerk, neither party can object to it after appeal.

An application to file an amended answer containing a call in warranty, made a year after filing the original answer, where the facts alleged in the amended answer must have been within the knowledge of the defendant before the institution of the suit, is too late, and will not justify any further delay for the purpose of bringing in the warrantor.

A PPEAL from the District Court of Caddo, Campbell, J. Garrett, for the plaintiffs. McGuire and Ray, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The appellant has asked that this cause be remanded for a new trial, upon the ground that it cannot be considered on the merits, for want of the evidence adduced in the court below, the absence of which he asserts is attributable to the fault of the district judge, and not to the appellant. The clerk has certified that the transcript contains all the evidence upon which the cause was tried. The transcript also shows that the district judge, at the request of the litigants whose cases were tried at that term and were applicable, reduced the testimony in the various cases to writing in a book, to serve as statements of facts in case of appeal, noting the titles of the respective causes, and closing the manuscript with his official certificate. Among the statements thus made was that of the testimony adduced at the trial of this cause. The course thus pursued by the district judge, at the request of the litigants, has been a common one; and is surely as well calculated to secure a fair and accurate statement of evidence, as if the testimony were taken down by the clerk. Having consented to that mode of preparing the case for appeal, the defendant cannot be permitted now to object to it.

There was a bill of exceptions to the refusal of the court to permit an amended answer to be filed containing a call in warranty. The defendant, who is a member of the bar, appeared in this suit in proper person. The application was made a year after the filing of the original answer, and after repeated continuances, two terms having intervened since the service of the petition. The matters alleged in the amended answer, if correctly alleged, must have been within the knowledge of the defendant before the institution of the suit; and even if they presented a case originally authorising a call in warranty, upon which we express no opinion, the court very properly considered the application as coming too late, and not justifying any further delay in the trial of the cause for the purpose of bringing in the warrantor.

The evidence forbids the imputation of the payments made by Luckett to the note upon which this suit is brought.

Judgment affirmed.

BRIGHAM et al. v. TAYLOR et al.

An appeal must be dismissed where the real party in interest is not included among those to whom the appeal bond is made payable.

A PPEAL from the District Court of Ouachita, Selby, J. Purvis and Parsons, for the appellants.

Garrett, for the defendants. It has been repeatedly decided, that the appellant must bring before the court all the parties having an interest in maintaining the judgment undisturbed. 12 Rob. 180. 5 Rob. 226. 3 Rob. 62, 436. 16 La. 110. 15 La. 363. 12 La. 475. In the case last cited, the Supreme Court declare the question then fully settled by previous decisions. And their names must be included in the appeal bond, or the appeal will be dismissed. 10 La. 271. 12 Rob. 205. C. P. 474, 575. In 12 Rob. 205 the court dismissed the appeal without any motion by appellee, being unable to examine it in the absence of proper parties. The appellants can not be permitted to correct their irregularities. The provisions of the act of 1839, sec. 19, do not apply to a case like this. The cases in which relief will be granted are there specified; a defective appeal bond is not among the irregularities mentioned; and for the cases mentioned in that act it must not appear that the defect, error. or irregularity is imputable to the appellant. It is the duty of the appellant to furnish the appeal bond; it is no part of the clerk's duty to make it out. C. P. 575. It is the duty of the appellant to see that the necessary steps are taken to bring up his appeal, and place it legally before this court. 16 La. 50. 14 La. 293. 6 La. 586.

The judgment of the court was pronounced by

SLIDELL, J. There is a motion to dismiss this appeal on various grounds, only one of which need be noticed. The plaintiff, Brigham, obtained an injunction against certain executions upon twelve months' bonds, which were originally given to Taylor, Gardiner & Co. It is alleged in the petitions for the injunction, that the bonds had been transferred by Taylor, Gardiner & Co. to the Ocean Insurance Company. The defendants in the cause were Taylor, Gardiner, & Co., the Ocean Insurance Company, and the sheriff. They all appeared in the court below in a motion to dissolve the injunction, which was granted against all of them. The written motion for dissolution is made by counsel in the name of "the defendants", and must be considered as an appearance of all the defendants including the Ocean Insurance Company. Upon . this motion there was judgment dissolving the injunction, and the plaintiffs, on motion in open court, obtained an order of appeal. But the appeal bond given, is given only to Taylor, Gardiner & Co., and to the sheriff. The Ocean Insurance Company is not a party obligee in the bond; yet, according to the averment of the petition, they are the real party in interest, as transferrees of the bonds upon which the executions issued. The Company was an indispensable party to the appeal, and not having been properly made a party by reason of the defectiveness of the bond, the appeal must be dismissed.

Appeal dismissed.

CLARKE v. Scott et al.

In an action for damages against the sureties in a sequestration bond, the fact that judgment was rendered for the defendant in the suit in which the sequestration was taken out, will not alone be noticed; the reasons given for the judgment will be considered, and where they show that judgment was affirmed in favor of the defendant on the ground that courts of justice should not lend their aid to either party to enforce a contract entered into for purposes reprobated by law, nominal damages only will be given.

A PPEAL from the District Court of Ouachita, Selby, J. McGuire and Ray, for the plaintiff. Purvis, for the appellant. The judgment of the court was pronounced by

Eustis, C. J. This suit is instituted by Clarke, who was the defendant in the case W. H. Puckett and wife v. Clarke, reported in 3 Robinson, 81, on a sequestration bond given by the plaintiffs in that suit in his favor and for his benefit, judgment having been rendered for the defendant and affirmed on the appeal. The suit of Puckett and wife was for the recovery of eight slaves and two horses, which were held in sequestration during its pendency; and the present action is for damages, the details of which are stated in the petition, for which the sureties in the sequestration bond are alleged to be responsible in consequence of the breach of the condition, that is for those sustained by the defendant in case the sequestration should have been wrongfully obtained. The case was submitted to a jury, who found a verdict for the plaintiffs for \$700; a remittitur of \$150 was entered by the plaintiff, and the defendant Copley has appealed.

It is contended by the counsel for the plaintiff that the decision of the case of Puckett and wife v. Clarke, is conclusive as to the rights of the parties, and necessarily renders the plaintiffs liable to the defendant, for the actual damage sustained by him by reason of the unlawful caption and detention of his slaves and horses under the writ of sequestration. In determining on the claim of the plaintiff, it is impossible for us to see nothing else but the text of the decree of the Supreme Court itself; we must examine and consider the reasons on which it was founded, and which the court felt itself bound to give as exponents of their opinion under the evidence of the rights of the parties. We do not find the property to have been considered to belong, in good conscience, to the defendant; such is not the basis of the decision. Let it speak for itself. The reasons given may not be conclusive and binding on us as facts, but they are given, under a provision of the constitution, by the court in the last resort, and cannot be overlooked.

The opinion given in that case by the Supreme Court is as follows, Bullard, judge, delivering it:

"The plaintiffs assert title to eight slaves, which they allege are in the possession of the defendant, and that he obtained them, together with two horses, illegally and fraudulently, and under false pretences and promises made to the plaintiffs to preserve them for their benefit, and to restore them when required. The defendant, in his answer, avers that he has a just title to the slaves, and that this action is brought in fraud to deprive him of his just rights. This case was submitted to a jury, whose verdict was for the defendant, and the plaintiffs have appealed.

CLAREE P. SCOTT.

44 It appears that the wife, one of the plaintiffs, inherited the slaves in the State of Mississippi, and that they became the property of the husband on their marriage, according to the laws of that State, and were afterwards sold under execution to satisfy a judgment against the husband, and bought in by the defendant, who left them in the hands of the plaintiffs until sometime afterwards, when they were delivered to the defendant, to prevent their being seized by other creditors of the husband. The sheriff's sale was probably not a real one, according to the evidence in the record, and no conveyance was made, but the slaves were left in the plaintiffs' possession. The defendant was, however, afterwards put in possession for purposes reprobated by law, that is to say, for the purpose of enabling him to set up his title under the first sheriff's sale, and thus hold himself out to the world as the owner, and defeat the pursuits of other creditors of the husband. The present action is brought, substantially, to obtain relief against that agreement, and to cause the defendant to restore the property, since the danger has passed away. Under these circumstances, our first enquiry should be, whether the case be one in which a court of justice ought to interfere, or whether it be not of that class of cases in which the maxima, Ex turpi causa non oritur actio, and In pari delicto potior est conditio possidentis, apply.

"In the case of Gravier's Curator v. Carraby's Executor, 17 La. 118, we stated explicitly the principles by which we consider ourselves bound to be governed in questions of this sort. It is not easy to distinguish the present case from that. In the case now before us, if the sheriff's sale was not a sham one, it vested the title in the defendant; and if it was, then there was collusion for the fraudulent purpose of covering the property; and the subsequent shifting of the same property back and forth, was in furtherance of the same design. Such contracts and transactions are illegal, and the parties will not be listened to, when they invoke the aid of the court to enforce them against each other."

From an examination of the evidence we have come to the same conclusions, as to the situation in which the parties have placed themselves in relation to this property, and concur fully in the view taken by the judge who gave the opinion on the duties of courts in similar cases. The plaintiff, Clarke, has the possession of the property, and as the case stands the judgment is to him a title. But we cannot recognise his claim for the damages claimed against the defendant, who may still be the owner in good conscience, by reason of his action in a court of justice to obtain by lawful means property to which there was no adverse title to his, acquired by the present plaintiff, until the final judgment in the case. Vide Stetson v. LeBlanc, 6 La. Rep. 272. We can allow only nominal damages.

It is therefore ordered that the judgment appealed from be annulled and reversed, and that judgment be entered for the plaintiff, against the defendants, for \$10, in solido, with costs in the court below; the plaintiff and appellee paying the costs of this appeal.

WILLIAMS v. VANCE.

Parol evidence is admissible to contradict or add to the stipulations in a written contract for the sale of land, where the party offering it alleges that the land described in the contract was not that which he intended to purchase, and that it was fraudulently substituted by the vendor for the latter. Per Curiam: The admission of parol evidence, for such a purpose, to defeat written contracts, is a rule of universal jurisprudence.

In answer to an interrogatory whether "payment of the note sued on had not been demanded since maturity", propounded to a defendant with reference to the question of costs dependent upon an amicable demand before suit, the latter cannot state in his answer matters striking at the foundation of the action and the validity of the contract out of which it originated.

An appeal will lie though the amount of the note sued on be under \$300, where the defendant having set up the invalidity of a contract of which the note sued on was a part, the amount thus involved in the controversy exceeds \$300.

A PPEAL from the District Court of Union, Copley, J.

A Bailey, for the plaintiff. The parol evidence was properly rejected. Phillips on Evid. vol. 1, p. 548; Ib. Cow. and Hill's Notes, pp. 1384, 1426 et seq. 3 La. 459. 10 La. 172. 4 Rob. 290. 16 La. 129. The court did not err in striking out the part of defendant's answer to the interrogatory, which was objected to. C. P. 353. 6 Rob. 1. 9 Rob. 173. The amount in controversy did not authorise an appeal. C. P. 874. 9 Rob. 153.

McGuire and Ray, for the appellant. The parol evidence should have been received. 4 La. 350. 19 La. 140. 2 La. 3. C. C. 1818.

The judgment of the court was pronounced by

SLIDELL, J. This action is on a promissory note for \$225, of which the defendant is maker, and the plaintiff payee. The appellant pleaded a failure of consideration. He averred that this note, with another for the sum of \$247 50, was given in consideration of an obligation executed by the plaintiff in his favor, to make him title to a piece of land in the parish of Union, being the west half of the north east quarter of section 25, in township 22, of range — east: That in this contract he was deceived and defrauded by the plaintiff, who described the lands as situated so as to comprise certain improvements, to wit, a dwelling house and out-house, worth at least \$300, and also a portion of cleared land, when in truth, and to the knowledge of the vendor, the improvements were on other land, not owned by the vendor; and that these improvements were the chief consideration or motive for the purchase. He prays for judgment in his favor upon the note now sued upon, and for a decree that the other note be returned, and the contract rescinded; or if not entitled to such relief, then that a proper deduction be made from the price, and for general relief, &c.

At the trial of the cause the plaintift offered the note in evidence, and his title from the United States to the land above described. The defendant also offered the obligation, or "bond for title", above mentioned, describing the land by numbers, &c. as above stated. By a bill of exceptions it appears that the defendant also offered to prove "that there was error in the principal motive for making the contract and giving the note sued upon; that by the representations of plaintiff he was induced to believe that he was purchasing improved lands, on which there was a dwelling house and considerable improvements, but that plaintiff defrauded him by putting into the bond for title particular numbers for lands upon which there are no improvements, lying at a different place from the land shown to him; which evidence was objected to by the plaintiff, on the ground that the bond was only for land by numbers, without saying any thing about improvements, and that oral evidence could not be received to contradict, or add to, the expression in the bond; which objections were sustained by the court, and the evidence was rejected.

The evidence ought to have been received. It went to show that the written contract never had any legal existence or binding force. Fraud vitiates all

WILLIAMS VANCE: WILLIAMS VANCE: contracts; those who practice it, rarely commit the imprudence of affording written proof of its existence; and if the injured were not permitted to expose it by oral evidence, they would, in almost all cases, be remediless. Hence the admission of parol evidence for such purpose to defeat written contracts, has become a rule of universal jurisprudence. See Story's Equity, vol. 2, § 1531. Greenleaf on Evidence, § 248. Broussard v. Sudrique, 4 La. 351.

The rejection of the evidence entitles the defendant to have the cause remanded for a new trial. In doing so it is proper to notice another bill of exceptions, taken by the defendant to the order of the court striking out a portion of the defendant's answer to an interrogatory. The sole interrogatory propounded by the plaintiff was: "Has not the amount of said note been demanded of you since maturity?" To this the defendant answered, that he had had a conversation with the plaintiff, in which the plaintiff said he was in great need of money, but did not, to his recollection, expressly demand payment. He then proceeded to give at length a statement of the reasons why he had not paid the note, disclosing its consideration and the circumstances under which it was given. The court struck out all but those portions responsive to the question propounded. We think the court did not err. Some latitude is allowed in answering interrogatories beyond the simple confession or denial of the fact. In the language of the Code of Practice (article 353), the party interrogated may state some other facts tending to his defence; provided they be closely linked to the fact on which he has been questioned, and an appeal made to his conscience. But in the present case a latitude is claimed which goes beyond the fair intendment of the lawgiver. The interrogatory went merely to the question of costs, dependent upon "the amicable demand before suit"; and the response runs into matters which strike at the foundation of the action, and the validity of the contract.

In conclusion, we observe in relation to what was said at bar upon the point of jurisdiction, that although the plaintiff sued upon a note not amounting to \$300, yet the answer of the defendant set up the invalidity of the entire contract, of which the note was a part. The controversy thus covered an amount exceeding \$300, and was brought within our jurisdiction.

It is therefore decreed that the judgment against the defendant, E. G. Vance, be reversed, and that this cause be remanded for a new trial as to the said appellant; the plaintiff paying the costs of this appeal.

TAYLOR et al. v. STONE.

To make a valid seizure of a promissory note under a f. fa, the sheriff must take actual possession of the note.

Without a previous seizure, no adjudication can be made by a sheriff under a fi. fa.

A PPEAL from the District Court of Catahoula, Farrar, J. Garrett, for the plaintiffs. There is no seizure unless the sheriff takes possession of the property. 1 La. 491. 6 Robinson, 347. 9 lb. 182. 7 lb. 500. Pailhes v. Thielen, 1 An. R. 34. McGuire and Ray, for the appellant. The judgment of the court was pronounced by

King, J. The defendant is sued for a balance, alleged to be due on a promissory note of which he is the maker. He admits his signature to the note; avers that large payments have been made on account of it, which have not been credited; and finally claims to be the owner of the note, in virtue of a sheriff's sale to him made under an execution directed against the plaintiffs, whereby the note has been extinguished, and his liability to the plaintiffs discharged. A judgment was rendered against the defendant in the court below, from which he has appealed.

It appears from the evidence that, under an execution issued against the plaintiffs, the sheriff attempted to seize the note in question, which, at the time, was in the hands of the attorney of the plaintiffs for collection. A notice of seizure was served upon the attorney, but the sheriff appears never to have obtained possession of the note, notwithstanding which he proceeded to advertize it for sale, and to adjudicate it, at the second exposure, to the defendant for \$100, on a credit of twelve months. It has been repeatedly held that a valid seizure, for purposes of sale under an execution, cannot be made, unless the sheriff obtains actual possession of the property seized. Without a previous seizure, no adjudication can be made. The sale of the note to the defendant was therefore void. Fluker v. Bullard, ante 338.

The plaintiff has prayed that the judgment of the District Court be amended, and that he be allowed a larger sum than was awarded to him by the court below. After allowing all the credits to which the defendant is entitled, the balance appearing to be due is \$1,618 21, instead of \$1,450, for which last sum judgment was rendered in the District Court.

It is therefore ordered that the judgment of the District Court be amended, and that the plaintiffs recover of the defendant the sum of \$1,618 21, with ten per cent interest thereon from the 1st of March, 1844, until paid, instead of the sum of \$1,450, decreed to the plaintiffs in the judgment appealed from; the appellant paying the costs of both courts.

FRELLSEN v. COPLEY.

No appeal will lie where the amount in dispute at the time of instituting the suit was less than three hundred dollars, though interest and costs, which have accrued since, raise the amount above that sum. Const. art. 63.

A PPEAL from the District Court of Ounchita, Selby, J. McGuire and Ray, for the appellant. Garrett and Purvis, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. We have no jurisdiction in this case. When the suit was instituted, the amount in dispute did not reach the sum of \$300; and, even if the interest and costs since accrued would carry the claim to a sum exceeding \$300, the case cannot be considered here. See Coons v. Threlked, 9 Rob. 153. Mason v. Oglesby, ante p. 793. Constitution, art. 63.

Appeal dismissed.

TAYLOR C. STONE.

LINDEMAN et al. v. THEOBALDS et al.

Continued possession by a vendor, acting as owner, after a sale, creates the presumption of simulation, and imposes on the vendees, as to third persons, the burden of proving the reality of the sale. C. C. 2456, 1915. The mere fact of the vendor, who was the mother of the vendees, continuing to live with her children on the place sold after the transfer, is not of itself a badge of simulation.

Where a party enjoins an execution against a third person claiming the property seized by virtue of his possession under an act of sale duly registered, and defendent prays for the dissolution of the injunction on the ground that the sale was simulated and fraudulent, he must establish the simulation, or the injunction will not be dissolved. In such an action evidence will not be admissible to prove that the sale was fraudulent; for where there has been a real, though fraudulent, sale, detrimental to creditors, the title and possession of the purchaser cannot be disregarded; the creditor can only reach the property by causing the sale to be annulled in a direct revocatory action. It is only in cases of simulated sales, not intended by the parties to convey any property, that the creditor may disregard the title of the purchaser and seize.

Where a married woman joins her husband in an action, in which they assert title in the latter to property, conveyed to her by her tutrix, in settlement for her share in the succession of her father, by an act sous seing privé, duly registered, but signed by the husband alone, under which the latter was in actual possession, the possession and registry will amount to notice to third persons; and the joining in the action is an approval of the acts of the husband.

Art. 2417 of the Civil Code, which provides that a sale of immovables or slaves sous seing prive has effect against the creditors of the parties and against third persons in general, only from the day of its registry in the office of a notary, and the actual delivery of the thing sold, must be considered as controlling art. 2242 which declares such sales to be valid from the dates of their registry in the office of a notary, or from the time of the actual delivery of the thing sold.

A PPEAL from the District Court of Ouachita, Copley, J. R. W. Richardson and Sharp, for the plaintiffs. Garrett, for the appellants. The judgment of the court was pronounced by

King, J. The plaintiffs have enjoined the execution of a writ of fieri facias, issued under a judgment obtained by the defendants against Maria B. Ludewig. They allege that they are the owners of the property seized by the sheriff under the writ, in virtue of a title derived from Maria B. Ludewig, and that the act under which they hold was duly proved and recorded, in 1844. The defendants in their answer aver that, the transfer from Maria B. Ludewig to the plaintiffs, who are her children, is simulative, frandulent, and collusive, and without consideration; that it was unaccompanied by delivery of possession; and that the vendor remained in possession after the transfer and up to the date of the seizure. The injunction was perpetuated in the court below, and the defendants have appealed.

The act under which the plaintiffs claim title is under private signature, but was proved and admitted to record in the office of the parish judge on the 11th of September, 1844. The vendor declares in the act that she is the widow of Conrad Lindeman, the father of the plaintiffs; that she was their tutrix for many years, and as such had charge of and administered the property inherited by the latter from their father, of which no final account had been rendered, and of which no account could then be judicially rendered, in consequence of

the length of time which had elapsed since the death of her husband; that in Library order to satisfy the just claims of the plaintiffs, as heirs of her deceased husband, she conveyed and gave in payment to them certain property described in the act, amongst which is the tract of land seized under the writ enjoined. In consideration of the transfer the purchasers exonerate the mother from all liability or indebtedness arising from her tutorship, stating that the act is a compromise; and a "complete acquittance and release from each side to the other" is given. This act is signed by the vendor, by Henry, and Benjamin Lindeman, by Fenner, the husband of Louisa M. Lindeman, and by Sandford, the husband of Catharine Lindeman.

It appears from the evidence that, immediately after the sale, Henry, and Benjamin Lindeman, and Sandford, were in possession, each of distinct portions of the tract of land conveyed, cultivating, and exercising other acts of ownership over, it. Neither Fenner, nor his wife, is shown ever to have been in possession. The mother continued to reside on the place with her children after the conveyance, but is not shown over to have exercised acts of ownership after the date of the transfer.

As regards the plaintiffs Henry, and Benjamin Lindeman, and Mrs. Sandford, we think, under this state of facts, that the case presents no serious difficulty. The act under private signature under which they claim, had effect against third persons from the date of the registry and recording, and of the delivery of possession to them, all of which had been effected prior to the date of the seizure. C. C. art. 2417. The fact that the mother continued to live on the place with her children after the transfer, is not of itself a badge of simulation. It is the continued possession of the vendor, acting as owner, after the sale, which creates the presumption of simulation, and imposes on the vendees, as regards third persons, the burthen of proving the reality of the sales. Civil Code, arts. 2456, 1915. Thibodeaux v. Thomasson, 17 La. 360. No such possession on the part of the vendor has been shown; but, on the contrary, the three plaintiffs whose claims we are now considering, appear to have been in the actual possession each of a distinct portion of the land conveyed to them, prior to, and at the date of, the seizure. Having failed to establish the continued possession of the vendor after this registered and recorded sale, it was indispensable to the success of the defence set up in this action by the defendants, to prove their averment of simulation by other evidence; for when there has been a real, although fraudulent, sale, operating to the detriment of creditors, the title and possession of the purchaser can not be disregarded. The creditor in such cases can only reach the property conveyed, by causing the sale to be annulled in a direct revocatory action. It is well settled that the title in such cases can not be attacked directly, commencing with a seizure. It is only in cases of simulated sales. which are really intended by the parties to the apparent contract to convey no property, that the judgment creditor may disregard the title of the purchaser and seize. Cammack v. Watson, 1 An. 132. Wright v. Chambliss, 1 An. Rep. 262. Hobgood v. Brown, ante 323. Nimmo v. Allen, ante 451.

The defendants offered a witness on the trial to prove that the slaves conveyed by the act of sale were worth \$15,000, and that the estate of Conrad Lindeman was insolvent at his death. This evidence was objected to, on the ground that the act could not be impeached for fraud in this action. The objection was sustained, and the defendants excepted to the opinion of the court. The judge

Luneman did not, in our opinion, err. The facts proposed to be proved by the witness would not have established that the sale was simulated, but that it was fraudulent, and, under the view we have taken of the case, such proof would only have been admissible in a direct action to annul the sale on the ground of fraud.

But it is contended, as regards Mrs. Sandford, that she neither signed the act, nor authorised her husband to sign it. It is true that no express authority from herself to her husband has been shown. But the latter was in actual possession under the sale, exercising ownership over a part of the land seized. This possession, with a duly recorded title, was a notice to third persons, and the wife has affirmed the acts of her husband by participating in this action.

In relation to Mrs. Fenner, a different question is presented. She claims under an act under private signature, which not only has not been signed by her, but under which neither she, nor her husband for her, has ever held possession. Both the registry of the act, and delivery of possession of the thing sold, were indispensable to give effect to the sale against third persons.

There is an apparent conflict between the articles 2242 and 2417 of the Code. The former provides that "sales or exchanges of real property or slaves by instruments made under private signature, are valid against bond fide purchasers and creditors, only from the day on which they are registered in the office of a notary, or from the time of the actual delivery of the thing sold or exchanged." The latter declares that the sale of any immovable or slaves made under private signature, shall-have effect against the creditors of the parties, and against third persons in general, only from the day such sale was registered in the office of a notary and the actual delivery of the thing sold took place. The former article, which gives effect to sales under private signature againstbond fide purchasers and creditors from the date of registry or delivery, and which occurs under the head of conventional obligations, must yield to the latter, which requires both registry and delivery, and which is found among the rules specially provided for the government of the contract of sale. C. C. 2413.

But it is contended that the contract under which the plaintiffs claim is a compromise, and must be good as a whole, otherwise it fails entirely; that the assent of all the parties to it was indispensable, to give it validity and binding effect between the parties themselves; and that the assent of Mrs. Fenner not having been shown, the act is incomplete even as to those who executed it. This quostion is one not perhaps free from difficulty, upon which we do not think it necessary to express an opinion.

It appearing on the face of the instrument that a part of the vendees had signed the deed, and it being shown that possession passed to them, and that the deed has been recorded; we think, as to those who so became parties, the credifors ought to resort to their revocatory action.

We conclude that, as to the plaintiffs who were in possession at the date of the seizure and were parties to the deed, the injunction was properly sustained; but that as to the interest claimed by Mrs. Fenner, the seizure was proper, and the injunction ought to have been dissolved.

It is therefore erdered that the judgment of the District Court be reversed, so far as relates to the plaintiff Louisa M. Lindeman, and that, as to the undivided interest of one-fourth in the land seized claimed by her, the defendants be permitted to proceed with the execution of their writ of fieri facias. It is further ordered that said judgment be affirmed, so far as concerns the plaintiffs Henmy Lindeman, Benjamin Lindeman, and Catharine Lindeman, wife of Sandford,

without prejudice to the rights of the defendants, if any they have, to proceed LINDEMAN against those parties in a direct action; the plaintiff, Louisa M. Lindeman, paying the costs of this appeal and one-fourth of the costs below, and the defendants the remaining three-fourths of the costs of the lower courts.

BANK OF ALABAMA v. LIVINGSTON-

Where the certificate of the clerk, appended to a transcript of the record of an action in another State, states that the document "is a full and complete transcript of the record and proceedings, executions and returns thereon, except the two first executions, which have not been returned," and it appears from the transcript itself that two other executions were issued subsequently to those stated not to have been returned, it will be presumed that the fact of the two first executions not having been returned was no obstacle to issuing the two last, and that the latter were issued according to the laws and practice in the State in which the judgment was rendered; and the transcript will be admitted in evidence.

PPEAL from the District Court of Morehouse, Copley, J. McGuire and Ray, for the plaintiffs. R. W. Richardson and Sharp, for the appellant. The judgment of the court was pronounced by

EUSTIS, C. J. This action is brought on a judgment rendered by the Circuit Court of Tuscaloosa county, in the State of Alabama, in favor of the plaintiffs against the defendant and Tristram B. Bethea, for the sum of \$950, and the further sum of \$21 61, damages, together with costs.

The only question which the case presents for our decision is set forth in a bill of exceptions, taken by the defendant to the admission of the transcript of the record offered in evidence by the plaintiffs, on the ground that it is not a full and complete transcript as appears by the certificate of the clerk, which certifies that the document offered is a full and complete transcript of the record and proceedings, executions, and returns thereon by the sheriff, except the two first executions, which have not been returned. Subsequently, as appears by the transcript, there were two executions successively issued, which we are bound to presume would not have been done, except in due course of law according to the practice in the State of Alabama, and that the unreturned executions were no obstacle to the issuing of those which were subsequently issued. We do not consider this fact to be an objection to the admissibility of the transcript, which is properly certified and authenticated.

The record being properly in evidence, there is nothing in the pleadings by which the effect of the judgment itself can be impaired by the proceedings had under it, with one single exception. The defendant is entitled to a credit of \$176 44, on the 6th of May, 1844, being the amount made under one of the executions. In this particular the judgment appealed from must be altered; and, as we on all occasions render our judgments in the simplest form, we at once impute that sum to the first interest due, and postpone the period from which the interest commences for a proportionate time, to wit, from April 3, 1837, till the 15th of July, 1839. By the laws of Alabama the plaintiffs are entitled to interest at eight per cent.

It is therefore decreed that the judgment appealed from be amended, so that the plaintiffs recover from the defendant the sum of \$971 61, with interest thereon at eight per cent per annum from the 15th of July, 1839, and \$13 56 costs; the plaintiffs paying the costs of this appeal, and the defendant those of the court below.

MILLAUDON v. BEAZLEY.

man the same of contractor

An absence, who owns property in this State specially mortgaged, may be proceeded against judicially by the mortgagee, on being represented by a curator ad hoc. C. C. 57. C. P. 116.

No amicable demand is required where the action is against an absentee. In such a case, it is impracticable.

A curator ad koc appointed to represent an absentee may acknowledge service of citation and petition. Such an acknowledgment is not a waiver of any right of the absentee.

The acknowledgment of a debt made by one of two debtors in solido, or the institution of a suit and recovery of a judgment against one of them, will interrupt prescription as to the other; but it will commence immediately after the interruption, to run again as to the latter.

A PPEAL from the District Court of Ouachita, Curry, J. R. W. Richardson, for the plaintiff. Baker, curator ad hoc, for the appellant. The judgment of the court was pronounced by

KING, J. The plaintiff has instituted this action against the defendant Beazley, upon two joint and several promissory notes, payable to order, made by Beazley & Day, and secured by a special mortgage. He prays for a judgment for the amount remaining due, and for a sale of the undivided half of the hypothecated property owned by the defendant, to satisfy the debt. The defendant being an absentee, a curator ad hoc was appointed by the judge below to represent him in the defence of the suit. On the 23d of December, 1844, the curator acknowledged service of the petition and citation. At the next ensuing term of the court he filed an exception, praying for the dismissal of the cause, on the ground that the appointment of a curator to represent the absentee was unauthorised by law, and pleaded further the want of amicable demand. The exception was overruled, and the cause continued until the next term of the court, for the purpose of enabling the curator to correspond with the absentee. After the expiration of this delay a plea to the merits was filed, and subsequently, in an amended answer, the prescriptions of one, three, and five years were specially pleaded. The defendant's plea of prescription was overruled, and the plaintiff having proved the execution of the notes, and exhibited in proof the mortgage . on which the action is founded, a judgment was rendered in his favor for the amount of his demand, from which the defendant, by his curator, has appealed.

The objection made that the defendant could not be brought into court by a curator ad hoc, was properly overruled. The defendant owned property in the State, which was specially mortgaged to secure the plaintiff's claim, and in such cases our laws expressly permit absentees to be proceeded against judicially, upon being represented by a curator ad hoc. C. C. 57. C. P. 116. The plea of want of amicable demand was also correctly overruled. The defendant being an absentee such a demand was impracticable.

In addition to the defences specially set up in the pleadings, the curator ad hec contends, in this court, that, as the representative of the absence, he was without authority to waive a service of citation and of a copy of the petition; that there has been no service on him by which the defendant has been brought into court, or the prescription interrupted; and he relies upon the cases of Hill v. Barlow, 6 Rob. 142; Carpenter v. Beatty, 12 Rob, 540; and Hyde v. Crad-

dick, 10 Rob. 367. With regard to the questions touching the authority of curators ad hoc determined in those cases, we express no opinion. None of the cases cited decide the point presented in this suit. The curator in the present instance, as far as appears from the record, waived none of the rights of the party whom he was appointed to represent. There was no waiver of citation nor of service of the petition, but the written acknowledgment of the curator is that both were served upon him. The service thus acknowledged was made on the 23d of December, 1844, and at that date brought the defendant into court, and operated an interruption of the prescription.

The first of the notes upon which this action is based, matured on the 1st of January, 1839, and the second on the 1st of January, 1840. The service of citation we have said was made on the 23d of December, 1844, more than five years after the maturity of the first note. Consequently prescription had accrued, as regards that note, prior to the inception of this suit, unless an interruption within that time be shown. To establish such interruption the plaintiff relies on the acknowledgment made by the curator of the vacant estate of Day, one of the joint and several co-obligors, on the 13th of June, 1839, and on a suit also instituted against that curator on the 2d of October, 1838, for a sale of the mortgaged property, which resulted in a judgment on the 13th of the same month. If it be conceded, as contended for, that the acknowledgment in the one case, and the citation in the other, interrupted the prescription, it commenced again immediately to run as to this defendant, and was completed before the commencement of the present action. The court below erred in overruling the plea of prescription, as regards the note which first matured. In relation to the second it was correctly disregarded.

The judgment of the District Court is therefore reversed. It is further decreed that the plaintiff recover of the defendant the sum of \$3,333 331, with ten per cent interest from the 1st of January, 1840, until paid. It is further ordered that the plaintiff's mortgage be recognised and enforced on a tract of land situated in the town of Monroe, bounded by Grand street in front, and below by Grammont street, back by the Ouachita river, and above by a line about ten feet from the line dividing said premises from a lot of John J. Cabeens, and including the building known as the Monroe hotel, together with the other buildings and appurtenances, with the exception of a lot sold by Henry O. McEnery to Samuel Kirby, as described in the act of mortgage; and that the undivided interest of one half, owned by said Beazley in said property, be seized and sold to satisfy said debt. It is further ordered that the defendant pay the costs of the court below, and the plaintiff the costs of this appeal.

TAYLOR et al. v. HOTCHKISS.

BEAZLEY.

A judgment rendered against defendants jointly, and registered in that form, cannot be enforced against property, in the hands of a third possessor, as a judgment in solido. Per Curiam : Mortgages only have effect against third persons as they are registered. Third persons are not required to look beyond the register, to ascertain whether the character of the mortgage differ from that exhibited on the books of the mortgage office.

PPEAL from the District Court of Caddo, Olcott, J. Crain and R. Jones, for the appellants. Wood and Landrum, for the defendant. The judgment of the court was pronounced by

TATLOR O. HOTCHELSS.

Kewa, J. The plaintiffs obtained a judgment against Green & Mc Neill, which they seek to enforce on property owned by Green at the date of the judgment, and sold by him to the present defendant, Hotchkiss, subsequent to the inscription of the judgment in the mortgage office. The judgment is joint in its form; but the plaintiffs contend that it should be construed with reference to the allegations of the petition in which the parties were alleged to be jointly and severally liable, and that effect should be given to it against the third possessor as a judgment in solida. Mortgages only produce effect against third persons as they are recorded in the office provided by law for that purpose. Third parties are not required to look beyond the register for the purpose of ascertaining whether the character of a mortgage differs from that exhibited on the books of the mortgage office. 4 Rob. 7. Jartroux v. Dupeire, ante p. 608. The judgment of the plaintiffs was registered in the form in which it was rendered, which is joint, and only gave notice of an encumbrance upon the fproperty of Green for one half of its amount. Beyond that sum it cannot be enforced on the property of the defendant.

From the evidence it appears that the portion of the judgment for which Green appeared by the inscription to be liable, has been satisfied by executions issued against him.

Judgment affirmed.

CANE et al. v. ALLEY.

The immovable property of the husband is tacitly mortgaged for the re-payment of paraphernal funds of the wife received by him during marriage; and this mortgage takes effect as to third persons, without registry, from the time when the funds were received.

A PPEAL from the District Court of Caddo, Taylor, J. Crain, for the appellants. Terrell, for the defendant. The judgment of the court was pronounced by

Kine, J. The defendant, Martha Alley, obtained a judgment against her husband for a sum of money belonging to her in her separate right, received by the latter after the marriage; and in the judgment, a mortgage was recognised in her favor, to take effect from the 28th May, 1835. At a sheriff's sale of her husband's property made in virtue of an execution issued under this judgment, Martha Alley became the purchaser of a tract of land. The plaintiffs obtained a judgment, in 1840, against J. H. Alley, the husband of Martha, which was duly recorded in the mortgage office, prior to the date of the judgment of Martha Alley against her husband. The plaintiffs seek in this action to enforce their judgment upon the land acquired by the defendant, Martha Alley, at the sheriff's sale of her husband's property. There was a judgment for the defendant in the court below, and the plaintiffs have appealed.

The only questions presented are, whether a tacit mortgage exists on the property of the husband for paraphernal funds of the wife received by the former during the marriage, and whether this mortgage takes effect to the prejudice of third persons, without registry. These questions have been repeatedly decided in the affirmative by the late Supreme Court, and the principles were re-affirmed by us in the case of Fisher v. Fisher, ante p. 774. The jurisprudence of the State upon these points is too well settled to be now disturbed. Pain v. Terret, 10 La. 300. Turner v. Parker, 10 Rob. 154.

SLIDELL, Justice, said that he did not assent to the correctness of the doctrine that, the mortgage in favor of the wife in case of paraphernal-claims, exists against creditors without registry, considered as an abstract proposition. But he gave his concurrence to the opinion in this cause upon the ground of authority, as a doctrine established by a long course of decisions, and which had become a rule of property. Fre alluded to the argument of the counsel for Staunton, reported in Turner v. Parker, 10 Rob. 159, and stated that he

felt bound to yield his own opinion to the force of authority.

Judgment affirmed-

CANE D. ALLEY.

DOUGLASS v. CRAIG-

The exclusive right granted to the corporation of the town of Shreveport, by sec. 6 of the stat. of 20 March, 1839, to establish ferries across the Red river within the limits of that town, was not repealed by any thing in the stat. of 24 February, 1848, creating the parish of Bossier.

APPEAL from the District Court of Bessier, Taylor, J. Crain, for the appellant, cited stat. of 20 March, 1839, s. 6, Bul. and C.'s Digest, verbo-Ferry. 16 La. 585. Wood and Terrell, for the defendant, relied on B. and C.'s Dig. p. 641; act 25 March, 1813; s. 5. 5 La. 294. 3 Mart. 375. IF La. 585, 588. Act 24 Feb. 1843. The judgment of the court was pronounced by

Kane, J. In 1839 the legislature granted to the corporation of Shreveport the exclusive right of establishing ferries across Red river within the limits of that town, and to the revenues arising therefrom. Acts 1839, p. 204, § 6. In virtue of this authority the corporation established a ferry within its limits, of which the plaintiff is the lessee, running to the opposite shore, which is one of the boundary lines of the parish of Bossier. In 1843, (Acts p. 19,) the parish of Bossier was created; and, among the powers granted to its police jury, was that of establishing ferries across the lakes and rivers within that parish. A ferry was established under this authority across Red river, immediately opposite to the town of Shreveport, and leased to the defendant, who was using it for purposes of profit, when he was restrained by an injunction obtained by the plaintiff, who claims the exclusive privilege of a ferry at that point, and damages which he alleges he has sustained by reason of the illegal acts of the defendant. The injunction was dissolved in the court below, and the plaintiff has appealed.

The exclusive right granted to the corporation of Shreveport to establish ferries across the Red river within its limits, was not repealed by the subsequent act of 1843, creating the parish of Bessier. There is no express repealing clause in the latter act, and we do not understand that the legislature, in creating a parish and conferring upon its local authorities the powers which they would equally have had under the general law if those powers had not been specially granted, intended to repeal this special privilege given to the corporation. There is no conflict between the two acts. They both exist, and must be construed together. The power to establish ferries, granted to the police jury of Bossier, must be subordinate to that conferred upon the town of Shreveport, within the corporate limits of the latter. Bank of Louisiana v.

DOUGLASS & CHAIG. Farrar, 1 Ann. Rep. 54. We think that the injunction ought to have been maintained. The evidence is too vague to enable us to award damages to the plaintiff.

The judgment of the District Court is therefore reversed. It is further ordered that the injunction obtained by the plaintiff be maintained, and that the defendant be perpetually enjoined from running a ferry boat across Red river, within the limits of the town of Shreveport, or otherwise interfering with the rights of ferry of the plaintiff, as the lessee of the corporation of Shreveport. It is further ordered that the defendant pay the costs of both courts, to be taxed.

FRIEDLANDER v. MYERS.

An affidavit for an attachment, which states that the defendant "is justly indebted to plaintiff in the sum of (mentioning the amount) for services rendered and to be rendered by deponent as clerk, part due, and a part of said sum not due; and that deponent verily believes said defendant has left the State to reside permanently out of it," is insufficient to sustain an attachment for any amount. Per Curiam: As regards the amount not due, the affidavit is clearly defective. To attach for a debt not due, the creditor must swear that the debtor is about to remove his property out of the State before the debt becomes due. As to the amount due, the affidavit is defective for uncertainty. To attach in any case, the creditor must declare on oath the amount due to him. C. P. 240, 243. Stat. 7 April, 1825, section 7.

A PPEAL from the District Court of Caddo, Olcott, J. Terrell, for the plaintiff. Murray, curator ad hoc, appellant, pro se. Crain, on the same side. The judgment of the court was pronounced by

SLIDELL, J. This suit was instituted by attachment, and there has been no personal service of citation. The attorney appointed to represent the absent defendant moved for a dissolution of the attachment, upon the ground of the insufficiency of the affidavit. The affidavit is that, "Myers is legally and justly indebted to the plaintiff in the sum of \$578 40, for services rendered, and to be rendered, by deponent as clerk, a part due, and a part of said sum not due. And further, deponent says that he verily believes that said W. L. Myers has left the State of Louisiana, to reside permanently out of the State."

The affidavit gives no information as to what is due and what not due. So far as regards the amount not due, the affidavit is clearly defective. To attach for an unmatured indebtedness, it is indispensable that the creditor should swear that the debtor is about to remove his property out of the State before the debt will become due. As regards the amount of indebtedness due, the affidavit is defective, for uncertainty. To attach in any case, the creditor must declare on oath the amount due to him. Here the amount due is not stated. C. P. 240, 243. Act of 1826, p. 170. Attachment is a rigorous remedy, and the creditor who resorts to it must strictly observe the formalities prescribed. They have not been observed in the present case, and the attachment cannot be sustained for any amount whatever.

It is therefore decreed that the judgment of the court below be reversed, and that the attachment be dissolved, and the suit dismissed as in case of non-suit; the appellee paying the costs in both courts.

THE STATE v. PETERSON.

- By permitting an application for a change of venue, supported by affidavit, to be filed, the prosecuting attorney does not thereby waive his right to oppose its being granted. Stat. 1 June, 1846, ss. 9, 10.
- The jurisdiction of the Supreme Court in criminal cases being limited to questions of law (Const art. 63), it cannot examine the evidence introduced on the trial, though reduced to writing below and brought up with the record, to determine whether the court exercised its discretion properly, in refusing a new trial on the ground that the verdict was contrary to the law and evidence.
- The caption forms no part of an indictment, and is not essential to its validity. Per Curiam: Captions are of frequent occurrence under the english system, where it is not unusual to try an indictment in a different court from that in which it was found. Under our law the accused is invariably tried by the court in which the indictment was found, and the necessity for a caption, technically so termed, cannot arise, if indeed it ever becomes necessary, under our system of courts, until an appeal is taken.
- Judgment will not be arrested on the ground that neither the place where the court was held, nor the name of the judge who presided at the court at which the indictment was found, nor the names or number of the grand-jurors who concurred in finding it, are set out in the caption of the indictment, where the schedule in the record sets forth those facts.
- It is not necessary that an indictment should contain a distinct averment of the appointment, and oath, of the foreman of the grand jury.
- Where one indicted for murder is convicted of manslaughter, it is not necessary that the verdict of the jury convicting him of manslaughter, should negative the murder. Stat. 20 March, 1818, s. 1.
- A PPEAL from the District Court of Catahoula, Mayo, J. Richardson, District Attorney, for the State. G. S. Sawyer, for the appellant. The judgment of the court was pronounced by
- King, J. The defendant was indicted for murder and convicted of manslaughter, and from the judgment rendered upon the conviction he has appealed. He complains that an application made by him for a change of venue, a motion for a new trial, and a motion in arrest of judgment, were improperly overruled by the court; and on those grounds asks for a reversal of the judgment.
- The defendant made a written application for a change of venue, on the ground of prejudice in the public mind in the parish in which the indictment was pending, and accompanied the application with the required affidavit. The application was notified to the district attorney, and on the same day filed by the clerk. It is contended that the district attorney, by permitting the application to be filed, waived his right to oppose it. The authority relied on does not, in our opinion, support this position. The practice of the english courts appears to be, after the application and oath have been made, to move the court for a rule to show cause why the suggestion of partiality should not be entered on the record, as unopposed, in order to have a trial in the adjoining county. When the rule is made absolute, a suggestion, which is the order of the court, for the change of venue is entered on the record, and this order is not traversable. But this entry is only made upon cause being shown that it is necessary, and upon reasonable notice to the opposite party. 1 Chitty, Criminal Pleading, 495. The assent of the district attorney to the necessity for a change of venue, and an order of the court granting it, are not to be presumed from the

STATE V. PREERSON. mere fact of permitting an application in writing, which could as well have been made orally, to be filed. Such an inference is repelled by the record itself. On the same day that the application was notified to the district attorney it was filed, considered by the court, and, after hearing evidence and arguments of counsel, overruled. It is evident that the object of the filing was merely to put the court in possession of the written motion, in relation to which evidence was about to be heard, and that the judge made no order, and intended to make none, for the removal of the cause, as upon the default of the district attorney, but intended to hear the opposition of the counsel of the State, if any he desired to make. The action of the court was in conformity with the practice contemplated by our statute. Acts of 1846, p. 109, ss. 9, 10. The record furnishes us with no means of determining whether the judge erred in overruling the application.

After conviction a motion was made for a new trial, on the ground that the verdict of the jury was contrary to the law and the evidence; and we are urged to examine the evidence, which was reduced to writing on the trial and has been brought up with the record, in order to determine whether the judge properly overruled the motion. Our jurisdiction in criminal cases is limited to questions of law alone. Constitution, art. 63. We are not permitted to examine the evidence for the purpose of determining whether the court properly exercised its discretion in refusing a new trial, or whether the verdict of the jury is not supported by the evidence, which was admitted without objection. The question is one of fact, in-relation to which we are not permitted to enquire or to determine.

A motion was made in arrest of judgment on the following grounds, viz: 1st. Neither the place where the court was held, nor the name of the justice who presided at said court, at which the indictment was found, are set out in the caption of the indictment. 2d. Neither the names, nor the number of the grand justors who concurred in the finding of this bill of indictment, are set out in the caption of the same. 3d. There is no evidence of the appointment or oath of the foreman of the grand jury, nor that he ever was appointed or sworn, contained in said bill of indictment.

The caption forms no part of an indictment, and is not essential to its validity. It is prepared after the finding of the indictment, and consists of a history of the proceedings extracted from the schedule which accompanies the indictment, when the latter is transmitted to a higher court. Captions are of frequent occurrence under the english system, where it is not unusual to try indictments in different courts from these in which they are found. Under our law the accused is invariably tried by the court in which the indictment is found, and the necessity for a caption, technically so termed, cannot arise, if indeed it ever becomes necessary, under our system of courts, until an appeal is taken.

The schedule which accompanies the record in the present instance sets forth every fact which it is contended should be exhibited by the caption. The style of the court, the name of the judge who presided, the time and place where the court was held, the names of the grand jurors, fifteen in number, and the facts that the latter, including the foreman, were sworn and charged, and presented the indictment on which the accused was tried, are all distinctly stated.

That part of the indictment in this case which has been treated in argument as a caption, is not a caption properly so called. It consists of a preliminary statement of many of the facts usually recited in a caption, the whole of which might be stricken from the instrument without affecting its validity.

No distinct averment in the indictment of the appointment and oath of the foreman, is necessary.

BTATE 9. PETERSON.

It is urged that the verdict of the jury convicting the accused of manslaughter should have negatived the murder. This was not necessary. Our statute authorises such a verdict. Bul. and Curry's Dig. p. 260.

Judgment affirmed.

SUCCESSION OF HARKINS.

The property of a succession is the common pledge of the creditors, except so far as privileges have been lawfully acquired.

An administrator is the trustee of the creditors; his first duty is to them; he is bound to watch over their interests.

An attorney at law will not be allowed to testify as to communications made to him by a cliont in the course of his professional employment, unless the client himself consent to their disclosure.

Parol evidence of declarations of a mortgagee is admissible to establish the fraudulent character of a mortgage, when effered by one not a party to the act. The weight to be given to such proofs, goes to the effect, and not to the admissibility of the evidence.

If a creditor of a succession choose to show that he has combined with the administrator to injure other creditors, no rule of law will prevent him from doing so, nor the creditors from availing themselves of the legal consequences in their favor.

Although, under our laws, an attorney at law is a competent witness for his client, the position of an attorney offering himself as such is one of extreme delicacy both to the witness and the court; and it is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not be a witness, except in extreme cases, when all other means of proof are impossible; and then the atterney should withdraw from professional participation in the cause.

A PPEAL from the District Court of Claiborne, Taylor, J. Evans, for the appellant. A. Lawson, for the opponent. The judgment of the court was pronounced by

SLIDELL, J. In April, 1845, Veeder, as administrator of Harkins, filed an account of his administration. He states payments of several claims made by him, and a mortgage claim held by himself individually for \$6,240 and interest, evidenced by the notes of the deceased, and a mortgage executed by him in Veeder's favor. He also gives the estate credit for various sums of money and notes received by him from sales of property of the succession, stating the whole amount of notes, cash, and assets that have come into his hands at \$5,850. He alleges that the debts set forth in the account rank in the order in which they appear, that they were privileged debts against the succession, and that he has paid them; that there are large amounts of money owing by the estate to different persons as ordinary creditors, but that he has not placed their debts on this statement or account, as there are no funds to pay the ordinary creditors, the entire property having been absolved by the privileged debts. He prays for the homologation of the account, and to be dismissed from the administration; also for judgment in his favor for the balance due him as exhibited by the account, and for the recognition of his mortgage and privilege. The account was accompanied by certain vouchers, among which is one showSUCCESSION OF HARRING.

ing that the administration had given Robinson certain mortgage notes, proceeds of sale of the property of the succession, on account of his claim, and had taken from Robinson a bond of indemnity, with a surety, to hold Veeder harmless from any injury he might sustain in consequence of such transfer to Robinson.

To the account and petition of the administrator, Robinson filed an opposition. He represents that he is a privileged creditor of the succession, as the holder of a judgment for \$2,070 and interest, rendered and recorded before the death of the deceased, by which he acquired a privilege on all the real estate and slaves of the deceased, which took effect on the 27 May, 1840, the date of registry. He opposes the allowance of any of the items charged by the administrator in favor of any other creditors, and alleges that no tableau of distribution has ever been homologated authorising their payment, nor any judicial authorisation in any way obtained with regard to such claims and their payment. He opposes, specially, the claim of Veeder, alleging that the deceased never received any consideration for the notes held by the administrator individually; that they were given in fraud; that if there was any indebtedness of the deceased to Veeder, it did not exceed \$1,860; that Veeder had promised the opponent that he would not claim a privilege over him for said amount of \$1,860; and that if the opponent would not bring an action to annul his martgage, he would share pro rata with him, and upon the basis of \$1,860 for Veeder's claim; and that, in consideration of this promise, he did not bring an action to annul the mortgage in favor of Veeder. He prayed for the disallowance and rejection of the account, and for judgment for his claim, with privilege. The administrator answered the opposition by a general denial, and plea of the prescription of five years against the alleged right and claim of Robinson to annul the mortgage.

At the trial of this opposition, Robinson offered in evidence the judgment in his favor, and the certificate of its registry. The judgment appeared to have been rendered on confession. The proces-verbaux of sales of the property of the succession were also offered. It was admitted, "that the legal notices were made by the administrator." It was also admitted that one Sarah O. Madden, had a recorded judgment prior to Veeder's, and that the judgment rendered in the cause was not to prejudice her rights. The administrator offered his account and vouchers, including the notes of the deceased and the mortgage in Veeder's favor. The certificate of registry of this mortgage, appended to a copy of the mortgage which was passed before the parish judge, states that "it is a true and correct copy taken from the original act on file and of record in my office"; but it does not state whether it was recorded in the mortgage book. The testimony of a witness, who is acknowledged to have been an attorney at law. was offered and rejected. The purport of his testimony was that, in 1840, the witness, at the request of Vecder and Harkins, drew up the form of an act of mortgage from Harkins to Veeder, on several slaves and a tract of land, to secure the payment of \$6,000; that, he thinks, Veeder was the creditor of Harkins for about \$1,800 only, but that Veeder was to pay some other debts for Harkins, which would make an indebtedness of \$3,000, and that the object of the mortgage was not only to secure Veeder, but to protect Harkin's property from being seized by Robinson, who had then sued him, and was about to obtain judgment at the term of the court then in session. There was also an admission that Veeder had made Robinson a partial paygment, in notes which belonged to the succession. There was also offered the testimony of

Harkins' widow, going to impeach the existence of the indebtedness acknowl- guccasnon edged in the mortgage. This testimony was rejected. The attorney and counsel of record of the opponent Robinson was also offered as a witness, and notwithstanding the exception of Veeder, was received. He states that he called upon Veeder and threatened him with a revocatory action to set aside the mortgage, unless he made some arrangement about it in favor of Robinson; that Veeder said, that he would not claim more than was due to him, which was about \$2.500; that Robinson should have the benefit of an equal privilege with him; and that they should be paid pro rata for what was really due; that, in consideration of this understanding, in which Robinson acquiesced, the revocatory action was not brought; that he received the partial payment in notes for his client, in carrying out this agreement. It is also proper to remark that we find no prayer for an order of publication, nor any order to that effect, nor any appearance at the trial by other creditors.

Upon these proceedings and evidence the court below rendered a judgment, sustaining the opposition of Robinson, as to a portion of the debts paid, and as to the claim of Veeder by reducing it to \$1,850, placing the two parties litigant on an equal rank as creditors, establishing the amount due to Robinson, and decreeing their claims to be paid pro rata out of the proceeds of the sales of the slaves of the succession. The rights of Sarah O. Madden were reserved by the decree. From this judgment Veeder has appealed. He claims a preference over Robinson, or at least that the amount allowed to Robinson should be reduced. The appellee in his answer to the appeal prays an amendment of the judgment in his favor, so as to allow him the whole amount claimed by him.

We have been thus minute in our statement of this case, because we have come to the conclusion that we cannot grant the prayer of either party, but must remand this cause for further proceedings.

The property of a succession is the common pledge of the creditors, except so far as privileges have been lawfully acquired. An administrator is the trustee of the creditors; his first duty is to them, and his imperative obligation is to watch over their interests. The law has carefully defined the special duties of the administrator with regard to the distribution of the funds of the estate, &c. A tableau of distribution must not only be filed, but its filing published, so that all creditors may have an ample opportunity to present their rights; and the same publicity must precede an administrator's discharge. A judgment of the court rendered after a strict observance of the formalities prescribed by the Code, is the warrant of the administrator for paying creditors. We cannot, with any propriety, take the loose admission made by the administrator at the trial, as proof that these formalities have been fulfilled, in a case where, according to his own statement, the estate is insolvent, and a preference is claimed by himself, which exhausts the funds in his hands; to say nothing of the state of facts presented in this cause. Nor as regards the opponent, who has received a partial payment, without any order of court, out of the funds of the estate, under the circumstances stated, can we hold that there is sufficient evidence that the tableau has been duly advertised. His judgment may have been upon a just debt; but its payment can only be enforced contradictorily with the other creditors, upon due publication. There are cases in which it is the imperative duty of the court to interpose its authority, even when not called upon to do so by the parties immediately before it.

SUCCESSION OF HARRINS.

In remanding this cause we shall express no further opinion upon the facts presented, nor the legal consequences of those facts upon the rights of the parties. They can be discussed contradictorily with the other creditors of the estate, who are not now before us. It is proper, however, to notice some bills of exception, presented by the record, with the view to simplify and facilitate the future proceedings in this cause.

A bill of exceptions, taken by Robinson, states that he offered the testimony of the attorney at law, taken under commission as already stated, which was objected to by Veeder, upon the ground that the information was obtained by the witness from Veeder and Harkins, in a communication made by them to him as an attorney at law, which objection was sustained by the court. We are not able to say with perfect certainty, under the case as presented, whether the attorney was employed by both parties. If he was, he was incompetent to state what was communicated to him by either of them in the course and business of his professional employment. The law protects such communications, and "the seal of the law once fixed upon them remains forever, unless removed by the party himself."

It appears by another bill of exceptions "that Robinson's attorney offered himself as a witness, to prove an agreement between him and Veeder, that Veeder was not to claim the benefit of his mortgage, that Veeder acknowledged that Harkins only owed him about \$1,800, and that in paying the debts of the succession Robinson should come in pro rata with him, Veeder, according to the amount of their claims; to which testimony defendant by his counsel objected, on the ground that parol testimony could not be admitted to contradict a notarial act of sale; that it could not be received to annul a mortgage evidenced by a notarial act, after twelve months had elapsed from the date of Robinson's judgment; and, on the further ground that, if a fraud was attempted to be practiced by Veeder, Robinson became a participater therein, and he cannot, now, in a court of justice, avail himself of any benefit resulting from his own turpitude"; which objection the court overruled.

We are of opinion that the creditor, Robinson, had a right to show the declarations of Veeder, that the whole mortgage debt had never existed as declared in the act. Robinson was not a party to the act, and the evidence went to show fraud, for which purpose oral evidence was clearly admissible. The weight to be given to proof of oral acknowledgments, was a matter which concerned the weight of the evidence, and not its admissibility.

Whether the facts stated established the turpitude of the party offering the testimony, we do not consider it necessary now to determine; but upon a tableau of distribution, which is practically a concurso of creditors, if a party chooses to show that he has combined with the administrator to injure other creditors, we know of no rule of law that will prevent him from doing so, nor the creditors from availing themselves of its legal consequences in their favor.

The argument of counsel has pointed to the fact that the witness was the attorney of record of the party for whom he offered himself, and to his testimony as being that on which the cause turns. In the view which we have taken of this case, as one in which we are not finally acting, we are not called upon to discharge the disagreeable duty of weighing this testimony. But we take this occasion to observe, as an imperative act of judicial duty, that although an attorney at law is under our laws a competent witness for his client, yet the position of an attorney thus offering himself as a witness is one of extreme deli-

for the Succession of Harkins.

cacy to the witness and to the court; and that it is always desirable, for the harmony of the profession, the independence of the bench, and the public confidence in the administration of justice, that an attorney should not be a witness, except in extreme cases, when all ether means of proof are impossible; and then, as it seems to us, the attorney should withdraw from professional participation in the cause. So far as the bench is concerned, it is a duty of the most painful nature to be called upon, as we sometimes have been, to weigh the evidence of a member of the bar.

It is therefore decreed that the judgment of the court below be reversed, and that this cause be remanded to the court below for further proceedings in the matter of the succession of *William Harkins*, upon due publication of notice of the tableau of distribution filed in this cause, and according to law; the appellee paying the costs of this appeal.

GRAYSON, Tutor v. MAYO.

A purchaser at a probate sale will not acquire the property free from mortgages created by the deceased, where there was an express stipulation, at the time of the sale, that the adjudication should not discharge the encumbrances.

Where one or more of several notes secured by mortgage have been extinguished by prescription, the mortgage itself will be extinguished pro tanto; and the maker of the notes cannot, by subsequent acknowledgments of the debt, made after the sale of the mortgaged property to a third person, revive the mortgage so as to affect the property in the hands of the latter, without his express assent.

The only demand which interrupts prescription is that made by a citation.

Where the tutor of a minor receives and sues on notes taken at a probate sale for the price of property inherited by the latter, he cannot question the authority of the judge to receive such notes.

A PPEAL from the District Court of Catahoula, Farrar, J. Garrett, for the plaintiff. O. Mayo and McGuire, for the appellant. The judgment of the court was pronounced by

King, J. The plaintiff, in his capacity of tutor of James P. Bowden, is the holder of three promissory notes, secured by a special mortgage on a slave, adjudicated to McLendon, at the probate sale of the succession of the minor's ancestor. The notes matured respectively on the 25th days of March, 1839, 1840, and 1841. At the probate sale of McLendon's property, the slave subject to this mortgage was purchased by the defendant, Mayo. The existence of the encumbrance was announced by the auctioneer, and the slave sold subject to the mortgage in favor of the succession of Bowden. The object of the present action is to enforce this mortgage on the slave in question, in the hands of the defendant. The defendant denies the existence of the mortgage, which he contends was extinguished by the probate sale, and further pleads the prescription of five years. A judgment was rendered in the court below in favor of the plaintiff for one of the notes, and recognising the mortgage on the slave, from which the defendant has appealed. The plaintiff asks for an amendment of this judgment, and urges that the prescription in regard to the two notes which first matured was interrupted by the acknowledgments of the administrator of McLendon, of the existence of the debt.

GRATSON V. MAYO.

The principle has been well settled, that the purchaser of property at a sale ordered by the Probate court, acquires it free from the mortgages created by the deceased. That such is the effect of probate sales when there has been no reservation made in regard to encumbrances cannot be questioned, after the repeated decisions in which the principle has been recognised. But the reasonson which those decisions are founded have no application to sales containing an express covenant that, the adjudication shall not operate a discharge of the encumbrances. No law prohibits such a stipulation, and the purchaser at a sale containing such a condition is bound by the contract. The proces-verbal of the parish judge in the present instance states that, "a mortgage was proclaimed to exist on the slave Lot, in favor of the succession of Elizabeth Bowden, deceased, for the sum of \$1,060, and that said slave was sold subject to that mortgage." The stipulation that the mortgage should remain unimpaired by the adjudication, and fellow the property in the hands of the purchaser, is positive and distinct. The defendant acquired the slave subject to the encumbrance, which may be enforced against him.

The acknowledgments of the administrator of McLendon's succession, that the debt evidenced by the notes sued on was still due, and that payment of it had frequently been demanded, were made after the sale to Mayo, and after two of the notes had been prescribed. The extinction of those notes carried with it the extinction, pro tanto, of the mortgage. Whatever may have been the effect of the administrator's recognition of the debt as far as regards the succession which he administered, it could not revive the mortgage upon property in the hands of the third possessor, without the express assent of the latter. Larthet v. Hogan, 1 An. Rep. 339. The amicable demands of payment upon the administrator, had not the effect of arresting the prescription. The only demand by which prescription is interrupted is citation.

The plaintiff contends that the parish judge was not authorised to take negetiable notes for the price of property adjudicated at the sale of Bowden's succession; that the words "or order", inserted in them, are surplusage; and that the only description of bonds which he was authorised by the terms of the sale to receive, were subject to a prescription of ten years only. The plaintiff having received the notes and made them the foundation of his action against the defendant, has affirmed the acts of the judge, and cannot now question the authority of the latter, nor change the character of his demand.

We consider the notes sued upon as negotiable instruments in their form and legal effect, and as such subject to the prescription of five years.

Judgment affirmed.

UNION BANK OF LOUISIANA v. KING.

Proof that the notary, by whom a note was protested, enquired of the cashier of the bank in which it was payable, and who was the holder of the note as agent, for the residence of the endorser, is not evidence of due diligence, and will not excuse the omission to address a notice of protest, deposited in the post-office, to the domicil or place of business of the latter. When the domicil or place of business of an endorser is unknown, the holder must make reasonable enquiries, and use due diligence, to ascertain them.

A PPEAL from the District Court of Caldwell. Mayo, J. Phelps, for the Usion Bask appellants. McGuire and Ray, for the defendant. The judgment of Kino.

SLIDELL, J. The defendant is sued upon two promissory notes of which he is endorser. They are both dated at Catahoula, and are payable at the office of the bank at Avoyelles. They matured in April, 1837. The netary who protested the notes certifies that he deposited the notices for King in the Avoyelles post-office, addressed to him at Harrisonburg, which was the posttown of the parish of Cataboula. The notary makes no mention in his certificates of any efforts to ascertain the residence, or address of the defendant. The cashier of the branch of the Union Bank at Avoyelles testifies, that the notary enquired of him as to the residence of the endorser, but that he does not recollect that he made enquiry of any one else in his presence; that he replied to the notary that he did not know where King was domiciled, and advised him to direct the notices to Catahoula, as being the place to which, judging from the face of the notes, the notices ought to be directed, when the domicil or nearest post-office could not be ascertained. This is the sole testimony tending to show diligence in ascertaining the endorser's residence. For the defence it is proved that King once lived in Catahoula, but removed, in the year 1834, to the parish of Caldwell, (formerly Ouachita,) where he has ever since resided; that he had been a merchant at Harrisenburg; that his removal thence to Ouachita, was a matter of notoriety; that he was a person generally known throughout the country; that his residence in Caldwell was about forty miles from Harrisonburg; that there has been a post-office in Caldwell, distant about a mile from King's residence, since the year 1827; and that King, ever since he came to reside in Caldwell, has applied regularly at that office for his letters and papers, to which place they came addressed.

The endorser is entitled to notice at his domicil, or his place of business, when the right to notice accrues. When such domicil, or place of business, is unknown, it is the duty of the endorser to make reasonable enquiries, and to use due diligence in ascertaining them. Such notice is only dispensed with when, after such reasonable enquiries and due diligence, the domicil or place of business cannot be ascertained. Due diligence has not been shown in the present case. The only person to whom application was made was the cashier, himself the holder as agent. It would be unreasonable to characterise this as due diligence; nor can we suppose, under the evidence, that further enquiry at the place of protest would have proved unsuccessful. This lackes justifies the judgment for the defendant.

We have been asked at least to reverse the final judgment for the defendant, and grant a non-suit. We have occasionally done so, under circumstances which appeared to call for the exercise of that discretion; but we do not think the present case of that character. This suit was instituted in 1841, and was pending five years before it was finally tried. If evidence existed which would have sustained the plaintiffs' case, there was abundant time to have obtained it.

Judgment affirmed.

STROUD et al. v. HUMBLE, Sheriff, et al.

Plaintiff, a-married woman, purchased certain property in her own name, at a probate sale of the succession of her father, made for the payment of debts and to effect a partition, the price of which was less than her share in the succession. The sale of the property of the succession was directed to be made for one-tenth cash, and the balance on credit. The act of sale declared that the price had been "in hand paid." The succession was solvent. In a partition subsequently made between the heirs, a note given by the plaintiff for the credit portion of the price was given up to her, as a payment pre tanto on her share in the succession. Held, that the interest of plaintiff in the succession of her father being paraphermal, the property so purchased by her must also be considered paraphermal, being an exception to the general rule that property purchased during marriage, whether in the name of the husband or wife, belongs to the community; and that the law, in this respect, was the same be fore the promulgation of the Civil Code of 1825 that it is at present.

One whose property has been seized under execution against another, may recover damages against the sheriff and plaintiff in execution, in solido:

A PPEAL from the District Court of Caldwell, Farrar, J. Purvis and Mc-Guire, for the plaintiffs. Garrett, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This suit was before us at our last term, and was then remanded for further proceedings. See 1 An. Rep. 310. At the trial on the merits, the titlé of the plaintiffs as the heirs of their mother, Sally Grady, the deceased wife of Stroud, to the female slave and her issue, which had been seized upon executions against William Stroud, their father, was recognised, and judgment was also given for \$150 as damages. From this judgment the sheriff, and his co-defendants, have appealed. It is submitted by the counsel for the defendants that the only issues before the court are: 1st. The title of the plaintiffs, as the heirs of Sally Grady, deceased, to the property. 2d. Whether, if they establish this, they have shown themselves entitled to the damages awarded by the court.

Upon the first point it is necessary to premise by a brief statement of the facts. It is conceded by the defendants' counsel that the negro woman Betcy, who has been seized under execution, belonged to the succession of John Grady. deceased, and that the children seized are her issue; that the plaintiffs are the children of Sally Grady, and that Sally Grady is the daughter of John Grady: But the contest as presented by the argument for the defendants is, as to the legal consequences of the following facts: After John Grady's death, his testamentary executor and one of his children presented a petition to the court of Probates in which the succession had been opened, stating that there were considerable debts which the executor had not funds to pay, and praying that the estate of the deceased be sold for the purpose of paying debts, and making a partition among the co-heirs; and that the terms of sale should be ten per cent cash, and the residue on a credit. It is evident that the estate was abundantly solvent, although in want of cash funds to pay debts; for we find that the debts, executor's commissions, and the costs, only absorbed about one-fourth of the proceeds of sale. The other heirs, and among them Sarah Stroud, the mother of the plaintiffs, accepted service of the petition, waived notice, and concurred in the prayer of the petitioners. A sale was accordingly ordered by the judge.

The decree was: "Let the prayer of the petitioner be granted, and let a sale be made as prayed for." The proces-verbal-of the sale, which was conducted by the parish judge himself, sets forth that it was made for the purpose of paying debts, and making a partition among the heirs. The terms announced were for slaves, one-tenth cash, and the balance on the 1st January ensuing. It declares that the negro Betcy was adjudged to Sarah Stroud, the last and highest bidder, for the sum of \$650, "who signs hereto by consent of her husband, who also signs agreeing to consent to the terms of sale; and John Sims signs as her surety." On the same day, before the same parish judge, the executor executed a deed of sale of the slave to Sarah Stroud, by consent of the husband. Both husband and wife signed this deed. A few months after this, and in the same year, a partition was made among the heirs, which is of record with the mortuaria. In this partition Sarah Stroud and her husband are stated to be represented by an attorney in fact, and the instrument states the share of each heir at \$1,033 59, and that William Stroud, who has married Sarah Grady, has received \$1,033 59, in the note and mortgage of himself and wife for \$585, the note and mortgage of Wood and Brown for \$414, and from a coheir \$54 in cash.

It is said, and, as we think, correctly, that the rights of Sarah Stroud under these facts, must be determined by our system of laws and jurisprudence, as existing before the Code of 1825 took effect. This sale was made in January, 1825. It is not necessary, in the view which we have taken of this case, to say whether they are to be exclusively determined by that standard. The settlement by the heirs, in December, 1825, being subsequent to the promulgation of the new Code, the two systems would perhaps be considered as both operating upon the subject matter to a certain extent. But we do not think that, under either system, the rights of Sarah Stroud would be different.

We are of opinion that, as the interest of Sarah Stroud as heir in the succession of her father was clearly paraphernal, the slave purchased under the circumstances at the probate sale was paraphernal also, and did not fall into the community existing between her and William Stroud. The sale was made to her, in her name. The thing sold was sold not only to pay debts. but to effect a partition of a succession of which she was an heir; the purchase was for little more than half of her share as heir. The counsel for the defendants has laid much stress upon the fact, that there was, by the terms of sale, a cash payment; and has urged that, there is no proof that Sarah Stroud paid the money; and that the law, in the absence of such proof, will presume it was paid by the husband, and consequently, in legal contemplation, by the community. But he has overlooked the fact that the deed from the executor, executed on the same day as the probate sale, asserts that the price was in hand paid to him by Sarah Stroud. The whole current of authority, both under the existing Code and the system of laws which preceded it, sanctioned the opinion that the title, vested in Sarah Stroud by these proceedings, was paraphernal. In Savenat w. Le Breton, 1 La. 520, the case was weaker than this, for the conveyance, on its face, was to the husband, who, however, acknowledged in the act, that he received it as a part of the plaintiff's paraphernal estate. Proof was admitted, apparently in part oral, that the wife's share in the succession of her parents had been deposited in money in the hands of an aunt, and that the aunt conveyed the property to the husband in discharge of this debt. The case was stated as being decided under the spanish laws; but Mathews, Justice, in dedivering the opinion, intimates that the doctrine of matrimonial rights, as asSTROUD V. HUMBLE. tablished by our Codes, is more favorable to the wife. In Newsom v. Adams, 3 La. 231, it was considered that on this subject there was no conflict between our former and present systems. The cases under our present Code are numerous and conclusive, that such a purchase stamps the property as paraphernal. The leading cases are Dominguez v. Lee, 17 Lu. 301. Terrell v. Culrer, 1 Rob. 368. See also Maussard v. Her Husband, 11 Rob. 446. Rousse v. Wheeler and wife, 4 Rob. 118. It is true that the Code of 1808 harmonised with the spanish law, and with the Code of 1825, in the general principle that property acquired by purchase during marriage, whether in the name of the husband or of the wife, belongs to the community. See 11 Rob. 529. But we are not aware of, nor has the counsel cited, any article of the Code of 1808, nor any authority, which establishes that such an acquisition, in the name of the wife, would not fall under a fair and reasonable exception to the general rule.

We do not consider the subsequent settlement made by the heirs as affecting Sarah Stroud's title. The title of the slave was in her; its price was less than her share; the act of partition, and the restoration of her note to her was a settlement between the heirs, and did not overthrow the paraphernal acquisition. Neither the husband nor wife so considered it, at the time; and what has been done twenty years ago, in good faith, and in the legal and just exercise of the wife's separate rights as an heir of her father, cannot now be disturbed by the creditors of the husband, and to the detriment of her children.

Upon the question of the allowance of damages, we have been asked by the appellees to increase them, and by the appellants to reduce them. An examination of the testimony has not satisfied us that we ought to disturb the finding of the district judge.

Judgment affirmed.

BEALL v. ALLEN.

A plea in compensation which states that defendant had paid as surety for plaintiff's wife an obligation, against which plaintiff had promised to hold him harmless, on which obligation judgment had been obtained against defendant, stating the amount thus paid, but not describing the obligation, its date, the creditor, the time of payment, nor the title of the suit in which the judgment was obtained, is too vague. No evidence will be admissible under it.

A PPEAL from the District Court of Caddo, Taylor, J. Terrell, for the plaintiff. Gilbert and Landrum, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff alleges that he entrusted to the defendant a quantity of cotton to be ginned and baled for the plaintiff, for which service payment was to be made; and that the defendant has sold the same, or converted it to his own use. He asks for judgment for the return of the cotton, or its value. The defendant answered by a general denial, and a plea in compensation. At the trial of the cause the defendant offered a witness to prove his claim in compensation; but this testimony was rejected.

On examining the answer and plea in compensation, we find it defective in that certainty which is required in such a plea. The plea is that the defendant has paid, as surety for the plaintiff's wife, a certain obligation, against which the plaintiff promised and was bound to hold him harmless, and upon which obli-

gation a judgment had been obtained against the defendant. The plea states the amount thus paid; but does not describe the obligation, its date, the creditor, the time of payment, nor the title of the suit in which the judgment was obtained. The plea was too vague and indefinite, and the defendant had no right to offer evidence under it. See White v. Moreno, 17 La. 373. Smith v. Scott, 3 Rob. 260.

The claim of the plaintiff was proved.

Judgment affirmed.

BEALL W. ALLES.

SANDRIDGE, Agent &c. v. Jones et al.

Where, through the negligence of a sheriff, an opportunity is afforded to a debtor of removing into another State property seized under attachment, and plaintiff thereby loses his recourse against it, judgment-may be recovered against the sheriff, and his sureties, in solido, for its value.

A PPEAL from the District Court of Caddo, Olcott, J. This was an action against a sheriff and his sureties, with a proper for judgment against them in solido, for the amount of damages alleged to have been sustained by plaintiff through the neglect of the sheriff. The plaintiff appealed from a verdict and judgment against him.

Crain, for the appellant. McGuire and Ray, for the defendants. The judgment of the court was pronounced by

King, J. The defendant, Thomas B. Jones, is sought in this action to be rendered liable for the value of several slaves, which were attached at the suit of the plaintiff, under a writ executed by one of the defendants Jones' deputies, and which were, as it is alleged, suffered to escape by the gross neglect of the officer. The cause was tried by a jury in the court below, whose verdict was for the defendants, and the plaintiff has appealed. When the writ was placed in the hands of the officer he was notified by the plaintiffs' attorney, that despatch and the utmost caution were necessary in executing it. That the defendant in attachment had declared his intention never to pay the debt for which he was pursued in that action; that the institution of the suit was becoming a matter of notoriety; and that prudence and diligence would be necessary. The plaintiff offered to bear any expense that the extraordinary diligence, which he asked, might require.

The officer to whem the writ was delivered gave it to another deputy, who retained it for a day, and then returned it to Watson, the officer from whom he had received it. Watson then undertook the execution of the writ himself, repaired to the neighborhood in which the slaves were, which he reached about noon. The weather being inclement, he waited until about four o'clock in the evening for the slaves to return from their work, before making his levy; and, after having effected his seizure, the slaves were not confined nor secured in any manner, but were suffered to retire to their cabins for the night, with no guard placed over them. The slaves when seized were at a point distant about six or eight miles from the boundary line between Texas and Louisiana, and the defendant in attachment resided in Texas. On the morning following the seizure, the slaves were missing. The sheriff returned on the writ that the slaves were attached, that they were removed to Texas, and that he had been unable to ze-

SANDRIDGE 9. Jones, cover possession of them. The officer thus appears to have been guilty of lackes at every step made in the execution of the writ. He was notified of the importance of promptness, notwithstanding which the writ was suffered to remain in the hands of a deputy for a day without an effort to execute it. He was warned of the probability that the defendant in attachment would make an effort to remove the slaves; and yet, after making the seizure, the slaves were permitted to remain at large, with no guard placed over them, or precautions used to prevent their escape, notwithstanding their immediate proximity to the boundary line of the State. His negligence has rendered him liable to the plaintiff for the amount of the loss sustained by reason of his lackes.

The witnesses differ in relation to the value of the slaves attached. We cannot, under the evidence, place upon them a higher estimate than \$1,200. The title to an interest of one half in them only, is shown to have been in the defendant in attachment, which fixes the liability of the sheriff at \$600. The plaintiff has shown that he is a creditor of the defendant in attachment for a sum much larger than the value of the entire property seized.

It is therefore ordered that the verdict of the jury be set aside, and the judgment of the District-Court reversed. It-is further decreed that the plaintiff recover of the defendants Thomas B. Jones, W. W. Harper, Vinkler H. Jones, and John S. Gilbert, in solido, the sum of \$600; and that said defendants pay the costs of both courts.

Poirrier v. White.

The act of Congress of 23 January, 1832, relative to the pre-emption rights of settlers on public lands, only authorised the transfer of certificates of purchase, or final receipts. The prohibition to assign or transfer a mere pre-emption right, before a patent had been issued, imposed by the act of 29 May, 1830, was not repealed or affected by the stat. of 1832; any sale or assignment made in violation of it is null; and a title to the land, subsequently acquired by purchase from the government by the party entitled to the pre-emption, will enure to his benefit, and not to that of the purchaser of the pre-emption right.

A PPEAL from the District Court of Bossier, Taylor, J. Lawson, for the appellant. Gilbert and Landrum, for the defendant. Crain, for the intervenors. The judgment of the court was pronounced by

Kine, J. In July, 1834, the plaintiff sold to Robinson his right of pre-emption to a tract of land, stated in the act of sale to have arisen under the statute of 1839. Robinson sold the land, with an adjoining tract acquired from Prevost, to the defendant White, who gave his three promissory notes for the price, and the land remained specially mortgaged in favor of the vendor to secure their payment. Two of these notes were transferred to Lambeth & Thompson, by Robinson, with a subrogation to all the rights of mortgage of the latter on the land hypothecated. In 1840, Poirrier purchased from the United States the quarter section of land, the right of pre-emption to which he had previously sold to Robinson, proving up his claim under the act of 1832. He has now instituted this action for the recovery of the land in question, alleging that his sale to Robinson, was in violation of an express prohibition of the law of Congress, and for that reason void. He also claims rents and profits. White, the defendant, called his vendor, Robinson, in warranty, and prayed that, in the event of evic-

Potrrier v. White.

tion, he be allowed compensation for his improvements. Lambeth & Thompson, the holders of two of the mortgage notes, have intervened in the suit, and pray that the title of White be maintained, but that, in the event of an eviction of the defendant, the plaintiff be decreed to pay them the price which he received from Robinson for the land. There was a judgment rendered in favor of the defendant in the court below, quieting him in his title; from which the plaintiff has appealed.

The act of Congress of May 29, 1830, granting pre-emption rights to settlers on public lands provides that "all assignments and transfers of the right of pre-emption given by this act, prior to the issuance of patents, shall be null and void." The act of 1832, supplementary to the act of 1830, authorised persons who had purchased under the act of 1830, to "assign and transfer their certificates of purchase or final receipts," and patents to issue in the name of the assignees. The act of the 19th June, 1834, revived the act of 1830, and continued it in force for two years. United States Statutes at large, vol. 4, pp. 420, 496, 698.

It is contended that the act of 1832 authorised the assignment of pre-emption rights, such as were transferred by the plaintiff; that the act of 1834, reviving that of 1830, revived with it the supplementary act of 1832; and that the sale from the plaintiff, having been made subsequently to the passage of the act of 1834, was not forbidden by law. It is not necessary to determine whether the effect of the act of 1834 was to revive the act of 1832, as well as the act of 1830. The act of 1832 only permitted purchasers to assign their certificates of purchase or final receipts. The prohibition from selling the mere pre-emption right was not repealed nor affected by the act of 1832, but remained in full vigor. That prohibition is express, and the absolute nullity is declared of any sale or assignment made in violation of it. The entry made by plaintiff in 1840, vested in him the title to the land, and authorises a recovery.

The warranter not having been cited, and having made no appearance in the cause, no judgment can be rendered against him and in favor of his vendee.

Lambeth & Thompson, the intervenors, claim, in virtue of their subrogation to the rights of Robinson, that, in the event of eviction, the plaintiff pay them the price which he received from Robinson. These parties were only subrogated by Robinson to all his rights and actions in regard to the notes transferred to them. There was no subrogation, or transfer to them of Robinson's recourse in warranty against his vendor, and Robinson makes no claim in this suit against his vendor. Justice between the parties requires that the plaintiff should be compelled to reimburse the price which he received from Robinson; and we regret that the state of the pleadings does not authorise us to render such a judgment.

The rents of the land have been proved to be worth \$196, and the improvements made by the defendant to be worth \$160. For the difference, which is \$36, the plaintiff is entitled to a judgment.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that the the plaintiff recover of the defendant the tract of land designated as the north-west quarter of section one, of township number sixteen, of range number thirteen, containg 112 16-100 acres; and further, that he recover of the defendant the sum of \$36. It is further ordered that the defendant pay the costs of both courts.

PREVOST v. WHITE.

A PPEAL from the District Court of Bossier, Taylor, J. This case only A differed from that of Poirrier v. White, in the fact of the pre-emption right to the land in controversy having arisen under the act of Congress of 19 June, 1834. The parties, with the exception of the plaintiff, are the same in the two cases, and they were represented by the same counsel.

BLOOMFIELD v. JONES et al.

Under ordinary circumstances a sheriff will be considered as having exhibited due diligence, by serving a citation in time to enable the plaintiff to take a default at the earliest period after the opening of the court at the term next ensuing. To render a sheriff liable for damages resulting from the failure to serve a citation somer—as for the amount of the debt, when the citation was not served in time to interrupt prescription—plaintiff must show that the officer was notified of the necessity of earlier service to prevent the prescription of the claim

A PPEAL from the District Court of Caddo, Campbell, J. Lawson, for the appellant. Crain, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff alleges that, in March, 1844, she was the owner of a joint and several promissory note, made in her favor by H. G. Williams and Thomas Sutton, due April 5, 1839; that, in the year 1844, on the 23d of March, the plaintiff having instituted suit against Williams, the citation and copy of petition for the defendant were placed in the hands of Jones, then sheriff of the parish of Caddo, who neglected to serve them until the 16th of April, 1844; that, by reason of prescription, there was judgment for defendant in said suit; that, in September, 1844, she brought suit against Sutton, in the District Court for Bossier parish, who pleaded prescription, and had judgment in his favor; that if the citation in the case against Williams had been served with due diligence, prescription would have been interrupted as to Williams, and by legalconsequence as to his co-debtor in solido; that by the wilful neglect and nonfeasance of the sheriff the debt has been lost, and the officer has made himself, and his official sureties, liable in damages to the amount of the debt and costs. The defendants pleaded a general denial, averring also due diligence in the service of the citation, &c. The cause was tried by a jury, who found a verdict for the defendants, in conformity to which a judgment was entered; and, a new trial having been refused, the plaintiff has appealed.

The record exhibits a bill of exceptions with regard to the legal effect of the exemplifications of the records in the suits against the makers of the note, as evidence in this cause; but we have not considered it necessary for the decision of this cause to examine the questions presented by the bill.

In examining the cause on the merits, we find a state of evidence which does not permit us to declare the verdict of the jury erroneous. Under ordinary





JOKES.

circumstances the sheriff would be considered as having exhibited due diligence, BLOOMPIZLD by serving a citation in time to enable the plaintiff to take a default at the earliest period after the opening of the court at its next ensuing term. This was done in the present case. But to take this case out of the general rule of diligence, the plaintiff produced a witness who testified that, when the citation was delivered to the sheriff's deputy, he informed the deputy that it was important that the citation should be served, or prescription would run; stating, however, on his cross-examination, that he did not recollect the precise words used. But, on the other hand, the deputy, who had been made a competent witness by the release executed in his favor by the sheriff, declared that he had no recollection whatever of the clerk having told him of the necessity of serving it speedily, or of his saying any thing about it; that he thought, inasmuch as it was unusual to give such an admonition, that he would have remembered it, had the clerk given it. In weighing this conflicting evidence, and the other facts connected with the question of diligence, the jury had better means to form a correct opinion than we have.

There is a good deal of testimony going to show that the sheriff was much pressed at the time with official business, particularly the pursuit of stolen property. But we have not permitted this to influence our opinion in affirming the verdict. It was his duty to increase the number of his deputies in proportion to the accumulation of his official labors.

Judgment affirmed.

HUESTON v. JONES.

Where in an action by the holder of a note against the maker, there is no allegation nor proof, that certain obligations of the payee, pleaded in compensation by the maker, were held by him before the transfer of the note to the plaintiff, the latter will be entitled to recover, though the note was transferred to him after maturity.

A printed book, purporting to contain the statutes of another State, and to have been printed by the authority of its legislature, not authenticated according to the act of Congress of 26 May, 1790, is inadmissible to prove a statute of that State.

PPEAL from the District Court of Claiborne, Taylor, J. Vaughn, for the plaintiff. Lawson, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. This is an action on a promissory note, made by the defendant to the order of Crownover, payable one day after date, and endorsed by the payee to the plaintiff, by an endorsement bearing date two years after maturity. The defendant answered by a general denial. He also pleaded that the plaintiff is not the owner of the note, but that it was held by Abraham Hueston, with whom the plaintiff had colluded for the purpose of avoiding the defendant's defence. He annexes certain joint and several obligations of one Beal and Abraham Hueston to his answer, which he pleads in compensation. He also propounded interrogatories to the plaintiff. The answers to these interrogatories negative the charge of collusion, assert the ownership of the note to be in the plaintiff by a transfer for value, and the plaintiff's ignorance of any defence existing against the note at the time of the transfer.

HURSTON. U. JONES. The evidence adduced by the defendant, and that also which he proposed to offer and which the court rejected, were insufficient to defeat the plaintiff's claim. There was no allegation in the answer, nor any thing in the evidence offered, nor in that proposed to be offered, to show that the obligations pleaded in compensation were held by the defendant previous to the transfer of *Jones'* note to the plaintiff.

The court properly refused to receive in evidence a printed book, purporting to contain the statutes of Mississippi, and to be printed by the authority of the legislature of that State, to prove the laws of that State. See the case of Phillips v. Murphy, ante p. 654.

Judgment affirmed.

KENNER v. PECK.

Where a plea in compensation does does not specify either the amount or the nature of the offset, no evidence will be admissible under it. C. P. 367.

Time will not be allowed to a party to obtain the answers of his opponent to interrogatories. when, even if taken for confessed, the facts they might establish would be impertinent to the issue. C. P. 350.

Interest will be allowed from maturity on a note payable at the counting house of the payee, bearing interest "after due until paid," though the protest, made several years afterwards, was the only evidence of a formal presentment at the place of payment, when the tenor of a letter written by the maker to the plaintiff, recognising the debt and promissing payment, justifies the inference that the defendant had provided no funds at the place of payment.

A PPEAL from the District Court of Catahoula, Mayo, J. O. Mayo, for the plaintifi, cited 2 Mart. N. S. 84. 17 La. 371. 3 Rob. 258. Purvis, for the defendant, relied on C. P. 347 to 350. 7 Mart. N. S. 269. Bradford v. Cooper, 1 An. R. 325. 12 Rob. 243. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff sues as holder of a promissory note made by the defendant to the order of Taylor, Gardiner & Co., and by them endorsed, payable at their counting-house in New Orleans. There was judgment for the plaintiff, and the defendant has appealed.

The first point urged by the defendant is, that the court below improperly refused him time to obtain the answers of the plaintiff to interrogatories propounded. The purport of these interrogatories was, to ascertain from the plaintiff whether Taylor, Gardiner & Co. were not the real owners of the note, with a view, as the defendant contends, of enabling him to establish a compensation, or set-off, of claims due to him by Taylor, Gardiner & Co. But the plea of compensation was framed in a manner so loose and defective, giving no specification whatever of the nature of the offsets, that no evidence would have been admissible under it, and the interrogatories, if taken as confessed, would have been impertinent to the issue really made by the pleadings, which amounted in legal effect to nothing more than the general issue, and a question of prescription. There was therefore no error in the ruling of the court. See C. P. 350, 367. White v. Moreno, 17 La. 371.

The plea of prescription was properly disregarded. Five years had not elapsed from the maturity of the note to the date of the service of citation.

KENNER v. Prck.

The appellant contends that interest should not have been allowed from the maturity of the note, but only from the day of protest. The note stipulates interest at ten per centum per annum after due, until paid. It is made payable at the counting-house of Taylor, Gardiner & Co., and was protested some years after maturity. The protest is the only evidence offered of a formal presentment at the stipulated place of payment. But a letter of the defendant addressed to the plaintiff is in evidence, which recognises the indebtedness, in reply to a letter of the plaintiff, and promises payment. The tenor of this letter justifies the inference that the defendant had provided no funds at the place of payment, and, coupled with the stipulation for interest after due till paid, justified the allowance of interest from maturity.

Judgment affirmed.

PROTHRO v. THE MINDEN SEMINARY.

Parol evidence will be received to prove a resolution of a board of directors authorising the president to execute a mortgage in the name of the corporation, when the witness, who was secretary of the board, states that the resolution was written by him as secretary on a slip of paper, and never transcribed on the minute book, that the paper was lost, and that an unsuccessful search had been made for it.

A PPEAL from the District Court of Claiborne, Taylor, J. Lawson, for the appellant. Vaughn, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. This action is upon two notes signed by Edward R. Olcott, president of the board of trustees of the Minden Seminary, and a mortgage of lands, executed by said president on behalf of said company, to secure their payment. The corporation answered by a general denial, and also pleaded specially that the corporation never executed the obligations, nor delegated to any one authority to bind it by note, or mortgage. There was a judgment of non-suit, and the plaintiff has appealed.

This corporation was created by an act of the legislature, passed on the 12th March, 1838. The title of the act is, "An act to incorporate a Seminary in the town of Minden." It is constituted in the usual terms a body politic, with perpetual succession, the capacity to sue and be sued, purchase, sell, hypothecate, and pledge all kinds of moveable and immovable property, &c., and dispose of the same as to them may seem meet. Power is conferred to pass, and put into execution, all by-laws for the government of the corporation, and the administration of its affairs; and the corporaton is "invested with all the rights and privileges which by law are granted to bodies politic." Provision is made for a board of directors, any four of whom shall constitute a quorum. The act declares that the said directors shall act in all matters concerning the corporation, and they are clothed with all the powers necessary for the establishment, maintenance, regulation, and administration of a seminary for the town of Minden. A provision in the act contemplates the appointment of a president of the board, who is authorised to receive from the treasurer of the State a sum of money annually appropriated, to be employed in fulfilment of the object of the corporation, under the surveillance and control of the board of directors.

PROTHRO

0.

MINDER
SEMINARY.

At the trial of the cause, the plaintiff offered oral evidence, to wit, the testimony of the secretary of the corporation, to prove a resolution of the board of directors authorising Olcott, the president of the board, to execute the mortgage and notes. The secretary also deposed that the resolution was taken on a loose piece of paper by him, as secretary; that said paper was lost, and never was transcribed on the book of minutes; and that an unsuccessful search has been made forit; to this testimony, which was taken down and comes before us as proof of the statement of facts, objection was made and noted, though it does not appear whether the court sustained the objection or not. The objection was that, it was not the best evidence. This is an irregular mode of presenting an exception; but we will proceed to consider it. Under the circumstances, we think the evidence was admissible. The writing was lost, and an unsuccessful search had been made for it. To refuse the plaintiff, under such circumstances, the benefit of the oral proof of the lost writing would not only violate the familiar rule of evidence, but would be particularly onerous in this case, for it would in reality be permitting a corporation to take advantage of the carelessness of its own officers and servants,

Considering the resolution as properly in evidence, it remains to examine its legal effect. The corporation, as we have seen, had a special grant of capacity to hypothecate immovable property, and dispose of its effects "as to them may seem meet." It was also clothed with all the rights and privileges which by the general law are granted to bodies corporate. Its board of directors was charged with the administration of its affairs, and a president is contemplated in the statute as its active officer. This officer, acting under a resolution of the board of directors, has executed this mortgage and the notes; and in the entire absence of any evidence that they have abused their trust, or have not received the equivalent as acknowledged in the notes and mortgage, we must presume that the debt was contracted in the honest discharge of their duties, and that the corporation is bound.

It is therefore decreed that the judgment of the court below be reversed, and that there be judgment in favor of the plaintiff against the said defendants, the Seminary of the Town of Minden, for the sum of \$1,775, with interest thereon at the rate of ten per centum per annum, from the 25th day of January, 1841, until paid; with mortgage therefor on the property described in the act of mortgage, executed by the said defendant on the 25th January, 1841, before George W. Peets, parish judge, whereof a copy is on file in this cause, and costs in both courts,

LEE et al. v. SEWALL et al.

Where a creditor of a partnership, for the payment of whose debts a third person had bound himself as surety, takes from the partners a note payable at a future day in settlement of a debt due him by open account, the prolongation of the term of payment will discharge the surety. C. C. 3032.

A PPEAL from the District Court of Caddo, Taylor, J. Crain, for the plaintiffs. Lawson, for the appellant. The judgment of the court was pronounced by

LEE U. SEWALL

SLIDELL, J. The petitioners allege that they are the holders of a note in their favor, made by Charles A. Sewall & Co. in liquidation, dated in May, 1841, and payable at ninety days after date, with interest at ten per cent from the 10th June then next, given for a debt due by Sewall & Co. to the petitioners; that, on the 12th January, 1841, the partners of that firm, Sewall and Williamson, dissolved their partnership, and that, by a written instrument dated on that day, Sewall, as principal, and Gilmer, as surety, bound themselves to pay all the debts and liabilities of the firm, and to save Williamson harmless from them; the consideration of which obligation was that Williamson had transferred to Sewall all his interest in the partnership assets. Judgment is accordingly prayed for against the defendants as principal and surety, for the amount of the note and interest, after allowing certain credits. Gilmer answered by a general denial, and also pleaded specially that, if he ever was liable as surety, he had been discharged by the plaintiffs' having given time to the principal. He also pleaded novation since the contract of suretyship was entered into by him. There was judgment for the plaintiffs for the amount of the note and interest, after allowance of certain payments, and the defendant Gilmer has appealed.

It appears that the note, which forms, together with the obligation of sure-tyship, the basis of this action, was given by Sewall in settlement of an open account due by Sewall & Co., before the dissolution, to the plaintiffs. The note bears date after the dissolution and the defendants obligation, and there is no testimony to show, that the other partner, Williamson, ever conferred any authority upon Sewall to bind the firm by note after the dissolution, nor any approval of the new arrangement, either by Williamson or by Gilmer.

The question is thus presented, whether the taking of the note, payable at a future day, with ten per cent interest for an indebtedness theretofore existing in the form of an open account, has discharged Gilmer. The plaintiffs contend that the obligation which Gilmer executed, contains a stipulation pour autrui, to the benefit of which they are entitled, under articles 1884 of the Civil Code, and 35 of the Code of Practice. If this be conceded, they then stand as though they were parties to that agreement; in other words, as though, on the 12th January, 1841, Sewall, as principal, and Gilmer, as surety, had promissed the plaintiffs to pay them the balance of the open account due by Sewall & Co. But "the surety is discharged when, by the creditor, the subrogation to his rights, mortgages, and privileges, can no longer be operated in favor of the surety." Civil Code, 3030; see also 3032. Here time was given by the plaintiffs to Sewall, without the consent of Gilmer; and, even if the obligation executed by Gilmer was one of which the plaintiffs could have availed themselves, they have discharged him by their own act. See the case of Mouton v. Noble, 1 Ann. Rep. p. 192.

It is therefore decreed that the judgment rendered against the said David Gilmer be reversed, and that there be judgment in his favor, with costs in both courts.

TUTORSHIP OF BATES.

A family meeting must be composed of five relations, or, in default of relations, of five friends of the minor. C. C. 305. The under-tutor cannot be a member of a family meeting, though he must be present for the purpose of advising. C. C. 302.

TUTORSHIP OF BATES.

Where a tutrix is deprived of the tutorship by marrying a second time without having convened a family meeting to decide whether she shall remain tutrix, the appointment of under-tutor does not cease with that of the tutrix. It is, under such circumstances, the duty of the under-tutor to provoke the appointment of a tutor. C. C. 303.

A PPEAL from the Court of Probates of Bossier, Scott, J. Lawson, for the appellants. Evans, contra. The judgment of the court was pronounced by

SLIDELL, J. There is a motion to dismiss this appeal. It was made returnable to Alexandria by an order of the District Court for the parish of Bossier, in November, 1846. Subsequently the case fell under the operation of the act of 24th April, 1847, which directed that appeals from the parish of Bossier, made returnable to the Supreme Court at Alexandria and not filed in the court at that place before the establishment of a term of the Supreme Court at Monroe, should be returned, filed, and tried, in the Supreme Court at Monroe, in the same manner as other cases, &c. Under this legislation we consider it our duty to hear this cause at this place. The appellee objects that he has had no notice whatever of this appeal, nor of any of the proceedings in the cause in the District Court after a former dismissal by this court. It appears by the record that the order of November, 1846, was made in the presence of the appellee, "who took cognisance of said appeal." The appellee is presumed to know the provisions of the act of 1847, giving this court authority to hear the cause at this place.

The appellant opposed the homologation of the proceedings of the family meeting which advised the appointment of E. D. McMullen as tutrix, on various grounds, one of which only is it necessary to notice.

A family meeting must be composed of five relations, or, in default of relations, friends of the minor. C. C. 305. Five persons are necessary to constitute the meeting. The under-tutor cannot be a member of the family meeting, but he must be present for the purpose of advising—il devra y être appellé, et y aura voix consultative. C. C. 302. In this case *Thomas Sutton* acted both as a member of the family meeting and as under-tutor, and signs the proceedings in both capacities. The family meeting must be considered as having been composed of four persons only, and this irregularity vitiates the proceedings.

It is said that when the former tutrix became deprived of the tutorship by her marriage, the appointment of the under-tutor fell with it. This is incorrect. When that event occurred, the law made it expressly the duty of the under-tutor to provoke the appointment of a tutor. C. C. 303.

It is therefore decreed that the judgment of the court below be reversed; that the opposition of the said *Richard E. Bates* be sustained; that the application for the homologation of the proceedings of the family meeting be dismissed; and that the proceedings of said meeting and the order therefor, be set aside; the appellee paying the costs of this appeal.

TRENT v. CALDERWOOD.

A surety on a twelve months' bond is not subrogated, on paying it, to an equivalent portion of the judgment under which the property for which the bond was given was adjudicated, but only to the rights of the creditor of the bond itself. Per Curiam: The debt created by the judgment is not the same as that represented by the bond. The surety who pays the bond has none of the rights of mortgage which the judgment itself imports.

A PPEAL from the District Court of Ouachita, Selby, J. McGuire and Ray, TRENT for the appellant. Copley, surety on the twelve-months' bond, pro se. CALDERWOOD, Stillman and Purvis, on the same side. The judgment of the court was pronounced by

Eustis, C. J. The only question in this case, is whether a surety on a twelve-months' bond is subrogated, on paying it, to the equivalent portion of the judgment under which the property for which the bond was given was adjudicated, or only to the rights of the creditor of the bond itself.

The debt created by the judgment is not the same represented by the bond. The surety who pays the bond is subrogated to all the rights appertaining to it, but can have no rights of mortgage, which the judgment itself imports. We understand this to have been held in the case of Coons, Curator, v. Graham, Curator, 12 Rob. 209. Such is our view of the law in relation to payment with subrogation.

The opinion of the court prepared in the case of the Succession of Harkins, ante p. 923, supersedes the necessity of any remarks concerning the attorney in this case being a witness.

The judgment appealed from is reversed, and the petition of Copley dismissed, with costs of the opposition in both courts.

PREWITT v. CARMICHAEL.

An attachment will not lie in an action for damages ex delicto.

A PPEAL from the District Court of Morehouse, Copley, J. Boatner, for the appellant. McGuire and Ray, for the defendant, cited C. P. 242, 243; Irish v. Wright, 12 Rob. 568, 575. The judgment of the court was pronounced by

Eustis, C. J. This is an appeal from a judgment dissolving an attachment, on the ground that an attachment will not lie in an action for damages for a tort. The plaintiff was shot, and maimed in the knee, by the defendant, and his action is brought for expenses incurred for medical and surgical services, and loss of time during his confinement. The case is accompanied with every species of aggravation, and the damage sustained is definitely stated, sworn to, and proved.

We have sought with much care for a precedent in which the plaintiff's action could be sustained, but without success. The practice, and the understanding of the profession generally, we believe, has been uniform against the validity of attachments in cases of tort. The subject has been recently thoroughly examined, and, under a full review of our legislation in reference to attachments, the evident intimation of the court was against the validity of attachments in actions for damages in cases of tort. See the case of Irishv. Wright, 12 Rob. 570.

Judgment affirmed.

HOBDY v. JONES.

In an action for damages for slander in asserting that plaintiff was living in concubinage with a person represented to be his wife, proof by plaintiff of co-habitation and reputation as husband and wife is sufficient evidence of a marriage.

A PPEAL from the District Court of Claiborne, Taylor, J. Gilbert and Landrum, for the plaintiff. Evans and Lawson, for the appellant, contended that plaintiff cannot recover without proving an actual marriage, co-habitation and reputation being insufficient, citing 4 Phillips on Ev. p. 206. Morris v. Miller, 4 Bur. 2057. But v. Barlow, 1 Doug. 170. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action of damages for slander. The slander charged is the declaration of the defendant, in conversation with a third person, that the petitioner was never married to his wife, and was living at his present domicil in open concubinage and criminal connection with her, together with other declarations of an aggravated nature. The petitioner alleges the falsity of those charges, his good reputation and that of his wife, and the injury sustained by him by reason of the slanderous report circulated by the defendant. It is alleged, among other injurious consequences of the slander, that it was promulgated on the eve of an election for the legislature, the plaintiff being then a candidate for the place of representative from his parish, and that several citizens, to whom his character was anknown, refused to support him in consequence of hearing the report; that the slander was uttered maliciously, and for the purpose of destroying his character and defeating his election. The defendant in his answer alleged that, he did not utter the words as laid in the petition as facts within his own knowledge, but stated them, in the canvass for the legislature, as matters that had been currently reported in the parish for many years; that, in so stating the existence of such reports, he stated the truth; that he was not influenced by malice, but acted from a sense of duty as a good citizen, in endeavoring to procure the election of men of unspotted reputation to represent the parish in the legislature. There was a verdict for the plaintiff for \$2,000. There was an unsuccessful application for a new trial, and the defendant has appealed.

On the merits, we consider it our duty to affirm the verdict and judgment. It was proved by several witnesses that, for may years, the plaintiff has lived with his wife as her husband; that they were generally reputed as married persons; that they had been visited as such by the ladies of their neighborhood, and had borne a good reputation. It was proved by some witnesses for the defendant, that rumors had existed that the parties were not married; these rumors do not appear to be general, and the evidence appears to justify their origin as traceable to an individual who was at enmity with the plaintiff, and who is characterised as a vindictive man, and disposed to indulge in the abuse of those whom he did not like. The rumors do not appear to have received much credence. It was proved that the plaintiff had been affected in the canvass by the defendant's attack upon his character.

It is proper to notice a bill of exceptions taken by the defendant:

Honoy. w. Jones.

"The judge charged the jury that, the circumstance of the plaintiff and his wife living together as man and wife was primd facie evidence of a marriage between them; to which charge of the judge the defendant by his counsel excepted, and requested the judge to charge the jury that, in an action of slander brought by a plaintiff to recover damages from defendant for having slandered him, by saying that he and his wife were living together in a state of concubinage and adultery, the law would not presume a marriage between plaintiff and his wife from co-habitation, but it would be incumbent on plaintiff to prove an actual marriage, which charge the judge refused to give to the jury; to which opinion of the court refusing said charge, the defendant excepted."

It is not necessary to decide on the correctness of the charge of the judge on the point stated, nor of his refusal to give the charge asked by the counsel for the defendant, for the law in relation to the particular point on which the decision of the court was had covers but an inconsiderable portion of the case. We will state, however, our opinion of the law on the evidence before the jury.

It was not incumbent on the plaintiff, under the evidence before the jury, to prove an actual marriage. The very authority quoted by the counsel for the defendant from Douglas' Reports, is conclusive. In an action for a criminal conversation with the plaintiff's wife, Lord Mansfield expressly states that it is the only civil case in which it was necessary to prove an actual marriage; in other cases, co-habitation and reputation are equally sufficient.

The possession of the conjugal condition in the present case was sufficient evidence of the marriage. By our laws it would be sufficient to establish the paternity of the issue, and was a question of fact for the jury to determine.

To enable them to come to this conclusion, evidence was properly admitted of the parties living together and treating each other as man and wife; of their being received in society as such; of their being visited by the families of respectable citizens of the neighborhood; and of their demeaning themselves in public and elsewhere, as man and wife, and being so considered in the community in which they had for years resided as members of society, in the enjoyment of their respective conjugal rights. Greenleaf on Ev. § 107. Holmes v. Holmes, 6 La. 463. From the uncontradicted evidence of this character the jury were bound to consider the marriage as proved, and their verdict, so far as relates to the proof of the marriage, is in accordance to our view of the law-The other slanderous words have the support of no evidence whatever to substantiate them.

The other bills of exceptions taken by the counsel for the defendant we do not consider it necessary to notice, otherwise than by saying that we are of opinion that the judge did not err in his decisions rendered on the matters excepted to; they rest on principles so familiar, as to require no particular explanation.

The damages we do not consider excessive; and the judgment of the District Court is in accordance with our view of the justice of the case.

Judgment affirmed.

COLE v. LUCAS.

A concubine can receive as a donation from her paramour, in moveables, but one-tenth of the value of his whole estate.

A slave can receive nothing by donation.

Where one who had been a slave claims a donation of notes, alleging that she had been emancipated, it is incumbent on her to show that the donation was made and the notes transferred subsequent to the act of emancipation. Mere possession of the notes is not evidence of the time when they were delivered.

The domicil of a citizen is in the parish in which he has his principal establishment, which is that in which he habitually resides; and if the place of his principal establishment be uncertain, by reason of his residing in different places, without any formal declaration of intentention as provided by law, and under circumstances which render his residence equivocal, either of the places where he so resides may be considered as that of his principal establishment, at the option of those whose interests are thereby affected. C. C. 42.

In a strictlegal sense that is properly the domicil of a person, where he has his true, fixed and permanent home, and principal establishment, and to which, when absent, he intends to

return.

A domicil once acquired remains until a new one is acquired, facto et animo.

One going to another State for health, pleasure, or any temporarypurpose, with the intention of returning, has a mere transitory residence, which constitutes no new domicil, nor an abandonment of the old one. It is not the act of inhabitance which constitutes the domicil, but the fact, coupled with the intention, of remaining.

In cases of doubt the original domicil is considered to be the true one.

In questions of domicil the declarations of the party whose domicil is in dispute are entitled to weight, only when made previously to the event which gave rise to the suit.

A PPEAL from the District Court of Catahoula, Mayo, J.

A Purvis, for the plaintiff. The notes sued on were taken by plaintiff before maturity, and for a valuable consideration. The evidence does not establish concubinage between the woman, Patsy, from whom he received them, and Miller, the payee. The notes, being personal property, had no other situs than that of the domicif of the owner, which was in Missouri at the time of their transfer to Patsy; and, by the laws of that State, the transfer of negotiable paper, with or without consideration, is valid. Succession of Packwood, 12 Rob. 334, 360. 9 Rob. 430. Saul v. His Creditors, 7 Mart. N. S. 71. 2 Rob. 253. Civ. Code, 483. Story, Confl. Laws, p. 362. As to the law of domicil, see 1 Kent, 76. Story, Confl. Laws, p. 44. Pothier, Coutume d'Orléans, ch. 1, no. 13. The notes were given to Patsy after her emancipation, and the effect of the donation must be determined by the law of Missouri, where the donation was made. Story, Confl. Laws, pp. 96 to 98. In cases like the present the verdict of a jury should not be disturbed. 3 Mart. N. S. 29. 12 La. 233, 290, 319.

Frost, G. S. Sawyer, Thomas and Snyder, for the appellant, contended that the notes sued on were delivered to Patsy while yet the slave and concubine of Miller, the payee, and that she was as such incapable of receiving them; that the plaintiff is a holder in bad faith, and without consideration, and colluded with Patsy to defraud the heirs of Miller; that the domicil of the latter continued to be in Louisiana, and the donations must be tested by its laws (Story, Confi. Laws, § 366. 4 Mart. 20. 5 Ib. 23. 7 Ib. 24. 2 Mart. N. S. 93); that the form of the donation was not such as to render it valid by the laws of this State (C. C. 483, 1523, 1525. 12 Robinson, 67. 1 Ann. R. 237); and those of Missouri are not in evidence.

. The judgment of the court was pronounced by

EUSEIS, C. J. This suit is brought on certain promissory notes drawn by Hugh Lucas in favor of Samuel Miller, and by him endorsed, forming part of

COLE

the price of a plantation and slaves situate in the parish of Catahoula, sold by Miller to Lucas, at Harrisonburg, in said parish, on the 11th May, 1843, which was mortgaged to secure the payment of the notes. They were originally nine in number, for \$3,000 each, and payable one every successive year, bearing ten per cent interest if not paid at maturity. The first, that due in 1844, was paid; and this action is instituted by the plaintiff an endorsee on the eight remaining notes, for the recovery of the amount of \$24,000 and interest, and to subject the mortgaged property to the payment thereof. Judgment by default was taken against the defendant, Lucas, who makes no defence. Griffin, curator of the vacant estate of Samuel Miller, deceased, intervenes in this suit, and claims the notes as belonging to the succession represented by him. There was the verdict of a jury against the intervenor, and in favor of the plaintiff, and the former has appealed.

Miller was domiciliated in the parish of Catahoula, on the Tensas river, where he resided for several years. In 1843 he sold his plantation, which was his principal establishment, with the slaves, to Lucas. He then purchased a place on the other side of the river, in the parish of Tensas, where he resided, and his domicil must be considered to have been there, unless changed by subsequent circumstances, as to all the purposes of this enquiry. Being in feeble health he left Louisiana for St. Louis, in April, 1844, where he died on the 21st May ensuing. These notes, after his death, were found in the possession of a mulatress named Patsy, who had formerly been the slave of Miller, and, as is alleged, his concubine, from whom the plaintiff alleges that he bought them, and to whom they were transferred by blank endorsements, and delivered by Miller previous to his death. The contest is between the claims of the plaintiff, as a bond fide holder of these notes, and the curator of Miller, who charges that they belong to the succession of Miller, and were obtained by the plaintiff through fraud and collusion with one William Kirk, for the purpose of despoiling the lawful heirs of their property.

This case has been very thoroughly argued, and we are placed fully in possession of all the facts necessary to an understanding of its merits.

I. These notes, it is conceded, once belonged to Samuel Miller, and they belong to his succession, unless some person has a lawful right to them; the plaintiff presents himself as having that right. He is a resident of the parish of Catahoula; during part of Miller's life he resided no more than a mile from him, and the remainder not more than eight miles; he went to Missouri in the fall of 1844, or early in 1845, and procured the notes from Palsy. From the evidence we are satisfied that the plaintiff is not in the position of a bond fide holder of these notes, without notice; on the contrary, we can recognize in him no rights but those which the person from whom he obtained them had.

II. It is then necessary to enquire into the validity of her claims. She was the slave of Miller and his concubine, and we think the evidence establishes that their concubinage was open and notorious. Under the cumulated incapacity of slave and concubine, she could not receive these notes from Miller as a valid gift, under our laws. The concubine can only receive in moveables one-tenth part of the whole estate of her paramour, and the slave can receive nothing by donation. But it is said she was emancipated on the 13th or 14th of May, 1844, at Madison city, in the State of Indiana, and that her incapacity to receive as a slave was removed by the act of emancipation. To render the gift

COLE .

valid under that hypothesis, it would be incumbent on the plaintiff to show that the notes were transferred, or given, to her subsequent to the act of emancipation. The more possession of the notes by her is no evidence of the time when they were delivered to her. The evidence by which the time of delivery is attempted to be fixed we find is extremely unsatisfactory, and not accompanied with that precision with which so important a point of a case ought to be established. The declaration of Kirk on this subject is: "After our arrival in Missouri, I gave the notes back to Miller, and he gave them to Patsy, after her return from Madison, as he himself told me, and I saw the notes in her possession." It is not pretended by Kirk that he witnessed the delivery of the notes from Miller to Patsy; his knowledge is from the dictum of Miller; all he saw was the notes in the hands of Patsy, after her return from Madison. But when were they given to her? Were they, or not, given to her in St. Louis, within your knowledge? was the question to be answered. Where is the proof that she received them only since her emancipation, or on her return from Madison. Miller told him so, and this is the only evidence upon which the truth of this fact rests. The charge made by the curator is that the deceased and Kirk colluded to defeat the operation of the laws of Louisiana and the rights of his lawful heirs, and it would be idle to attach any importance to the declarations of the deceased made in re agenda, in furtherance of his purpose. Nor do we understand that the answers of Kirk on his cross examination, change this declaration of his as to the fact of his deriving his knowledge of the time of the delivery of the notes from Miller himself. There is some confusion in relation to this fact in the deposition taken as a whole, but there ought to have been none. The fact ought to have been clearly and substantively established, and it is not a little singular that this witness alone is able to testify in relation to this fact, and he the agent of the deceased and protector of Patsy.

Kirk's own account of his connection with these notes imposes on all who are in search of the truth the necessity of scrutinizing his testimony. He says: "I saw Miller myself endorse these notes. After endorsing the notes, Samuel Miller handed them to me, telling me to keep them for Patsy's benefit, that he intended to have her emancipated, and that he wanted the notes to enure to her benefit. After Miller, whom I accompanied on his last trip to Missouri, arrived there, I gave him back the notes, and he gave them to Patsy after her emancipation, on her return from Madison, as he himself told me, and I saw the notes in her possession." Patsy accompanied her master and her protector on the trip to St. Louis, and the time of the delivery of the notes, as it is seen, is only stated as coming from the lips of the deceased. Kirk does not pretend that he saw it, and whatever he did see he speaks of with precision and emphasis: e. g. "I saw Miller myself" &c.

The notes having been originally entrusted to Kirk in Louisiana for the benefit of Patsy and returned to Miller in Missouri, the ceremony of re-delivery, under the dominion of a system of laws in which such a farce is supposed to be tolerated, ought not to be left to depend upon the hearsay evidence of its principal actor, repeated by the common agent of both parties.

III. In support of the validity of the transfer of these notes to Patsy, it is urged by the counsel for the plaintiff that the domicil of Miller was in St. Louis or in Missouri, at the time it was made, and to constitute that domicil it is conceded that two things must concur, the residence and intention of making it the home of the party. These are facts which it is incumbent on the plaintiff to

Cole

establish affirmatively, and it is contended are proved by the testimony of Kirk, and the witnesses examined at St. Louis. That when Miller sold his estate to Lucas, in May, 1843, the motive of the sale was to convert his property into such a disposable form as would enable him to evade the laws of this State, and secure the proceeds for the benefit of Patsy, may be considered as established. The delivery and endorsement of the notes to Kirk, for that purpose, prove that beyond all question.

On the 14th of August, 1843, Miller gave a power of attorney authorising Kirk to have Patsy emancipated, by taking her to one of the north-western States—Ohio, Indiana, or Illinois. In this procuration he styles himself, "of the parish of Tensas." It appears that Miller was apprehensive he would have to take back the property he had sold to Lucas, and for that reason purchased the property he then held in the contiguous parish of Tensas.

In poly to the interrogatory, whether Miller did declare to witness his intention to make St. Louis, Missouri, or some other county in said State, his domicil, did not purchase property there for the purpose of making said State his home, and did not claim St. Louis as his domicil, Kirk responds: "I know it was his intention to make Missouri his domicil. He talked of it as his home; said he had left Louisiana permanently. I believe one reason why he had left Louisiana was on account of the climate not agreeing with him. I do not know of his buying property. I know of his renting a house in St. Louis, and he told me his calculation was to buy property as soon as he could get a good chance to invest." Kirk also states that Miller often told him that his intention in selling out to Lucas was, to remove to Missouri, and settle there for the rest of his life; and, in April, 1844, Miller went to St. Louis, taking with him the remainder of his slaves unsold, and at St. Louis made the same declarations to witness. Comfort, a witness, says that he saw Miller in St. Louis on the 18th May; he informed him that he had formerly resided in Louisiana, but had sold his plantation, and had come to Missouri to reside.

As far as we can judge, we should think it established that, when Miller sold to Lucas, he intended to remove out of Louisiana, at least for such a time as would enable him to realise his purpose of securing to Patsy the benefit of the notes he had given, or intended to give, to Kirk for her use. But the power of attorney given to Kirk to emancipate Patsy does not strengthen the proof of that intention, and indicates an absence of any purpose of leaving the State at the time, and within a reasonable time after, it was made; and there is no act of Miller indicative of any intent to leave Louisiana until upwards of ten months afterwards, when he left for St. Louis.

Dr. Doniphan, who had been his physician since 1842, and had been frequently at his house, is asked this question: "When said Miller left this State, on said trip to the State of Missouri, did you, or not, understand from him it was on account of his health, and that he should return again," &c.? He answers: "I did: he spoke of having, or expecting to have, to take back his property, as Lucas could never pay for it, and for this reason he purchased the place he then held in Tensas parish." The disease with which Miller was afflicted and died was the dropsy, and his physician advised him to leave for St. Louis. In the mortuary proceedings had at St. Louis in the succession of Miller, he is mentioned as Samuel Miller, late of St. Louis county. The inventory, dated 7th January, 1845, contains an account of one man slave and four children, and one woman who had run away in October previous, and not since

COLE EUCAS been heard of, a book-account of \$500 against William Kirk, one dinner table, two breakfast tables, one feather bed and bedstead, one small bedstead or lounge, and one gun. There is no other matter relied upon by either party, as affecting the question of the change of domicil of Miller. The testimony of the witnesses taken orally related to the fact of concubinage; that of Kirk and Doniphan was taken under commissions, in asswer to interrogatories propounded by the parties respectively.

IV. By our laws the domicil of each citizen is in the parish in which he has his principal establishment, which is that in which he makes his habitual residence; and if the fact of his principal establishment is rendered uncertain by reason of his residing in different places, without any formal declaration of intention as provided by law and under circumstances which render the residence equivocal, either of the places where he so resides may be considered as that of his principal establishment at the option of the persons whose interests are thereby affected. Civil Code, art. 42. Judge Story, in his Conflict of Laws, § 41, states: " In a strict and legal sense, that is properly the domicil of a person where he has his true, fixed, and permanent home, and principal establishment, and to which whenever he is absent he has the intention of returning." We think this authority to be of great weight, as well from the learning and ability of that eminent judge as from his knowledge and experience derived from an administration for many years of the jurisprudence of different States, in which rights under one of them were brought in conflict with those held under another.

It is generally a difficult matter to determine the place of domicil of persons emoving to neighboring or contiguous States; and those who have in view to defeat the operation of laws which they wish to avoid, generally accompany their movements with such declarations and outward demonstrations as will enable them to effect their objects. As the validity of every domicil depends upon its truth, there are certain rules which have necessarily established themselves in aid of judicial enquiries after it; they are the dictates of sound reason, and supported by long acquiescence and the best authority. A domicil once acquired remains until a new one is acquired-facto et animo. Ibid, § 47. A person going to another State for health, for pleasure, or any temporary purpose, with the intention to return, has a mere transitory residence, which constitutes no new domicil, nor an abandonment of the old one. It is not the act of inhabitancy which constitutes the domicil, but it is the fact, coupled with the intention, of remaining there. Ib. § 44. In cases of doubt, the original domicil of a party is considered as the true domicil. Such has been the decision of the late Supreme Court in the case of Gravillon's Heirs v. Richards' Executors et al. 13 La. 299; and such is the jurisprudence of the Court of Cassation. Merlin, Rep. verbo Domicile, § 2.

From a careful examination of the evidence, we think it results that the intent, indeed the sole purpose of all the acts of Miller, was to secure to the concubine the benefit of the notes which he had delivered to Kirk, probably soon after the sale to Lucas, in May, 1843; and that his declared intention to leave the State was in order to enable him to effect that object, to which this intention was subordinate, and on which it alone depended. If that object could have been affected in any other way, that there was no intention on the part of Miller to break up his establishment, and change his residence from Louisiana; and that what was said and done in St. Louis was solely in view of

COLE

that object. It was all with a view to the supposed operation of the laws of Misseuri upon the incapacity under which he and his concubine labored under the prohibitive laws of this State; and if the notes in the hands of Patsy could have been negotiated, and she received the equivalent, the purpose of Miller would have been answered, and the Misseuri residence no more thought of. He did not leave the State when he first gave the notes to Kirk, nor did he intend to leave it when he gave the power of attorney to Kirk to emancipate Patsy in one of the free States, nor when he purchased the plantation in the parish of Tensas, on the epposite side of the river to that he sold to Lucas; and when he left for St. Louis, in April, 1844, his physician swears that he advised him to go on account of his health, and that Miller told him he intended to return, which the interests of his property in Louisiana required.

The circumstances which are adduced in support of the change of domicil to Missouri, are certainly of no great weight. The deceased made no investment in St. Louis. It is true he hired a house, but what sort of a liceuse is not told us. He of course must have had a sheker for himself and his slaves. But the inventory shows nothing in the way of furniture, which indicates any thing more than a transient stay there; and there is no proof of any fact that we have been able to find which indicates an intention to remain there except for the purpose of securing the notes to his concubine, through the operation of the laws of Missouri.

V. And in relation to the testimony of Mr. Kirk, which has been the object of attack from the counsel of the intervenor, admitting the witness swore to what he saw and what he heard, its effect on legal grounds, without adverting to his position and agency throughout this affair, appears to us to have been misconceived by the counsel for the plaintiff. He urges that the declarations of Miller, in relation to his change of demicil, are evidence as part of the res gesta; but, if that be conceded, another question arises as to the weight to be given to them. It is obvious that the declarations of Miller as to his intention of changing his domicil, made before his sale to Lucas, and the delivery of the notes to Kirk for Patsy's benefit in Louisiana, would stand on a very different footing from those made since and with a view of legalising what he had done, and giving effect to a violation of our laws. A party can hardly be permitted thus to make evidence to support his unlawful acts. We have understood the rule to be that, in questions of domicil the declarations of the party whese domicil is in dispute are only entitled to weight when made previous to the event which gave rise to the suit. Thorndike v. Boston, 1 Metcalf, 242. Kilburn v. Bennett, 3 Ib. 199.

The declarations of Miller are not stated to have been made previous to the combination of Miller and Kirk, made in Louisiana, to secure the notes for Patsy. The only residence claimed for Miller is during his stay for a few weeks in St. Louis. It is not pretended that he intended to reside there, but the declarations proved show that he had the whole range of the State of Missouri, which alone circumscribed his purpose. Something more than this is required to support the definite requisitions of a legal domicil; the true, fixed, permanent home and principal establishment, to which the party, whenever absent, has the intention of returning. There was no residence in a place where he intended to remain. The matter of intent is thus, as we originally stated, dependent on the original purpose conceived when the sale of the property was made to Lucas.

Core .

VI. We therefore conclude that it is not proved that a domicil was acquired by Samuel Miller, before his decease, in the State of Missouri, and that his criginal domicil in the parish of Tensas, in this State, was his legal domicil at the time of his decease; that it was incumbent on the plaintiff to prove affirmatively that a domicil was acquired elsewhere, before the original domicil can be considered as changed; and that, even if it were doubtful under which domicil the party died, he would be held, under the rules of law, to have died under the original domicil in Louisiana.

We have thus given the reasons for our conclusions at greater length than usual, because we are under the necessity of reversing the verdict of a jury, and giving judgment in opposition to it. In questions of fact the verdict of juries on conflicting testimony, in matters of frand, is entitled to great weight. In this case, it will be observed, the rights of the parties, particularly those of the succession of Miller, depend merely upon questions of law. They were laid before the jury at length by the charge of the judge, and their application to the facts, with proper discrimination, is no easy task; and it is not at all surprising that a jury should have fallen into error in the conscientious discharge of their duty. Ours is equally imperative. In supervising the verdicts of juries we can surrender none of our constitutional privileges, which give to us the exclusive control over verdicts on all questions of law. The questions of law, as presented by the facts, are in favor of the succession of Miller, and his heirs are entitled to the benefit of them.

VII. By the 1468th article of our Code, those who have lived together in open concubinage are respectively incapable of making to each other, whether inter vivos or mortis causa, any donation of immovables; and, if they make a donation of moveables, it cannot exceed one-tenth part of the value of the whole estate. Those who afterwards marry are excepted from this rule. No issue is made as to the proportion the amount of the gift to Patsy bears to the estate, and the only question raised is as to its validity. We have already stated our opinions of the relations subsisting between the parties to this donation. The disabilities under which the law places persons who have lived in this condition, are created for the maintenance of good morals, of public order, and for the preservation of the best interests of society.

When the comity of this State is invoked through its tribunals, to give effect to a donation made in another State, in derogation of the laws and policy of our own, of which a citizen is seeking to have the benefit, and that appeal rests upon the operation of the foreign law, it will be time enough to answer it; but it must not be understood from the circumstance of our not noticing this point of the defence, that we are disposed to understee its gravity and importance. The difficulty of all questions relating to the conflict of laws admonishes us of the propriety of avoiding such as the rights of parties do not render necessary to be decided.

It is therefore adjudged that the verdict of the jury be set aside, and the judgment in favor of the plaintiff reversed. And it is further decreed, that the property of the eight notes, executed by Hugh Lucas, the defendant, on the eleventh of May. 1843, payable to the order of Samuel Miller, on the first day of March, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, for \$3,000 each, secured by a mortgage reserved in an act of sale of a tract of land and slaves made by said Miller to the defendant, in the parish of Catahoula, and bearing even date therewith, and in contest in this suit, is in the succession of said

Miller; and that the intervenor, as curator of the vacant succession of Samuel Miller, deceased, recover of the defendant, Hugh Lucas, \$6,000, the amount of the notes which fell due on the first of March, 1845 and 1846, with interest at the rate of ten per cent per annum on \$3,000 thereof, from the first of March, 1845; and with like interest on \$3,000, from the first day of March, 1846; and that the mortgaged property, as described in the act of sale filed with the petition for reference to and description, be seized and sold to pay said sum with interest, and on such terms of credit as will meet the payment of the remaining six notes at their respective maturities; and, that the plaintiff and appellee pay the costs incurred by the intervention in the court below, and of this court, and the defendant those of the lower court not created by the intervention.

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF LOUISIANA.

AT

NEW ORLEANS,

IN

NOVEMBER and DECEMBER, 1847.

PRESENT:

Hon. GEORGE EUSTIS, Chief Justice.

Hon. PIERRE ADOLPHE ROST,

Hon. GEORGE ROGERS KING,

Hon. THOMAS SLIDELL,

Associate Justices.

BACH V. BARRETT.

Plaintiff cannot recover in an action to rescind the sale of a slave for a redhibitory disease, where an offer to return the slave is neither alleged nor proved.

A PPEAL from the Parish Court of New Orleans, Maurian, J. Josephs, R. N., and A. N. Ogden, for the appellant. No counsel appeared for the defendant. The judgment of the court was pronounced by

Kins, J.* This is a redhibitory action instituted to recover the price of a slave, who the defendant alleges was affected, at the time he purchased him of the defendant, with an incurable disease. A judgment was rendered in the court below in favor of the defendant, and the plaintiff has appealed.

The evidence does not in our opinion fix with sufficient certainty the date when the complaint of which the slave died commenced to authorise a recovery. The plaintiff purchased the slave on the 30th of December, 1836. Between the 5th and 10th of January following, the slave reported himself as being sick. His disease was then diarrhoea, for which he was treated. A short time after, he appears to have so far recovered as to return to his usual work, at which he continued for several weeks, when he was again found to be unfit for service, and withdrawn by the plaintiff, in whose possession he remained until June, 1837.

^{*} Rosr, J., did not sit on the trial of this case.

[†] This action was instituted on the 15 June, 1837.

BACH v. BARRETT.

He was then removed to an infirmary, where the disease under which he then labored was pronounced by the attending physician to be dysentery, accompanied by incipient consumption, and to be incurable. Of that complaint he died several months later. The disease not having manifested itself within three days after the sale, an attempt was made to prove its previous existence by the physician who treated him in the infirmary. That physician, judging from the condition in which he found the patient, thinks that the disease must have existed six or seven months before he saw him. Another physician states that after dysentery has progressed for six months, it is impossible to determine, from any examination of the patient, within a month or six weeks of the time when the disease commenced. Independently of this conflict of medical opinion, there is a further consideration which would induce us to hesitate before reversing the judgment of the inferior court. It appears from the evidence that, the slave was visited by the physician of the plaintiff in the incipient stage of the disease. That physician was not called to testify in the cause, and the absence of his testimony is unaccounted for. It is to be presumed that he could have fixed with more accuracy the date when the disease commenced, and that he could have determined its true character at its origin, and whether it subsequently became incurable from the neglect of the plaintiff. It was incumbent on the plaintiff to make his evidence as complete as, from the nature of the case, it was susceptible of being rendered; and no cause has been shown for his failure to adduce testimony so important to his success.

But apart from the merits as depending upon the testimony, no offer of the plaintiff to return the slave has been either alleged or proved.

Judgment affirmed.

McDonogh v. Derbigny.

Where there is nothing in the record to show that the amount in dispute exceeds three hundred dollars, the appeal must be dismissed.

A PPEAL from the District Court of the First District, Buchanan, J. Gricot and Roselius, for the appellant. Labarre, for the deferdant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff obtained an injunction against the defendant to restrain him from tearing down certain buildings, and taking away any materials then upon certain ground, of which buildings, materials and ground the plaintiff alleged himself to be the proprietor. He also alleged that an adjudication of the buildings and materials made to the defendant was null. The prayer of his petition was that the injunction be perpetuated, the buildings decreed the property of the petitioner, and the adjudication declared null and void. The petition does not assert, nor does the evidence disclose, what is the value of the buildings and materials. So far therefore as the plaintiff's demand is concerned, there is nothing before us to show that the matter in dispute exceeds the sum of \$300. It is, on the contrary, left wholly uncertain.

. The defendant denied that he had any intention to destroy the buildings, or carry away the materials, and asserted a privilege upon them for the sum of \$240. This sum is insufficient to confer jurisdiction upon this court.

The judgment of the court below which declared the adjudication to the McDosoca defendant null, perpetuated the injunction, and gave judgment for the defendant DERRIGHT. for \$240 with privilege, cannot be reconsidered by this court. The case falls within the rule recognised in the case of Plique v. Bellomé, ante 293; and the motion to dismiss must prevail. Appeal dismissed.

GREEN v. FONBENE.

Where one of the parties to a contract which stipulated for the payment of a fixed penalty in case of the failure of either to comply with its terms, notifies the other that it is impossible for him to comply with the contract, and that he must consider it as null, to exonerate himself from liability for the penalty on the ground of a subsequent promise by him to perform, he must show that the new promise was accepted by the other party. Per Curiam: The gratuitous abandonment of an acquired right is not to be presumed.

Where a party contracted with another to deliver merchandize for a certain price, the latter binding himself to pay the price, under a fixed penalty in case of non-compliance on his part; and the purchaser notifies the seller of his inability to comply and declares the contract null, it will amount to an active breach of the contract, and the seller will not be bound

to tender the goods to enable him to recover the penalty.

PPEAL from the District Court of the First District, Buchannan, J. G. W. Christy and Wray, for the appellant, cited C. C. 1925, 1926. Lynch v. Postlethwaite, 7 Mart. 218. Kelly v. Caldwell, 4 La. 40. Garcia v. Champomier, 8 La. 519. Soulé, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff and the defendant agreed, the former to furnish within a certain time, and the latter to receive and pay for at a certain rate, a quantity of staves. The defendant bound himself in a penalty of \$500 for the performance of his part of the contract. Two or three months after this contract was made and before the period for its execution had expired, the defendant addressed a letter to the plaintiff, in which, after stating the depressed condition of the foreign and domestic market as to the article contracted for, he says it is impossible for him to fulfill the contract, and concludes his letter by saying, "therefore you will consider our contract null." This suit is brought by the plaintiff to recover the stipulated penalty of \$500. The petition avers the contract, the stipulation of the penalty, the address to the plaintiff of the letter advising the impossibility on the part of the defendant to fulfill the agreement, and undertaking to annul it, and the liability of the defendant to pay the pen-

The answer of the defendant is as follows; "He admits his signature to the contract and to the letter annexed to the petition; and further, he says, that a very short time after writing said letter, the said plaintiff being in New Orleans, was duly informed, by a verbal notice of said defendant, that he was ready and willing to receive the staves mentioned in the contract, but that said plaintiff has never complied with his share of the contract, and has never delivered at the place designated in said contract any staves whatever, on account of or for the said defendant; that no real tender has been made unto this defendant in conformity to law, so as to make him answerable to plaintiff in the sum by him claimed, his letter being annulled by his promise to abide by the contract; that FORBERZ.

the plaintiff has made himself liable towards the defendant in the penalty of the contract, for which defendant reserves to himself the right of suing the plaintiff; that he denies owing said *Green* any sum whatever, and prays to be dismissed."

This answer admits the contract and the writing of the letter, and sets up a subsequent promise by defendant to fulfill the contract. But it is to be observed that the answer does not allege that the new promise was accepted by the plaintiff; and on this very material point the testimony offered by the defendant is equally defective. To relieve the defendant from the consequences of his own written declaration that it would be impossible for him to perform his part of the contract and that it must be considered null, it was certainly necessary to furnish evidence of a very clear and satisfactory character. This has not been done. There is testimony of a conversation between the plaintiff and a clerk of the defendant, which is of a vague character, and, taken it in its fullest legal extent, only shows that the plaintiff, in reply to a declaration of the clerk that the defendant would accept the staves if they were brought, answered that he had received a letter from the defendant renouncing the contract, and that as the defendant had told him not to make the staves he did not make them. This does not establish an acceptance by the plaintiff of the new promise or offer, nor is it to be regarded as a waiver of the clear right to the penalty which the plaintiff had acquired by the defendant's letter, which was an active breach of the contract. He could with propriety say, I made no staves because the defendant wrote to me not to make them, that he could not pay for them, and that the fulfilment of the contract on his part was impossible. The gratuitous abandonment of an acquired right is not to be, presumed.

There was evidence received, notwithstanding the exception of the plaintiff, to the effect that, in conversations with the defendant's clerk, the plaintiff first said he had not received the defendant's letter, and afterwards changed his ground, and said he had received it. We think this testimony was inadmissible under the pleadings. The petition charged the addressing of this letter to the plaintiff by the defendant, and made it, with the contract, the basis of the action. The answer did not deny, but in clear terms admitted the writing of the letter; and set up an avoidance of its legal effect by a subsequent promise.

We are of opinion that the first conclusion of the district judge was correct, and that the plaintiff is entitled to recover the penalty. After the defendant declared his inability to fulfill the agreement, and signified in so positive a manner that he would not stand to it, the plaintiff was not bound to procure and tender the goods bargained for. Garcia v. Champomier, 8 La. 519. The district judge, in his second opinion, after granting a new trial, considered the letter not as an absolute and active breach of the contract, but as a proposition to annul it. But in this view we cannot concur. The language of the defendant was unqualified and peremptory.

It is therefore decreed that the judgment of the court below be reversed, and that the plaintiff recover of the defendant the sum of five hundred dollars and costs in both courts.

TO YOUR OF ...

BRONSEMA v. RIND et al.

Where a judgment creditor alleges that property was paid for by his debtor, but purchased in the name of a minor child of the latter to screen it from the pursuit of his creditors, and prays that it may be adjudged to belong to the debtor, and to be liable to seizure for his debts, the vendor of the property should not be made a party to the action. The object of the action being to determine the ownership of the property, and not to annul the sale, the vendor has no interest in the question.

A father can make no purchase in the name of his minor child, to the detriment of his credi-

tors whose claims existed at the time of the purchase.

No final judgment on the merits can be rendered in an action by creditors, the object of which is to declare the property purchased by a debtor in the name of a minor child to belong to the debtor, where the under-tutor of the minor, though made a party to the action, never answered, where no judgment by default was taken against him.

A PPEAL from the First District Court of Jefferson, Clarke, J. Greiner, for the appellant. McMillen, for the defendant. The judgment of the court was pronounced by

King, J. The plaintiff alleges that he is a judgment creditor of Nicholas D. Rind; that the latter is the owner of a lot of ground, with valuable improvements thereon, which he paid for with his own funds, but purchased in the name of his minor daughter, Louisa M. B. Rind, for the purpose of protecting it from the pursuit of his creditors. The plaintiff prays that the property be decreed to belong to Nicholas D. Rind, and held liable to seizure in satisfaction of his judgment, subject to a tacit mortgage in favor of the minor Louisa, for such sum as may be ascertained to be due to her. The district judge was of opinion that Jones, the vendor of the property, should have been made a party to the suit, and that a sufficient cause of action was not set forth; and he rendered a judgment of non-suit, from which the plaintiff has appealed,

The judge, in our opinion, erred. The object of the action was not to annul the sale from the vendor, but to decree the property, which it purports to convey to the minor, to belong to the father, who it is alleged is the owner, and has resorted to this device to secure it from the pursuit of his creditors. The vendor has no interest in the matter in controversy, and could not have been properly made a party to the suit. The object of the action being to determine the ownership of the property, and to render it liable for the payment of the debts of the defendant Nicholas D. Rind, the averments of the petition are sufficient, if supported by evidence, to authorize the judgment prayed for.

The defendant could no doubt have invested the funds of his minor child, is any he had, in real estate, in the name and for the benefit of the minor, and creditors could not have complained that the legal formalities necessary to render such a purchase obligatory on the minor had not been observed.

The father, however, can make no purchase of property in the name of his child, to the detriment of creditors whose claims exist at the time of such purchase. Such acquisitions, intended to prejudice the rights of creditors, are frauds upon the latter, against which they are entitled to relief. But the allegation in the present instance being, not that the purchase was made for the benefit of the minor, but for that of the father himself, who has merely used the name of his child to secrete his preperty from his creditors, upon establish-

BRONSEMA V. RIND. An objection, however, has been made in this court to the regularity of the proceedings, which renders it necessary to remand the cause, without an enquiry into its merits. The under-tutor of Louisa Rind was made a party to the cause and was an indispensable party, there being a conflict of interest between the minor and her tutor. The father alone appeared and answered. There was no default taken against the under-tutor, and no answer filed by him. No final judgment can be rendered upon the merits, until this party is before us.

It is therefore ordered that the judgment of the District Court be reversed. It is further ordered that the cause be remanded for further proceedings according to law, the appellee, Nicholas D. Rind, paying the costs of this appeal.

COCHRAN v. DEWEES et al.

Where an act of sale is offered in evidence by a party to prove the fact of the payment of the price of the thing purchased, but is admitted by the judge only to prove rem insam, and the party offering it neither excepted to the decision of the court in restricting its effect as evidence, nor in any way reserved the point, the correctness of the decision in restricting the effect of the evidence cannot be examined on appeal.

A PPEAL from the District Court of Jefferson, Clarke, J. Greiner, for the appellant. F. B. Conrad, for the defendants. The judgment of the court was prenounced by

Eustis, C. J. The defendants, sureties of Winters, city marshal of Lafayette, applied to the governor for their discharge, which was opposed by the plaintiff, on the ground that Winters had received the price of the adjudication of certain lots in Lafayette, purchased by the plaintiff, and that his title on a monition having been finulled, the purchase money ought to have been returned to him, and that the parties were liable on their bond for the default of Winters in retaining it. The application and opposition were referred by the govvernor to the First District Court. A supplemental petition was afterwards filed, by which judgment was asked against the defendants for the sum of \$1200, for damages alleged to have been sustained by the plaintiff through the neglect of duty of Winters, in making the sale, by reason of which the sale to him was annulled. To this the general issue is pleaded. The plaintiff was non-suited, and he has appealed.

It appears to us that there is no evidence of the damage sustained by the plaintiff through the acts of Winters.

In relation to the remedy of the plaintiff against the defendants, as sureties, for the return of the purchase money alleged to be paid by him, it is still open to him. In the present case, if the sheriff's deed was offered to prove the fact of payment, and refused to be admitted by the judge for that purpose, the plaintiff ought to have excepted to the decision of the court, or have in some form reserved the point. The sheriff's deed was admitted by the judge as evidence of res ipsa only, and no exception was taken by the plaintiff to this limited operation of it as evidence. Whatever may be our opinion of the correctness of the view of the district judge on this question, we cannot remand the case on that account, and thus amerce the defendants in costs. The non-suit must therefore stand.

Judgment affirmed.

WHITING P. COONS.

A keeper of public stables has no privilege on horses placed with him on livery, for money loaned to their owner, entitling him to be paid by preference to an attaching creditor.

A PPEAL from the First District Court of New Orleans, McHenry, J.

Roselius, for the appellant, cited Civ. Code, art. 2920, 2921, 2927, 3191, 3192,
3193. No counsel appeared for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. There are four suits, nos. 502, 503, 505, and 506, in which the plaintiffs have judgment against the defendant, *Coons*, by which each has recovered a horse which had been stolen from him in the State of Ohio, together with damages and costs. The horses were in the stable of the plaintiff in this city, with four other horses, which were the property of the defendant. The latter were attached in the suits 502, 503, 505, and 506, and were held subject to the debt for which the plaintiffs severally had judgment. *Coons* has appealed, and we are bound, under the evidence, to affirm the judgment rendered against him with the maximum of damages.

The district judge allowed the plaintiff a privilege on the four horses which were stolen, for their keeping and feeding up to the time of the institution of the several suits, to which Whiting had been made a party defendant, and rendered a judgment for the balance of Whiting's account against Coons, as for an ordinary debt, without any privilege; from this Whiting has appealed.

The allowance of the privilege in favor of the defendant for the livery of the four horses stolen is not objected to by their owners, and no change of judgment on this account is asked, and none will be made in &; but we must not be considered as assenting to the principle which the allowance, without any qualification, apparently involves, in relation to which we express no opinion.

For the rest of the plaintiff's account, which is for cash advanced Coons, he can have no privilege on the stolen horses, and having made no attachment against Coon's property, he has no right to participate in the proceeds with the plaintiffs in the several suits whose attachments give them a right of preference over other creditors.

Judgment affirmed.

SHROPSHIRE et al. v. RUSSELL.

A sequestration will be allowed to issue only where the party is clearly entitled to it.

In an action by one partner against another to compel him to account for and pay over the share of his co-partner in profits alleged to belong to the firm, plaintiff is not entitled to a sequestration.

Profits made by a partner in the purchase and sale of merchandize, in which his co-partners are entitled to share, are not subject to any privilege in favor of the latter.

Privileges are stricti juris, and are only allowed where the lawgiver has expressly awarded them.

SHROPSHIRE V. RUSSELL. A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. C. A. Jones, and Grymes, for the appellants. Benjamin and Micou, for the defendant. The judgment of the court was pronounced by

SLIDELL, J. There was much cogency in the argument of the learned counsel of the plaintiffs upon the point made, that where one partner lays hold of the partnership property, asserts it to be his sole and separate property, and detains it as such, a sequestration may issue at the suit of the other partners. The strong inclination of our minds is to the recognition of that doctrine; but, on a careful consideration of the affidavit for sequestration, we find that the point is not necessary to be decided. A party who applies for the stringent remedy of sequestration must, as in the remedy of attachment or arrest, present a case clearly entitling him under the 'Code and statutes to that process. The allegations of the plaintiffs' affidavit, upon which the sequestration must rest, are confused. Some of its allegations, perhaps, point obscurely to the social ownership of the fund to be sequestered, but, in the main, they treat it as a fund under the control of Russell, upon which the plaintiffs allege themselves to have a privilege; and for a portion of the amount of which they allege he is their debter. The affidavit is positive that he is indebted to them in the sum of \$8,000. This sum is the alleged amount of the plaintiffs' social share of the profits upon corn bought by Russell, and which profits are alleged to have accrued under such circumstances as entitled the partnership to an account and the benefit of them. The case is not, therefore, that of a partnership sequestering property belonging to the firm, and unjustly claimed and detained as his own exclusive property by another partner; but a suit against the unfaithful partner to compel him to account for and pay over the shares of his partners, in profits of which he is alleged to be a trustee for the firm. As to the allegation of the affidavit that the plaintiffs have a privilege upon the fund constituting those profits, and theh lying in the hands of McGregor and others, Russell's factors, we know of no provision of our Code creating such a privilege, technically speaking. It is well settled that privileges are stricti juris, and are only allowed in those cases where the lawgiver has expressly accorded them.

What would have been our opinion as to the right to sequester if the affidavit really presented such a case as was assumed by the plaintiffs' counsel in argument, it is unnecessary to say conclusively; nor do we wish to be understood as saying that, the remedy of injunction would not have been available on this occasion. We confine ourselves to a concurrence in the opinion of the district judge, who, while he expressed his regret that he could not hold on to the sequestration, decided that it was improperly issued.

The decree of the District Court dissolving the sequestration is therefore affirmed with costs.

MUNROE v. FROSH et al.

Where one of the partners in a mercantile firm established in another State resides in this, and is in the habit of buying goods to be shipped to, and sold by the foreign house, the partnership property will not be liable to attachment for a partnership debt contracted here by the resident partner. Per Curiam. The partnership cannot be considered a non-resident, and the credit was given to it.

MUNBOR E.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Benjamin and Micou, for the appellant, contended that the defendants being bound in solido as commercial partners, the residence of one partner within this State cannot prevent an attachment from being sued out against the non-resident partner. Smith v. Elliott, 3 Mart. 370. Cucullu v. Mangenal, 4 Mart. N. S. 185. F. B. Conrad, for the defendants. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon promissory notes made by the firm of Frosh & Muller, to the order of plaintiff. A small item of \$23 is also claimed for merchandize sold here, by plaintiff, to Frosh & Muller. An attachment issued, and was levied upon certain property which was bonded by the firm. There was a rule afterwards taken to set aside the attachment, which rule was sustained; and from the order of dissolution the plaintiff has appealed.

If it were established by the evidence that the property attached belonged to Muller, this case would be quite free from difficulty; for it is satisfactorily shown that Muller was a resident of New Orleans. But we are of opinion that the property attached belonged to the firm of Frosh & Muller, and a question of less easy solution is thus presented. It appears that Frosh & Muller were partners in trade. Frosh was living at Galveston, in Texas, and a house was established there under the style of Frosh & Muller. Muller lived at New Orleans, and conducted the business of the house at this place. The firm was in the habit of buying goods here by Muller, acting in the name of the firm, which goods he shipped to Galveston to be there sold. The property attached was money shipped by the house at Galveston, and consigned to Muller individually; but no doubt it was the property of the house, as appears from the statement of the garnishee, and from the fact that the bond was given for it in the name of the firm. The case is therefore to be considered as that of a mercantile house having two establishments, one abroad, conducted by Frosh, and one here, conducted by Muller. The plaintiff dealt with the firm of Frosh & Muller by its partner here. The sales of merchandize were to the firm; the notes of the firm were taken; they are dated at New Orleans; and, in legal contemplation, under the facts stated are payable here.

It seems to us that under such circumstances an attachment ought not to lie against the partnership. Under the facts stated, the partnership cannot be deemed a non-resident, and the credit was given to the partnership. The remedy by attachment is a stringent one; it has always been strictly construed, and has not been permitted, except in those cases where it is clearly and fairly applicable. Its object was to enable suitors in our courts to collect their debts from non-residents. To extend the remedy to the present case would lead to practical results highly detrimental to commerce, and which we cannot believe the lawgiver ever intended to sanction. From our earliest knowledge of New Orleans as a commercial mart, its commercial affairs with other States of this Union, and with foreign countries, have been carried on in a great degree by houses some of whose partners resided here and some out of the State. Each of such partners, it is true, is a solidary debter; and yet our experience does present a single case in which, upon the contract of a mercantile house made here in its name by a non-resident partner, an attachment has been sustained in our courts upon the partnership property, or even upon the interest of a non-resident partner in the partnership assets. We think a fair and reasonable interMUNROE W. FROSE.

pretation of our attachment laws and their policy, forbids us to allow the plaintiff to seize the partnership property of Frosh & Muller, upon a partnership debt of that house contracted here by its resident partner.

Judgment affirmed.

JACOBS v. TURNER et al.

Where notice of protest of a note is left at the counting-room of an endorser, with a person who declared himself to be his agent, the notice, having been left at the proper place, cannot be affected by proof that the person with whom it was left was not the agent of the cudorser.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. There was a judgment below in this case against the endorser, T. B. Lee, from which he appealed. The judge, in giving his reasons for the judgment, says: "That notice of protest was given to the endorser Lee, by leaving it at his counting-room with a gentleman who 'declared himself his agent.' The regularity of this notice has been supposed to depend on the fact of the person in question being actually defendant's agent, which I think immaterial. The notice was left at the proper place, and whether the person with whom it was left was agent or not, cannot invalidate it."

B. A. Crawford and Hamner, for the plaintiff, cited 14 La. 494. 15 La. 113. B. B. Lee, for the appellant, relied on Story on Notes, § 309.

EUSTIS, C. J. For the reasons given by the district judge, the judgment in this case is affirmed, with costs.

SUCCESSION OF WHITE.

No appeal will lie from an interlocatory judgment which can cause no irreparable injury to the party who deems himself aggrieved:

A PPEAL from the Second District Court of New Orleans, Canon, J. J., and H. H. Strawbridge, for the executrix, appellant. C. G. Morgan, for the opponent. The judgment of the court was pronounced by

King, J. This appeal is taken from an interlocutory judgment of the District judge, sustaining an exception to the sufficiency of an opposition filed to an executrix' account, and permitting the opponent to amend her pleadings. An examination of the record has satisfied us that the judgment appealed from is not one which can cause an irreparable injury to the appellant, and that a case is not presented which authorises the appellant to claim a revision of the judgment of the inferior court, at the present stage of the proceedings.

Appeal dismissed.

RILEY v. CITY OF LOUISVILLE.

The fact that the counsel of a party was not aware that the case had been set for trial will not entitle the party to relief from the effect of a surprise and an ex parte trial, unless it be shown that the counsel could not, by the exercise of reasonable diligence, have ascertained the condition of the case, and been present at its trial.

A PPEAL from the District Court of the First District, Buchanan, J. Randall, for the plaintiff. Finney, on the same side. Mott, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. It is always our inclination to relieve litigants from the effect of a surprise and exparte trial, when we can properly do so. But in the present case we could not overrule the opinion of the district judge who refused a new trial, without establishing a dangerous precedent. The defendants' counsel was evidently not aware that the case was set for trial, and that the return of a commission had put it in readiness for trial; but it does not appear that he could not, by the exercise of reasonable diligence, have known the condition of the cause, and been present at its trial.

The plaintiff was not bound, by the agreement on file, to offer the depositions of all the witnessnes examined under joint commission. If the defendants' counsel had been present at the trial, he could have offered such depositions as he deemed material to his cause. The opposing counsel was not bound, in his absence, to offer the adversary's evidence.

The ownership of the steamer by the defendants is proved. The defendants' counsel, in his argument, attempts to present the question, whether a municipal corporation can be the owner of a steamer and responsible as such. Looking to the manner in which this case is presented by the pleadings and evidence, we do not feel called upon to entertain the question. It is, however, not improper to remark that, although it may appear unusual that a political corporation should be the owner of such property, yet, in the present case, the circumstances were peculiar. The ownership of the steamer by the city of Louisville sprung from, and was directly connected with, the accomplishment of, a matter appertaining to its municipal concerns. The city was engaged in the erection of a court-house within its limits; and the stone, of which it was to be constructed, was to be brought by water to the town. It loaned the money to the building contractor to purchase a steamer for the purpose, and for its security took the title in the name of the city, and the vessel was enrolled as the property of the city. We may also remark that, although in a suit formerly brought in one of our courts by this corporation, its ownership of the steamer was alleged and formed part of the basis of its action, it has not thought proper now, in repudiating the ownership, to place its charter before us.

Judgment affirmed.

Succession of Wadsworth.

In the absence of proof to the contrary, it will be presumed that an order directing a sheriff to sell property of a succession, was regularly issued.

A probate sale will not be set aside, at the instance of the administratrix, on the ground that the description of the property in the advertisement of sale was not a full one, where there is no reason to believe that any injury resulted from the defective description, and the creditors of the succession do not complain.

A probate sale of the property of a succession to which there were no minor heirs, ordered to be made on credit, on the application of the administratrix, for the purpose of paying debts, and not shown to have been made for less than the actual value of the property at the time, will not be set aside on the technical ground that the sale could not be legally made for less than the amount at which the property was appraised in the inventory.

An order for the sale of the property of a succession, made at the suit of an administratrix, without citing the attorney of absent heirs, is not a nullity. Nor will the administratrix be permitted to question the validity of such a sale, made in execution of a decree of a court of competent jurisdiction, provoked by herself, and not appealed from, where the purchaser is satisfied, and the heirs, who alone could have a right to complain, are silent. The administratrix, representing the succession, was authorised to provoke the sale of the property. The omission to cite the attorney of absent heirs was an informality anterior to judgment which could not be enquired into collaterally, though it might subject the administratrix to damages at the suit of the absent heirs. Per Curiam: The provisions of the Civil Code, arts. 1042, 1157, are, so far as regards the point under consideration, substantially the same with those of the stat. of 22 February, 1517.

A PPEAL from the Second District Court of New Orleans, Canon, J. R. M. Carter, for the appellants. Benjamin and Micou, for the administratrix. The judgment of the court was pronounced by

SLIDELL, J. The administratrix of this estate presented a petition to the court in which the succession was opened, praying that a sale of certain property might be made for the purpose of paying debts. Upon this petition a decree was rendered that the sale be made by the sheriff, after the legal advertisements, and on the following terms: the lots in New Orleans for one-fourth cash, and the balance at six and twelve months, for notes secured by mortgage on the lots. Upon a copy of this order addressed to the sheriff, he adjudicated certain lots in New Orleans to the appellants, who took a rule upon the administratrix to show cause why she should not execute a deed to them. The administratrix resisted the application on several grounds, which we shall notice in their order.

1st. That the sale was made by the sheriff without the knowledge or concurrence of the administratrix, or any one representing her.

In reference to this ground of defence the testimony of one of the counsel was taken, who states that his partner left the State a short time before the sale; that his partner did not mention to him that any sale had been advertised, nor was the witness aware of the sale until informed by the sheriff after the sale had been made; that he then called on the administratrix, who told him that she had not been informed of the sale. The counsel further stated that he had given no instructions to the sheriff, nor had been requested to do so by him. It is to be observed that this statement does not negative the idea that the partner of the witness, one of the counsel of record, and who prepared the petition for sale, had ordered the writ of sale to issue. We must presume, in the absence of proof to the contrary, that the writ issued regularly. It was

in fact the prayer of the petition that the sale should be made by the sheriff, Succession and, even without any direction of the attorneys, the clerk might with propriety have issued a mandate to the sheriff. The sheriff, in the execution of that order, did not require the assistance of the administratrix.

II. The next ground of defence is, that the description of the property in the advertisement and adjudication were wholly insufficient to inform purchasers of the location or value of the lots.

The three lots adjudicated to the appellants, with another lot, no. 6, adjudicated to another purchaser, were described in the advertisement as being the property of Wadsworth's succession, and situate as follows: "" Four certain lots of ground designated on the plan of the same and other lots, as the numbers three, four and five, measuring each twenty-five feet front on St. Mary street, by the same width in the rear, and opening on an alley ten feet wide, by one hundred and fifteen feet four inches and four lines in depth, between parallel lines. No. six measures twenty-five feet front on St. Mary street, one hundred and eighteen feet two inches in depth. on an alley ten feet wide, fifty feet six inches and five lines on another alley tenfeet wide in the rear, and one hundred and fifteen feet four inches four lives on the line next to lot no. five." It is true that this description is not in itself a full description. It does not state in what block or square the lots are, nor even the name of the municipality in which they are situated; and it is in proof that in the second municipality there are two streets called St. Mary. But the question is whether these are defects of which the estate can avail itself. The inventory shows that the succession has property which corresponds with that described, giving precisely the same description, with additional particulars. It is not pretended that the property is not owned by the succession, and the only ground of objection is, that the description is not a full one. If there was reason to believe that bidders at the sale had been left in the dark, and that the property had been sacrificed, we might perhaps, at the instance of creditors, refuse to compel the performance of the adjudication. But we have no reason to suppose that any injury was created by the defective description, nor have the creditors asked our interference. So far as the fact of their being two streets called St. Mary bears upon the matter, it affords an argument against the appellee, for property on the other street of that name is proved to be more valuable than the lots sold.

III. The next objection is, that the lots were sacrificed by a sale at much less than their appraised value.

It is not proved that the sale was made at less than the actual value of the lots at the time of sale. The objection is put in argument upon the technical ground, that the sale could not be made for less than the amount of appraisement in the inventory. We think this point is covered by the cases of Towles v. Weeks, 7 La. 312, and Richards v. Deuel, 11 Rob. 508. It is particularly to be observed in the present case, that there are no minor heirs, and that the sale was ordered on credit, upon application of the administratrix, and for the parpose of paying debts. We do not consider the case of Packwood's Succession, cited by the appellee, as in point. Ante p. 96. In that case the order was express to sell according to appraisement, and there were minors interested.

Lastly. It is said that the order of court under which the sale was made was irregular, having been obtained without citation of the attorney appointed to represent the absent heirs. The counsel has referred to articles 1042 and 1157 of the Civil Code, the former subjecting administrators to the same

SUCCESSION OF WADSWORTH.

duties and responsibilities as curators, and the latter declaring that the curator's petition for the sale of real estate must be notified to the attorney of absent heirs, contradictorily with whom the order of sale must be made. This legislation is substantially the same, as regards the point under consideration, with the act of 1817. In interpreting that statute we held in Gibson v. Foster, ante 503, that the curator was the representative of the succession and had authority to provoke the sale of the property, and that the omission to cite the attorney of absent heirs did not involve the absolute nullity of the judgment; that it was an informality apterior to judgment, and one which could not be enquired into collaterally, though it might subject the curator to damages at the suit of the absent heirs. Applying that authority to the present case, we cannot treat the decree of the Court of Probates commanding the property to be sold, as an absolute nullity. The purchaser is satisfied with his adjudication, and the heirs, who alone could have a right to complain, are silent. Certainly the administratrix is not to be permitted to question the validity of a public sale, made in execution of a decree of a court of competent jurisdiction, provoked by herself, and unappealed from.

It is therefore decreed that the judgment of the court below be reversed, and that the administratrix do execute an act of conveyance to Bannister and Rigney, as prayed for in the rule taken by them on the 6th May, 1847; the costs of said rule in both courts to be paid by the succession.

BRIDGE v. OAKEY.

An inspector of elections is not answerable in damages for a mere error of judgment in rejecting a voter, when his motives are upright. To maintain an action against him for refusing to receive a vote, it must be alleged and proved that he acted fraudulently or maliciously. To constitute malice the act must be a wrongful one, done intentionally, without just cause or excuse. Personal ill will to the party aggrieved is not essential to its existence; and, in the absence of any declared intention to do wrong, the motive may be inferred from the circumstances attending the act.

Where there are but two inspectors of an election, the assent of both is required for the reception of a vote.

A PPEAL from the Third District Court of New Orleans, Kennedy, J. Rawle, for the plaintiff. A. O. Hall, Elmore and W. W. King, for the appellant. The judgment of the court was pronounced by

King, J.* The plaintiff alleges that he is a qualified voter, and that the defendant, acting as one of the inspectors appointed to hold an election, in July, 1844, refused to receive his ballot, and thereby prevented him from voting. He avers that this refusal of the defendant was malicious, fraudulent, and illegal, and claims damages for the wrong of which he complains. The defendant excepted that the petition set forth no cause of action. The exception was maintained and the suit dismissed. Upon an appeal to the late Supreme Court, that judgment was reversed, and the cause was remanded. 12 Rob. 688. The cause was then submitted to a jury, who gave a verdict for the plaintiff for \$5; and the defendant, after an ineffectual effort to obtain a new trial, has appealed.

^{*} SLIDELL, J., did not sit on this case, having been of counsel.

BRIDGE V. OAKEY.

It is contended that the plaintiff has failed to prove that, the motive of the defendant for refusing to receive the plaintiff's vote, was fraudulent or malicious. The principle urged by the defendant that an inspector of an election is not answerable in damages for a mere error of judgment, when his motives are upright and pure, and that to maintain an action against him for refusing to receive a vote, it must be alleged and proved, that he acted fraudulently or maliciously, is not contested by the plaintiff's counsel, and indeed is too well settled to be questioned. The technical term malice used in describing the character of the wrong, is defined to be "a wrongful act done intentionally, without just cause or excuse." 2 Phil. Ev. 245. Personal ill will to the party aggrieved is not essential to its existence. In the absence of direct proof of a declared intention to do a wrong, the motive may be inferred from the circumstances which attend the act. There being, in the present instance, no evidence of such declared intention, we will briefly state the principal facts disclosed by the evidence, from which the jury, who are the most competent judges of such issues, inferred an improper motive, and which do not in our opinion authorise us to reverse this verdict.

The defendant and H. Gillingham were appointed inspectors of election for the third ward of the second municipality. On the evening immediately preceeding the election the defendant attended a meeting composed exclusively of inspectors of the political party to which he belonged, called for the purpose of procuring a concert of action among them in relation to the Elliott votes. The deliberations of the meeting were protracted, but resulted in no definitive action. On the morning of the election the defendant at first refused to open the polls, on the ground that the sheriff of the parish court could not be found, and that his presence was necessary to preserve order. After some discussion the inspectors appointed an officer to keep order, the polls were opened, and sixteen votes were received. Gillingham refused to receive the vote of the seventeenth person who presented himself, on the ground that the right of suffrage was claimed upon an Elliott certificate of naturalisation, which did not, as he believed, contain the required oath. The defendant insisted that the vote was legal and should be received. Other voters, possessing the requisite qualifications, and among the number was the plaintiff, subsequently presented themselves. No objections were made to their qualifications, but the defendant refused to receive their votes, stating that the vote of the seventeenth voter was under consideration. After this difference of opinion arose between the inspectors, this answer was uniformly returned by the defendant throughout the day to all who applied to cast their votes, in consequence of which no other votes were received at that box. Gillingham, the co-inspector, desired to receive the votes of such qualified persons as presented themselves, but was met by the steady refusal of the defendant, who persisted in asserting that the seventeenth ballot was still under consideration. Gillingham declared to the defendant at the time that his opinion was formed in relation to the certificate of naturalisation of the seventeenth voter. The defendant replied that his mind was also made up. The defendant further declared that he would receive no other votes until the seventeenth vote was received. The polls are required by law to be closed at four o'clock, P. M. This refusal to receive votes after the sixteenth was cast, was persisted in by the defendant until about one minute before four o'clock, when he announced that he was ready to reject

BRIDGE O. OARET. the Elliott vote and receive the others. Before the voters could reach the polls it was announced that they were closed.

Other facts are disclosed by the testimony, which no doubt operated upon the minds of the jury, but which we do not deem it important here to detail. Upon this testimony we will only remark that, the repeated assertion made by the defendant that the seventeenth vote was under consideration, is wholly inconsistent with the fact that the opinions of both of the inspectors in relation to the propriety of receiving it had been previously formed and expressed. There being but two inspectors, the assent of both to its reception was indispensable. The refusal of one to receive it was sufficient to cause its rejection. From the moment that Gillingham declared his opinion that the vote was illegal and should not be received, it was rejected, and beyond the control of the other inspector, who could no longer treat it as under advisement. That the defendant was aware that such was the effect of the refusal of one of the inspectors is manifest from his own declaration that, no other vote should be deposited until the seventeenth was received. The rejection by Gillingham of the seventeenth vote offered, even if improperly done, which is not urged, furnishes no excuse or justification for the defendant's refusal to receive the votes of qualified voters, who subsequently presented themselves. We think that the verdict of the jury ought not to be disturbed.

Judgment affirmed.

HITE et al. v. VAUGHT.

The institution of an action, and recovery of judgment, against one of two drawers of a joint and several bill interrupts prescription as to the other; but it will commence to run again as to the latter from the time of such interruption. Per Curiam: We cannot regard the effect of the judgment against one co-debtor in selido as extending to the other, so as to change the title of the creditor and clothe the debt with a new character as to the latter; on the contrary, he will remain a mere debtor on a bill, notwithstanding the merger into judgment of the liability of his co-debtor. C. C. 2092, 3505, 3517.

A PPEAL from the District Court of Jefferson, Clarke, J. Mott, for the appellants. Brewer and Hiestund, for the defendant, cited Jacobs v. Williams, 12 Rob. 183. Carraby v. Navarre, 3 La. 362. Segond v. Landry, 1 Rob. 335. Troplong, Préscrip. no. 45. Duranton, Préscrip. no. 117. The judgment of the court was pronounced by

SLIDELL, J. The defendant is sued upon a bill of exchange, drawn at Louisville, by the firm of C. M. & W. Vaught, upon W. Vaught, dated 8th May, 1838, and payable at ninety days. The defence is prescription; and, in the consideration of this plea, we are to treat the defendant as a solidary debtor with C. M. Vaught, it being proved that W. Vaught was a member of the firm of C. M. & W. Vaught, by whom the bill was drawn.

The present suit was not brought until March, 1847, and, the contract being subject to the prescription of five years, it is clear that the defendant has been liberated by lapse of time, unless in some way prescription has been interrupted, or otherwise impaired. To defeat the plea the plaintiffs rely upon the transcript of the record of a suit brought in Kentucky against C. M. Vaught, in 1839. He confessed judgment on the 29th May of that year, and the last

proceeding in that cause was the issuing of a fieri facias, in June, 1839, and its return of nulla bona in August following.

VAUGHT.

It is obvious that these proceedings against one of the solidary debtors interrupted prescription as to the co-creditor, W. Vaught. But the prescription thus interrupted began to run again in 1839, and since that time five years intervened before the institution of this suit, and prescription was thus fully acquired. We cannot regard the effect of the judgment against C. M. Vaught as extending to W. Vaught, so as to clothe the indebtedness of the the latter with a new character, and subject it to the prescription applicable to judgment debtors. The title of the creditor, as against W. Vaught, was not changed by the rendition of a judgment against the co-debtor in solido; on the contrary, he still remained, as he originally contracted, a mere debtor upon a bill of exchange, notwithstanding the merger into judgment of C. M. Vaught's liability. See Civil Code, arts. 3505, 2092, 3517. Troplong on Préscription, §630.

Judgment affirmed.

MEERER v. THE COMMISSIONERS OF THE CLINTON AND PORT HUDSON RAILEOAD COMPANY.

Sec. 24 of the stat. of 14 March, 1842, relative to the liquidation of banks, giving to the commissioners appointed under the statute the powers of syndics, has never been considered as placing the stock mortgages under the control of the commissioners.

A mortgage to secure a loan not made at the date of the mertgage, is an obligation subject to a potestative condition on the part of the debtor. Such a mortgage does not take effect from the date of the registry. It has effect only from the date, and for the amount, of the loan.

A PPEAL from the District Court of East Baton Rouge, Burk, J. Joor, and T. G. Morgan, for the plaintiff. A. M. Dunn, and Roselius, for the appellants. Elmore, Attorney General, for the State. The judgment of the court was pronounced by

Rost, J. The plaintiff enjoined an execution issued by the commissioners of the Clinton and Port Hudson Railroad Company, on a twelve-months' bond given to them by her, for the purchase at sheriff's sale of certain property mortgaged to the Company by her husband, Moses Meeker, and herself, to secure stock and a stock loan of her said husband. The grounds of injunction are that the petitioner, though not a party to the loan, was a party to the mortgage; that having an interest in discharging the claim, she is entitled by law to the privilege of paying nine-tenths of it in the obligations of the Company; that she has tendered to the defendants and to the aheriff ten per cent of the amount of the bond in specie, and the balance in notes and bonds of the Company, which they have refused to receive. The defendants aver that the plaintiff is their debtor by a contract with them for the purchase of property, and cannot avail herself of the privileges granted to the debtors of the corporation before its failure. The injunction was perpetuated, and the defendants appealed.

The Clinton and Port Hudson Railroad Company being desperately insolvent, its charter was adjudged to be forfeited by a decree of court, and its assets

METER

CLINTON AND
PORT HUDSON
RAILFOAD COM
PANY,

placed in the hands of the defendants, as State commissioners. If no other questions arose in this case but those apparently involved in the issue, it would present no difficulty after the decisions in Felps v. Commissioners, &c. 10 Rob. 89. French et al. v. Stanton et al. 1 Ann. R. 8. On those questions the judgment appealed from is clearly erroneous. But, on the argument, the evidence in the record suggested another enquiry, to which, as guardians of the public interest, we deemed it our duty to call the attention of the counsel in the cause and of the attorney general. That officer has appeared on behalf of the State, and asks that the sale under which the plaintiff claims be set aside and annulled. The grounds of his application will be best understood by a brief statement of the facts of the case.

The property sold to the plaintiff had been mortgaged to the Company by her husband and herself, in July, 1838, to secure one hundred and ninety shares of one hundred dollars each, of its capital stock, and the act contained a stipulation that the mortgagor, Moses Meeker, should be entitled to a credit equal in amount to one-half of his stock, and that the same property should stand mortgaged for the loan. In 1839, the legislature, notwithstanding the well considered objections of the governor, passed an act authorising the loan of the bonds of the State to the Company for the sum of \$500,000; the Company bound itself to pay the capital and interest of said bonds; and, in order to secure the payment thereof, pledged to the State their capital stock, with all their property moveable, immovable, and slaves, and subrogated the State to all the stock mortgages which had been executed under the original and amended charter of the Company, amounting to the sum of \$750,000. These conditions having been complied with, the bonds were delivered to the Company, who have never paid the interest accruing upon them.

On the 20th July, 1840, Moses Meeker availed himself of his credit to the amount of \$3,566, for which he gave his note-payable one year after date, and renewable according to the provisions of the charter. This note was not paid at maturity; and after the rendition of the judgment of forfeiture, in 1842, the commissioners instituted proceedings against Meeker upon it, and obtained judgment for the amount thereof and interest, and further that the property described in the act of mortgage be seized and sold under the decree. The property was accordingly sold, but no certificate of mortgage was produced by the sheriff on the day of sale, and no mention was made of the stock mortgage. The commissioners appearing to be of opinion that it was extinguished by the judicial sale, and that they were authorized to grant a release of it on the books of the recorder of mortgages; so that, if the sale was legally made, the plaintiff, who became the purchaser, now holds the property free from the stock mortgage. The question presented is, whether that mortgage was extinguished by the judicial sale; and, if not, whether the commissioners have power to grant a release of it.

The act appointing the commissioners was passed on the 26th of March, 1842. It provides that the liquidation shall be conducted according to the provisions of an act passed for the liquidation of banks on the 14th of the same month. No express authorisation is given in the latter act to the commissioners of the banks to interfere with the stock mortgages pledged to the State, but the 24th section of the act provides that, in all matters not specially provided for, the powers, duties, and liabilities of the commissioners shall be the same as those conferred or imposed on syndics of insolvent estates. Sees. Acts of

1842, p. 34. The stock mortgages are not, properly speaking, assets of the bank, and the section giving to the commissioners the powers of syndics has CLINTON AND never been considered as placing those mortgages under their control.

MEEKER PORT HUDSON

It was argued at bar that the relation existing between the Clinton and Port RAILROAD COM-Hudson Railroad Company and the State was that of debtor and creditor; and a distinction was endeavored to be drawn from this assumed fact between the situation of that corporation, and that of the property banks. The distinction is not easily perceived. The bonds of the State were loaned, and the stock mortgages given in pledge in this case, as in the others. If the act for the liquidation of banks gave no power to the bank commissioners over the stock mortgages, it can give none to the defendants. But besides, in the act authorizing the appointment of these commissioners, the legislature have placed their intention beyond all doubt, by providing that nothing therein contained shall be so construed as to affect the right of the State to foreclose the mortgages of the stock-holders according to existing laws. Sess. Acts of 1842, p. 460.

The course adopted by the commissioners in this case not only affects the right of the State, but effectually destroys it. They have not sold the stock debt and mortgage, which is all they would have power to do if they had any control over these claims, but, in a sale under the mortgage to secure a loan, they have considered themselves authorized to sink the whole stock mortgage. Should their powers be such as they suppose, this proceeding would still be illegal, and the only way in which the property could have been transferred free from mortgages, would have been to sell it under the stock debt and the mortgage given to secure it, that mortgage taking the precedence of the other.

The commissioners seem to have acted under the belief that the mortgage for the stock and the mortgage for the loan were of equal rank, because they were included in the same act and bore even date. This is an error. The stipulation of a mortgage to secure a loan not made, is an obligation on a condition potestative on the part of the debtor. Conventional mortgages of that kind do not take rank from the date of their inscription. It is not the contract itself which forms the vinculum juris, but the accomplishment of the condition. The mortgage would have remained inoperative if the credit had not been used, and it can only have effect from the date and for the amount of the loan. 2 Troplong, Hypothèque, nos. 477-480. The loan in this case, case was made more than a year after the State had been subrogated to the rights of the Company in the stock mortgages. Those mortgages take rank from the date of their inscription, and when property affected by them is seized for a stock loan, made after that inscription, it must be sold subject to them. The sheriff was without warrant of law to sell the property free from the stock mortgage; and the commissioners are not authorized to release it. The amount of the adjudication was less than the amount of the stock mortgage, and therefore there was no sale. No title vested in the plaintiff under the adjudication, and he cannot be required to pay the price.

For the reasons assigned it is ordered that the judgment so far as it perpetuates the injunction, be affirmed with costs, It is further ordered that the siezure be set aside, that the sale made to the plaintiff, and the bond given by her, be avoided and annulled; reserving to the defendants their rights under the judgment obtained by them against Moses Meeker.

DICK et al. v. BAILEY et al.

Where a sheriff of another State, who had acquired possession and a special property in goods seized under an attachment, before issue joined in the action, without the authority. of the law or of the parties litigant, ships the goods to this State, with instructions to an agent to sell them at private sale, he will thereby divest himself of any special property in the goods, and the original owner may resume his control over them here, or they may be seized at the suit of one of his creditors.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. L. Peirce, for the plaintiffs. T. J. Lacy, for the intervenor, who appealed. A sheriff who abuses his trust is answerable only to the parties injured. His sending property seized beyond the State, in his own name, cannot destroy his special property in it, nor change its ownership. Brownwell v. Manchester, 1 Pick. 132. At common law a sheriff had authority to remove beyond his bailwick property levied on. Gilbert on Distresses, pp. 49, 50. The right of property and possession was in the sheriff alone, after the seizure. 13 Johnson, 151. 4 Burr. 1563. He could maintain trespass or trover. 6 Johns. 196. 7 Cowen, 332. 8 Wend. 667. Hunton, on the same side.

The judgment of the court was pronounced by

SLIDELL, J. The plaintiffs allege that Bailey, a planter and a resident in Louisiana, is indebted to them for supplies furnished to his plantation, and for which they have a privilege upon his crop; that he shipped a portion of his crop to them for the purpose of paying them, and transmitted a bill of lading, but that the cotton on its transit was taken at Vicksburg, in Mississippi, by some person unknown, and was forwarded to Payne & Harrison of New Orleans. They pray for judgment with privilege upon the cotton or its proceeds. Payne & Harrison answered that they had sold the cotton before the writ of sequestration issued, and held the proceeds subject to the order of the court; that it had been received by them as consignees under a bill of lading in the name of the sheriff of Warren county as shipper, and under a letter of instructions from that officer to sell the cotton forthwith and remit the proceeds to him. Steel, in his capacity of sheriff, intervened in the cause, alleging a property in himself acquired by the levy of a writ of attachment at Vicksburg, upon the property then on board a steamer, in the suit of Freeman v. Bailey, and his. shipment to Payne & Henderson for sale on his account as sheriff. Freeman also intervened, and joined in the claim of the sheriff. Bailey answered by confessing the indebtedness to Dick & Hill and their right of privilege, and denying the right of Payne & Harrison, or any person other than Dick & Hill. The court below gave judgment against the sheriff and Freeman, and in favor of the plaintiffs.

Two questions only have been discussed by counsel: First, whether the acts done by the sheriff at Vicksburg constituted a seizure of the cotton and created a possession in the sheriff; and secondly, whether, supposing the sheriff to have seized and acquired possession, his special ownership so created was lost by his subsequent act of sending it out of the State of Mississippi to Payne & Harrison, with the instructions and for the purpose above stated.

The conclusion to which we have come on the second point renders it unnecessary to consider the first. We will assume that the sheriff did seize and take possession of the property under a lawful writ. The intervenor contends,

DICK W. BAILEY.

and we think correctly, that a sheriff who seizes goods under lawful process acquires a special property in them, which would authorize him to maintain an action of trover against a wrong doer. It is also true that this special property is not lost if the sheriff commits the custody of the goods to a person chosen by himself, such person being considered his agent or servant. Nor are we prepared to say that even the removal of the property out of the sheriff's bailwick, or out of the State of Mississippi, by himself or servant, would, under all circumstances, divest such special property. Upon this point the authority cited by the intervenor is entitled to great respect. In that case (Brownwell v. Manchester, 1 Pick. 233,) the sheriff of a county in Massachusetts attached some sheep, removed them into the State of Rhode Island, and delivered them to two persons, chosen by himself, for safe keeping. Those persons put them in charge of a third for safe keeping, and the sheep were forcibly taken from this keeper by a stranger, who afterwards delivered them to the defendant in attachment. The sheriff brought an action of trespass against the wrong doers, and recovered. In the argument of the cause the point was expressly urged, that the sheriff had no authority to act without the State, and that as soon as the chattels were carried into Rhode Island the attachment was dissolved, and the possession of the officer became wrongful. But the court held that the special property was not so determined, and said that there was no difference, as to the authority of the officer over the goods, between carrying them just over the line of an adjoining State and carrying them into an adjoining county, which it seems, at common law, the sheriff might, in some cases, lawfully do.

But, conceding to this authority its full weight, the case before us differs in three obvious particulars. The object of removing the animals into the adjoining State might well have been their better pasturage and preservation; but there is no reason to suppose that the cotton could not have been kept as safely at Vicksburg as in New Orleans. The next point of distinction is much more important. In that case the sheriff was acting in the accomplishment of a lawful purpose, the safe keeping and preservation of the property, which was an official duty. Here the purpose was an unlawful one, and a gross violation of his official duty. Before issue joined in the cause, and even any notice of the defendant of the existence of the suit, he sent the property out of his bailwick and State, for the purpose of selling it forthwith at private sale, and with peremptory orders to the consignee to do so. This was entirely beyond, and in violation of, his official duty and authority, and it is not pretended that the defendant and owner, Bailey, ever sanctioned the proceeding. The sheriff, then, by thus abusing his authority and vloiating his official duty, became, as it would seem under the common law authorities, a trespasser ab initio. See the opinion of Lord Ellenborough, in Phillips v. Bacon, 9 East. 302, and the cases cited in Sewall on Sheriffs, 255. The third point of distinction also is material. In Brownwell's case the trespasser who disturbed the possession of the sheriff was a mere stranger. But here the party who disputes his special ownership is a bond fide creditor, acting through the ministry of the law, and with the concurrence of the original owner.

Looking, then, to the fact that the sheriff, if he ever acquired possession and a special property, brought the goods out of the State of Mississippi without authority of the law or of the parties litigant, for the accomplishment of an unlawful purpose, we consider him as standing before us without a special property in the goods, and that the original owner might have reclaimed and re-

DICK v.
BAILEY.

sumed the control over them after they reached this State. And if he could do so we see no reason why the plaintiffs should not be allowed to subject the property to their privileges, especially when the original owner joins with them against the trespasser, and had shipped it to the plaintiffs before the attachment.

Judgment offirmed.

LITTLE et al. v. Managers of the Citizens Bank of Louisiana.

The post-notes issued by the Citizens Bank of Louisiana, payable to order, at three, four and five years from date, out of the proceeds of the sale of the bonds of the State loaned to that institution, formed a part of its capital and not of its circulation; and they are not exempted on the ground of being circulated as money, from the laws applicable to stolen property.

To entitle a possessor of stolen property to demand from the owner the price paid for it before the latter can obtain restitution of it, the possessor must show that he bought it at public auction, or from a person in the habit of selling such things. C. C. 3473.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. J. Barker and T. A. Clarke, for the appellants. Pitot, for the defendants. The judgment of the court was pronounced by

Rost, J.* The plaintiffs sued the defendants on certain post-notes issued by them. The defendants filed a general denial, specially denying that the plaintiffs had acquired the post-notes in good faith; and further resisted the claim on the ground that the notes had been stolen from Boutin, Gally & Co., to whom they had been adjudged by a decree of the court to pay the amount of them. They cited in warranty Boutin, Gally & Co. who appeared and joined in the defence. There was judgment in favor of the defendants, and the plaintiffs appealed.

On the night of the 23d of January, 1844, the store of Boutin, Gally & Co. was broken open, and the notes sued upon, together with others, were stolen from them. Early the next morning they wrote advertisements giving a description of the notes, which were sent to all the brokers' offices in the city, and published as soon as practible in the newspapers in New Orleans, Cincinnati, Louisville, St. Louis, New York, Philadelphia, and Boston. They were also forwarded to Europe. The papers in which the advertisements were inserted at the north, were the Journal of Commerce and Courrier and Enquirer of New York, the North American of Philadelphia, and the Boston Daily Advertiser. The witness, John A. Iselin, of New York, to whom the advertisements had been sent for publication, wrote, in answer: "Nous avons fait publier les détails du vol dont vous aviez été.victime dans deux de nos journaux, ainsi que dans un à Philadelphie et un à Boston. Du reste, tous les journaux que nous avons vus en ont fait une mention détaillé."

Between the 9th and 13th of August following, this same person had a conversation with Jacob Little & Co., who stated to him that they had not in their possession, and had never held, the post-notes advertised. In order to ascertain the fact, they examined their books in his presence, and the only post-

^{*} Eusrus, C. J., being a stockholder in the Citizens Bank, did not sit in this case.

notes shown to have been purchased by them, were purchased in February. Little 1844, from an english house, and were not those upon which they sue. There CITIZENS BANK are in the record several letters of the plaintiffs corroborating this evidence, and stating the fact that they had neither purchased those notes nor sent them to Horace Bean & Co. of this place, in whose hands they appear to have been at the time the plaintiffs wrote the letters and made the declarations alluded to. In one of those letters, bearing date the 13th August, 1844, immediately after the examination of their books, made in presence of Iselin, they say: "We find, on examination, that the \$4,900 Citizens Bank post-notes returned by you a few days since has been in error, as the only Citizens post-notes we have sent you, since May 25th, 1843, is as per statement annexed. We shall hold yours here till we hear from you again. Messrs. Maitland, Comrie & Co. sold us the Citizens' post-notes we sent you on the 27th of February, the same day on which they received them from England. Consequently they could not have been those stolen in New Orleans on the 23d of January."

On the 13th of August, then, the plaintiffs absolutely denied having any knowledge of these post-notes, and held them on account of Horace Bean & Co. They now sue upon those very notes, and attempt to falsify their own positive declarations by the testimony of one of their clerks, a young man 23 years of age, who swears that the plaintiffs did buy those post-notes on the 22d June, 1844; that they paid for them 35 cents on the dollar; that they received them in the usual course of business from a person unknown, and paid the current rate for them. He farther states that the plaintiffs take no newspapers; that they are not generally acquainted with every thing that transpires about bank obligations. In the cross examination he swears to the negative fact, that the advertisement of Boutin, Gally & Co. did not come to the knowledge of the plaintiffs. The only evidence, if evidence it be, bearing on that part of the case, besides the testimony of this unfortunate witness, is a letter of the plaintiffs to Horace Bean & Co., bearing date the 3d of September, 1844, in which they say: "We were in error about the Citizens' post-notes; were led into it by our clerks. It appears that we bought them of Joseph Cisco, whom we do not know."

How this fact was made to appear to them we are not informed, and we do not perceive how they can extricate themselves from the dilemma in which this letter places them. If the name of Joseph Cisco was on their books they must have found it, and with it the transaction with which it is connected, when they searched for it in the presence of Iselin, If, on the other hand, it was not on their books, they and their clerk declare that their vendor was unknown to them, and they could not have recollected a name which they never knew. The statement that they were led into error by their clerks, will not bear examination. One of those clerks swears that the post-notes were offered at the counter, and that, after some negotiation, the plaintiffs bought them. He says they did not come into the plaintiffs' possession by his aid, interference, or advice; and mentions that, at the time of the purchase, other clerks were absent. If it were true, as argued at bar, that a clerk might have purchased those postnotes without making an entry in the books at the time, it is not true that a clerk could send them to Horace Bean & Co. without instructions from his employers; nor could we bring our minds to believe that any commercial house, dealing in good faith, would make such a transmission without keeping any reLITTLE

cord whatever of it. This is as difficult to explain as the fact that, the plaintiffs CITIZERS BANK receive no newspapers.

The attempt of one of their counsel to justify this transaction by their habitual negligence and looseness in the management of their affairs, is not to be tolerated. Neglect, such as this hypothesis would exhibit, is incompatible with good faith. The oath of their clerk that they had no notice, is to be deplored, but cannot be believed; and they can make nothing by throwing their affairs into confusion, intentionally debarring themselves of the means of knowledge usually resorted to by exchange brokers. Besides these circumstances, one of the post-notes is manifestly altered, and a number inserted in it different from that it originally bore, and under which it had been advertised. This unexplained circumstance stamps the whole transaction with bad faith, and we are clearly of opinion that, under our rules of practice, the defendants may show bad faith in the holder. Their plea that the plaintiffs did not acquire the postnotes in good faith, but purchased or acquired them with a full knowledge that they had been stolen from Boutin, Gally & Co., cannot be viewed otherwise than a special plea of mala fides.

Under the rules of the commercial law we would hold this to be a clear case against the plaintiffs. But we are of opinion that it does not come under those rules, and that the court below properly considered that it was to be governed by our local laws on the subject of stolen property. In France similar dispositions of the Napoleon Code are held to apply to promissory notes, when made payable to bearer or endorsed in blank, and we consider it a safe rule of interpretation that exceptions to substantive laws made for the preservation of property are not to be presumed. 2 Troplong, Préscrip. no. 1065.

The post-notes of the Citizens' Bank were issued payable at three, four and five years, and were intended to be paid out the proceeds of the sale of the bonds loaned by the State to the bank. They were a part of its capital, not of its circulation. In the legislation that has taken place in relation to that institution they have never been considered as circulation, either by the legislature er the board of currency, and they cannot be so viewed on general principles. They were payable to order, and at remote periods. They bore interest till paid, and some of the coupons of interest are attached to those upon which this suit is brought. It is vain to say that they were received in New York by the plaintiffs as money, and that the laws concerning stolen property are inapplicable to them. Boutin, Gally & Co. strictly fulfilled the requisites of art. 2259 of the Civil Code. Upon proof of that fact, in a litigation between them and the defendants, the latter were adjudged to pay them the amount of the post-notes, upon their giving bond to refund whatever the holders might be entitled to recover upon them. Boutin, Gally & Co. having complied with the law, the holder could in no case recover any thing more than the price he paid (Civil Code, art. 3473); and to be entitled to recover that price he must show affirmatively that he bought the post-notes at public auction, or from a person in the habit of selling such things. The plaintiffs in this case have proved neither. Their evidence, if otherwise entitled to credit, would only go to show that they bought the post-notes at private sale from a person unknown to them, and, as we think, much below their market value at the time of the alleged

There is in the record other evidence, not material to the view we have taken of the rights of the parties, and which on other grounds we cannot notice, except for the purpose of expressing our regret that counsel should persist LITTLE in testifying for their clients in spite of the pains we have taken to satisfy them CITIZERS BANK that nothing is gained by so doing.

Judgment affirmed.

SUCCESSION OF MACARTY.

A mandamus will not be issued in any case, where the party applying for it has a full and adequate remedy by appeal.

The Supreme Court has no general superintending jurisdiction over the inferior courts. The jurisdiction of the court in this respect is the same under the present constitution as under that of 1812.

The summary action of the Supreme Court will be confined to cases in which its interposition is necessary for the maintenance of its appellate jurisdiction.

RULE on Buchanan, Judge of the Fifth District Court of New Orleans, to show cause why a mandamus should not be issued. L. Janin, for the rule. Eyma and Pitot, contrâ. The judgment of the court was pronounced by

SLIDELL, J. The testamentary executors of L. B. Macarty, having filed an account, a decree of homologation was rendered on the 20th November, 1847. A few minutes after the rendition of this decree, Madame Lalaurie, an heir of the deceased, presented an opposition to the account, and moved the court for leave to file the same, which was refused; and thereupon an application for a mandamus was made to this court. We granted a rule to show cause, and have heard the case upon the answer of the district judge, and the argument of counsel. The argument has taken a wide range, and has principally discussed questions of practice with regard to the homologation of accounts, the right of an heir to personal citation, and the effect of a judgment of homologation rendered, but not signed.

But there is a question which stands before these, and involves, if not our authority, at all events the discretion to be exercised by this court in issuing the writ of mandamus to an inferior tribunal. The jurisdiction of this court, so far as the subject under consideration is concerned, is not distinguishable from the jurisdiction of the Supreme Court under the former constitution. What was held therefore by our predecessors upon the present question has the authority of precedent, and the force of that authority is certainly much increased, if it be found, upon examination of their decisions, that they were uniform and repeated. In Laverty v. Duplessis, 3 Mart. 42, the Supreme Court disclaimed a general, superintending jurisdiction over the inferior courts.

In the case of The State v. Judge Watts, 8 La. 76, there was an application for a mandamus, to compel a district judge to sign a final judgment rendered by him. It was then said: "That courts are clothed with authority, in the exercise of a sound legal discretion, to set aside the judgments rendered by them before they are signed, and grant new trials. In the present case the judge has thought himself authorised to grant a new trial, on the suggestion of fraud between the parties litigant, on the part of the creditor of one of them. Whether he discreetly exercised his legal discretion, is a question which we do not feel ourselves authorised to entertain, under this motion for a mandamus.

SUCCESSION OF MACARTY.

If he was in error, that error can be corrected by this court only on appeal. The Supreme Court derives its jurisdiction from the constitution, by which it is declared to be appellate. Its powers are commensurate with its jurisdiction; and the court has uniformly refused to exercise a general supervisory control over the proceedings of the inferior tribunals, and can interpose its authority only when necessary for the exercise of its appellate jurisdiction."

In the case of *The State* v. *Judge Morgan*, 12 La. p. 120, the district judge had sustained a plea to the jurisdiction of his court, and had ordered the cause to be trasferred to the Court of Probates; and thereupon there was an application for a *mandamus*, to command the district judge to try the cause. It was held that the judgment of which the applicant complained was appealable, and that he must seek relief, not by *mandamus*, but by an appeal. See also *Winn* v. *Scott*, 2 La. 89. *State* v. *Bermudez*, 14 La. 483.

In applying the principles recognised so repeatedly by our predecessors to the present case, our first enquiry should be, has the applicant a full and adequate remedy by appeal; and, upon this point, no doubt can be entertained. The case is within the appellate jurisdiction of this court. Madame Lalaurie is a party interested, and the decree homologating the account is of that final character which authorises a resort to the appellate court. So also, if under the circumstances, the plaintiff in this rule had a right to open that decree, and the district court improperly refused that right, such refusal also was in the nature of a final decree which could be brought by appeal before this court for revision, by bill of exceptions, or other proper exhibition of the action of the district court in the matter.

We listened attentively to the argument of counsel, and heard no reasons assigned for the summary interference of this court by mandamus, except those deduced from the supposed or real inconvenience to the litigant of taking an appeal. The argument ab inconvenienti is entitled to no weight. If it were, it could be urged with much greater force against the plaintiff in the rule; for if applications of this sort were entertained upon the motion of every dissatisfied litigant, the whole time of this tribunal would be absorbed in superintending the proceedings of the inferior courts; and the embarrassment and delay of litigation would soon become intolerable. The disclaimer of a general superintending control over the inferior courts, and the limitation of the summary action of the appellate court to those cases where its interposition is necessary for the maintenance of its appellate jurisdiction, rules so repeatedly recognised by our predecessors, rest upon a wise policy, and a sound exposition of the constitution. We cannot defeat them.

The application for a mandamus is, therefore, dismissed, at the costs of the applicant.

MARCENARO v. BERTOLI.

Where moveables forming part of a succession opened in this State are bequeathed to, or inherited by, a married woman, domiciled, with her husband, in a foreign country, and the wife subsequently dies, the law of the domicil of the spouses, in case of a contest between the survivor and the heirs of the deceased spouse, will govern in determining to whom the property belongs.

By the laws of England legacies to a wife, and residuary personal estate inherited by her, MARCENARO are included under the term choses in action; and it is only where they have been reduced into possession by the husband, that they become his property. To affect such a reduction the husband must exercise some act of dominion over the property; the mere intention to reduce them into possession is not enough. To effect a reduction the act must be such as to change the property; it must divest the wife's right, and make that of the husband

BERTOLI.

PPEAL from the Commercial Court of New Orleans, Watts, J. The de-A fendant appealed from a judgment in favor of the plaintiff. In June, 1844, the late Supreme Court pronounced an opinion reversing the judgment of the lower court and rendering one in favor of the defendant as in case of non-suit; but a re-hearing was granted. The final decision on this re-hearing was rendered by the present court. The case was argued by L. Janin, for the plaintiff; and Roselius and R. H. Wilde, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. Joseph Barabino, who was domiciled at New Orleans, died there in the month of May, 1834. He left an olographic will, which was duly admitted to probate and ordered to be executed. By this will be bequeathed to his sister, Anna Barabino, who at the date of his death was the widow of Angel Mordella, the sum of \$2,000. A considerable portion of his estate was left undisposed of by this will, which consequently fell by our law to his sister german Anna, and his half-brother Lorenzo Basso, in the proportion of threefourths to the former and one-fourth to the latter. In July, 1834, Anna contracted marriage at Gibraltar, with Marcenaro, the plaintiff, both being domiciled at Gibraltar, where they continued to live till her death, which occurred on the 24th December, 1834. Marcenaro still resides there.

In the month of August, 1834, Marcenaro and his wife Anna, transmitted from Gibraltar a power of attorney to E. J. Forstall, a resident of New Orleans and a partner of the house of E. J. Forstall & Co., by which they and each of them constituted him "their and each of their true and lawful attorney," with "authority for each of them, the said constituents, in his and her name, and for his and her use, to recover and receive from the executors of Barabino," &c., all sums of money whatsoever due or payable to them by reason of bequests to her by said will, or by reason of any residuary estate and effects to which the said Anna might be entitled by the laws of the United States, as the lawful sister of Barabino. There was given the usual power to sue, give acquittances in the name of the constituents, to represent them in any court, &c.

In November, 1834, the attorney thus appointed presented, in the name of his constituent Anna, a petition to the Court of Probates of New Orleans, in which, after alleging her heirship as sole heir, she prays that the executors of Barabino be cited, that they may be ordered to render an account; that she be put into possession of the estate of the deceased, and that all sums of money belonging to it be paid over to her. Upon this petition the Court of Probates, in February, 1835, rendered a decree recognising Anna and Basso as the only lawful heirs of Barabino, in the degrees of relationship above stated; recognising Forstall as attorney of Anna, she being described in the decree as the wife of Marcenaro, and commanding the executors to render an account, and that the estate be divided in conformity to law.

In March, 1835, Lizardi & Co., a commercial house at New Orleans, of which house Forstall was a member, received from the executors, for the account of Anna Mordella, a sum of \$4,625 87 in cash, and a sum of \$4,205 in promissoMARCENARO v. BERTOLL

ry notes. It appears also that Anna Mordella, at the time of her marriage with Marcenaro, had two children, issue of her marriage with Mordella. These children survived her; one of them resided at Gibraltar, the other was married to Bertoli, the present defendant, and was domiciled with him at New Orleans.

In 1836, Bertoli presented a petition to the Court of Probates at New Orleans, in which he states the death of Anna Mordella intestate, the heirship of the two children, and his marriage with one of them, and prays to be appointed curator of Anna Mordella's succession. After the usual formalities of advertisements, and no oppositions being filed, letters of curatorship were granted to Bertoli. An inventory was made, comprising certain real estate inherited from Barabino, and a sum of \$2,040 in cash, which is stated as an amount declared by Forstall to be the balance remaining in his hands of a larger amount received by him as the agent of Anna Mordella. Soon after the making of this inventory the house of Lizardi & Co. paid to Bertoli, in his capacity of curator, \$2,498 95, taking a receipt in which the sum is stated as a balance of account in favor of the late Anna Mordella. Lizardi & Co., on the same day, closed their account-current with Anna Mordella, exhibiting the receipts in cash and notes, in March, 1835, from Barabino's executors, and charging her with divers remittances and disbursements. The balance of account thus paid by Luzardi & Co. to Bertoli forms the subject of the present controversy.

We have been thus particular in stating the facts, because their accurate statement is very essential to the due consideration of the plaintiff's rights. Marcenaro, in his individual capacity, brought this suit in the year 1840, in the Commercial Court, for the above sum of \$2,498 95, against Bertoli, in his individual capacity. He bases his right to recover this sum from Bertoli upon the law of England, which he contends is and was in force at Gibraltar, and by "reason of which he became entitled as husband, in absolute ownership, to all the personal estate which his said wife might then (the date of her marriage) own, or thereafter acquire, and among others to her share in the estate of the said Joseph Barabino, and to the proceeds thereof." The payment by Lizardi & Co. to Bertoli, in his capacity of curator, he treats as an unlawful payment.

In proceeding to consider the right of the plaintiff to maintain this action, we shall not notice an objection made by the defendant's counsel, that the english laws and jurisprudence, and their prevalence at Gibraltar, have not been sufficiently proved. We shall assume, for the purpose of our present enquiry, that they do exist as the governing law and jurisprudence at Gibraltar; and shall take them to be as we find them in english treatises, the sources of information to which the witnesses and the plaintiff's counsel refer us. And here it is first to be examined how the jurisprudence of England would consider the rights which Anna Mordella acquired by the death of her brother Barabino, as his legatee and heir. And this examination must be confined to that part of Barabino's succession which consisted of moveables; for as to the immovables to which the wife became entitled as heir, Marcenaro sets up no right in this action. The moveables then of Barabino's succession, after due administration by the executors by the payment of the testator's debts, were to be applied to the payment of the legacy and of the distributive share of Anna Mordella as heir. Her right to this payment as legatee, and to this distributive share as heir, was what the english jurisprudence would consider a chose in action. By that jurisprudence, marriage is an absolute gift to the husband of all the goods, personal chattels, and estate which the wife was actually and beneficially possessed

of at that time in her own right, and of such other goods and personal chattels MARCENARO as come to her during the marriage. The moment these come into the wife's actual possession they become the husband's absolutely, jure mariti.

BERTOLL

But the law is different with regard to such of her personal property as is included under the denomination of choses in action; a term which includes debts owing to her, arrears of rents, legacies, residuary personal estate, money in the funds, &c. Marriage is only a qualified gift to the husband of his wife's choses in action, viz: upon condition that he reduce them into pessession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his personal representatives, will be entitled to it, in her own right, without administering on his estate, or holding such property as assets for his debts. If, on the other hand, the wife die before her husband, his rights with regard to her choses in action which he has not reduced into possession during her life-time, are not absolutely destroyed. They do not belong to him as husband; but he is entitled to them as administrator of his wife, and they would be liable as assets for her debts dum sola. In suing for them, therefore, he must sue for them not as husband, but only in the character of administrator.

What is to be considered as a reduction into possession of the choses in action of the wife during the marriage, has been well settled. The husband must exercise some act of dominion over the fund during the marriage. The mere intention to reduce the wife's choses in action into possession is not sufficient. The act, to effect that purpose, must be such as to change the property in them. It must be something to divest the wife's right, and make that of the husband absolute. Such as a judgment recovered by him in an action commenced by him alone, or an award of execution on a judgment recovered by him and his wife, or receipt of the money, or a decree in equity for the payment of the money to him, or to be applied to his use. If stock to which the wife is entitled be transferred to her name, it will not be considered as a reduction into possession by the husband; nor if money be left in the hands of a trustee for the benefit of the wife; nor if the husband actually received the money, but as a trustee or in some fiduciary capacity, and not simply as husband; nor if he and his wife give a power of attorney to a person to receive, but the attorney does not actually receive it during her life. And in equity the rights of the wife meet with even greater favor.

Applying these principles to the case before us, we find no reduction into possession during the wife's life. It is erroneously stated in the former opinion that the wife died in December, 1835. She died in December, 1834, and the money was received by the New Orleans agent in the following March. When Lizardi & Co. received this money they seem not to have been aware that she was dead, and received it for her, and so credited it in account. When the petition was filed by Forstall in the Court of Probates, it was filed in her name; the prayer was that she be put into possession and that the money be paid to her. These judicial proceedings, which the husband seems to have adopted, for he refers to them in his petition, point to her rights.

It cannot be said that the payment to Forstall was a payment to the husband. At the date of this payment his power as to her was revoked by her death. Her husband's authority as husband had also become inoperative, for he ceased, as we have seen, to have any authority as mere husband. He had, as surviving husband, the right, under the jurisprudence which he invokes, to become adMARCENARO D. BERTOLI. ministrator; but he had received no grant of letters of administration, and had given no power of attorney in that capacity. The receipt therefore from Barabino's executors by Forstall, in 1835, was an unlawful receipt; but its restoration to the curator charged with the administration of the wife's succession was lawful.

We will not here discuss the question whether, if the husband had obtained a grant of letters of administration from the proper tribunal at Gibraltar, he would have had a right to act upon the fund here under those letters directly, or after obtaining a judicial recognition of those letters here; nor will we discuss the question whether, if Marcenaro, without obtaining letters of administration at Gibraltar, had seasonably applied for letters of administration here, he would have been entitled to them. It suffices to say that he has received no grant of letters at either place, and stands before us claiming as husband only, of Bertoli in his individual capacity. But Bertoli, during the husband's inaction both here and at Gibraltar, had obtained in the proper court at. New Orleans letters of curatorship, by which this fund, as well as the real estate of the wife, was placed under his administration. Letters of administration having been thus granted, if the english law is to govern with regard to the distribution of this fund, the husband's rights are not gone. By that jurisprudence, if the next of kin of the wife have taken out letters of administration and thus have got the chose in action, or its proceeds, into their hands, they hold as trustees of the husband, and are thus answerable to him. We do not, however, decide this question in the present case. The counsel for the defendant has contended that this fund is an immovable, because the wife's interest in the succession of her brother, which was opened here, was, as he alleges, an immovable by disposition of our law; that under our Code the distribution of the whole succession of Anna Mordella, as situate here, must be in favor of her children. It is unnecessary now to express an opinion upon this point. The plaintiff must, after what has occurred, go to the court where the succession of Anna Mordella is under administration, and sue the curator; or if the children of Anna Mordella have been put into possession of her estate, he must sue them. The present action cannot be maintained.

For the reasons now expressed the judgment of non-suit rendered by the former Supreme Court in this cause, stands affirmed.

COLT v. O'CALLAGHAN.

Where several judgment creditors, each of whose claims is under three hundred dollars, but whose aggregate amount exceeds that sum, unite in a petition of intervention in an action between their debtor and a third person claiming a privilege in virtue of separate seizures made by them under execution, an appeal taken by them will not be dismissed on the ground that their claims do not severally amount to three hundred dollars.

Where a vendor has no privilege by the law of the place of sale, he can acquire none by the transfer of the property to a country where a privilege would be granted to a vendor under such a contract made within its jurisdiction.

A PPEAL from the Commercial Court of New Orleans, Watts, J. Elwyn, for the plaintiff, relied on Story's Confl. Laws, § 323. Huberus, De Conflictu Legum, § 7. Harrison v. Skerry, 5 Cranch 298. Schmidt, on the same

side. Bartlette, for the defendant and appellant. T. H. Howard, for the intervenors, who also appealed, relied on Whiston v. Stodder, 8 Mart. 135. The O'CALLAGHAM judgment of the court was pronounced by

EUSTIS, C. J. The plaintiff sold to the defendant, in the city of New York, several coils of wire for the sum of \$500, which was seized by the appellants, who were judgment creditors of the defendant, under executions. The judge who tried the cause gave the plaintiff his privilege of vendor adversely to the seizure made by the appellants; from which judgment this appeal is taken. A motion was made to dismiss the appeal, on the ground that the claims of the appellants, who were intervenors in the court below, do not severally amount to a sufficient sum to give this court jurisdiction. The appellants united in their petition of intervention, and their aggregate claims exceed in amount the sum of \$300. The value of the thing seized, as well as the plaintiff's claim, exceeds that sum. The motion to dismiss the appeal is therefore disallowed.

It is alleged that the delivery of the wire to the defendant took place in New Orleans. It was shipped by the vendor to O' Callaghan, the purchaser, in New Orleans, he paying the freight; and, under the statement of facts, "that Colt sold and delivered the wire in question to O' Callaghan, and that the same never was paid for, &c.," signed by counsel, we are bound to consider the contract as complete and executed in New York. The judge allowed the plaintiff his privilege of vendor, on the principle that privileges appertain to the remedy, and are not dependent on the law of the place where the contract was made. The case was before us before the adjournment in June last, and was set down for further argument at the November term.

We have been referred to the treatise of Judge Story on the Conflict of Laws, as supporting the doctrine in which the privilege to the plaintiff was allowed. In section 322 of that work it is expressly laid down, that where the lien or privilege does not exist in the place of the contract it will not be allowed in another country, although the local law where the suit is brought would otherwise sustain it, and the case of Whiston et oi. v. Stodder et al., 8 Mart. 135, is cited in illustration of the principle. In that case it was decided, after argument by eminent counsel, that in a sale completed in a country in which the vendor has no privilege, he acquires none by its being brought here. By the laws of New York Colt could have no privilege on the merchandise sold by him, and it is difficult to find a reason for his acquiring one here.

This decision is said to be in derogation of a general principle that the allowance of priorities of payment belongs exclusively to the remedy. It is true that in the work referred to, in which the principle established in Whiston's case is acknowledged, the antagonist doctrine is thus apparently recognised in section 575: "The liens, implied hypothecations, and priorities of satisfaction, given to creditors by the law of particular countries, and the order of payment of their debts are generally treated as belonging to the subject of proceedings ad litis ordinationem, and not to the merits of the claim;" and Rodemburg, Boullenois and Voct are referred to as authority.

Since the decision of the case of Whiston, we have never known it to be deviated from in our tribunals; and we are not aware of any decision of a court in the last resort, in which the rule just quoted has been acted upon. The case of Harrison v. Skerry, 5 Cranch, 298, we considered in the case of Lee v. His Creditors, ante p. 599. The opinion in the case of Harrison v. Skerry must be taken as one whole, and as applicable to the state of facts then under COLT O'CALLAGRAN.

consideration, in which priority of payment was given to the United States in the distribution of the effects of a bankrupt over debts contracted by a foreigner in a foreign country. This opinion has been considered as adverse to the recognition of liens under foreign contracts, and never, as we are aware of, been held as sanctioning the doctrine that a party who has no privilege on merchandise by the law of the place where his contract is completed, can acquire one by a translation of the property to a country where a privilege is granted on similar contracts made within its jurisdiction.

The quotation made by the counsel from Huberus relates to prescription and execution alone.

Those who are at all familiar with the subject of the conflict of laws are often embarrassed in their enquiries on finding that, in many rules which have been held to be general and of universal application, the cases excepted outnumber those within their purview, under the jurisprudence of the present day; and our experience often admonishes us of the necessity of the greatest caution in laying down or adopting any general rules, however plausible they may appear, which have not stood the test of scrutiny, of experiment, and of time. In this case we see no reason for deviating from the law as settled in Whiston's case.

It is therefore decreed that that portion of the judgment allowing the plaintiff a privilege on the wire be reversed; and that there be a judgment in favor of the intervenors, subjecting the wire seized in this case to their executions severally; the plaintiff paying the costs of the intervention and of the appeal.

SUE v. VIOLA et al.

One who made no appearance before judgment, and raised no issue in the court below, and against whom the judgment cannot have the force of res judicata, has no right to appeal therefrom.

A PPEAL from the District Court of the First District, Buchanan, J. Greiner, for the plaintiff. Dufour, for the appellant. No counsel appeared for the defendants. The judgment of the court was pronounced by

SLIDELL, J. The plaintiff sold some merchandise in France to the defendants, shipped it, and gave the defendants the bill of lading. It was to be paid for in cash: the defendants failed to do so, and absconded. The plaintiff sequestered the goods after their arrival at New Orleans, and Bousquet, in whose possession they were found, intervened and claimed the goods as having purchased them from one Peyret, the agent here of Viola frères. They alleged in their intervention that they had paid the duties on the goods at this port, and, if not entitled to the goods, are, at least, entitled to reimbursement of the amount of duties. The court considered Bousquet a purchaser in bad faith, dismissed his intervention, and restored the property to the plaintiff. Peyret was not cited, nor did he become a party to the cause.

After judgment he appeared by petition of appeal, and now asks a judgment in his favor for the amount of duties, as having been paid by him. Under the evidence it is not clearly shown that he paid them. But besides this he has no right to relief in this cause, not having appeared before judgment, nor raised any issue in the court below. The only parties litigant were the plaintiff, the

defendants, and the intervenor, none of whom have appealed. The judgment of the court below is not res judicata against Peyret. If he has any claim, it is not adversely affected by the judgment, and therefore he cannot appeal. See Williams v. Trépagnier, 4 Mart. N. S. 343. Young v. Cenas, 1 Mart. N. S. 308.

Appeal dismissed.

SUE U. VIOLA.

CLARKE v. SALOY et al.

Where the laborers employed by a builder, and the furnishers of materials for its construction, deliver to the owner attested accounts of the amount due to them for the purpose of having the amount retained out of subsequent payments to the contractor, in pursuance of the stat, of 18 March, 1844, and the amounts so claimed exceed the balance due to the builder, the owner may institute an action against the claimants, for the purpose of having the amount due by him distributed by order of court among the parties entitled thereto, and himself relieved from liability on depositing the amount due by him in court.

A PPEAL from the First District Court of New Orleans, McHenry, J. Fulhouze, for the plaintiff. Mazureau, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. The petition in this cause alleges the following facts: The plaintiff had made a contract with one J. Chateau, by the terms of which he was to build a house for the plaintiff, and the plaintiff was to pay a sum in cash, and the residue in two instalments. This contract was, with the consent of the plaintiff, assigned by J. Chateau to R. Chateau, who, at the stipulated stage of the work, received the second instalment. In the subsequent prosecution of the work, the contractor became embarrassed, and did not fulfil his contract; the plaintiff was compelled to have some portions of the work finished by other persons. Various parties, who had claims against Chateau as under-workmen and furnishers of materials, delivered to the plaintiff attested accounts, pursuant to the statute of 18 March, 1844. These claims amounted to \$1,471 72, while the amount coming to the contractors from the plaintiff was but \$720. * The plaintiff further alleged that each of these creditors of the contractor claimed the right of payment in full, that she had no knowlege of the justice or correctness of their claims, was unable to decide upon their respective rights and privileges, and could not pay any of them without the risk of error and responsibility towards the others. She therefore prayed the citation of all these creditors, and that the fund which she deposited in court might be distributed among them according to their respective rights, and she discharged from all further liability.

To this petition an exception was filed by Saloy, one of the creditors, praying the dismissal of the action, upon the ground that the plaintiff, according to her own showing, stands toward him in the relation of his debtor, and not his creditor; that she has no claims against him, and has nothing to do with the conflict, if any exist between the several defendants; that she cannot interfere nor cause them to be called, and decreed to come to a settlement of their respective claims. This exception was overruled. Judgment by default was entered, and, upon the evidence adduced, the court being satisfied that the allegations of the petition were fully proved, rendered a decree directing that the fund deposited remain for distribution among the creditors upon further hearing, dis-

CLARER P. SALOY.

charging the plaintiff from all personal liability under the building contract, and authorising the cancellation of the privilege at the morfgage office. From this judgment Saloy has appealed.

We concur with the court below in the opinion that the allegations of the petition were proved, and our attention will be addressed to the exception pleaded by the defendant. In solving the question whether such an action can be maintained, our inquiry ought not to be limited by the literal provisions of the Code of Practice. Whether the definition of an action contained in the first article of that Code literally covers a case of this nature, seems to us of but little importance. If any provision of law could be cited forbidding such an action, we should be bound to obey it, however questionable its policy; but, in the absence of such a prohibition, the true test is, whether the ends of justice, for the administration of which courts were established, will be promoted and accomplished by the maintenance of this action. In answering this enquiry it is necessary to consider the situation of the parties; we may also take into view, in a case where the legislator is silent, such analogies as are presented by our legislation, and may gather assistance from the practice of courts of justice in other civilized countries.

Here are numerous creditors, who, availing themselves of the provisions of the act of 1844, have notified their accounts to the plaintiff, and thus given her warning that whatever she owes the contractor must be retained and paid over to them. These conflicting claims may presently become the subject of as many different suits against her, in as many different courts; for the statute has given an action to the creditor of the contractor against the owner, as "for money had and received to his use." The claims amount to \$1,471 20, while all that she owes to the contractor, and the full extent to which she ought in law or honesty to be made liable, is \$720. She is willing and anxious to pay all that she owes; but does not know to which of the claimants, or in what proportions, she ought of right to render the debt; and fears that she may be harrassed by a multiplicity of suits, and suffer injury from the conflicting claims of the parties. She therefore applies to a court of justice to protect her, not only from being compelled to . pay the same amount repeatedly to the different claimants, but from the vexations attending upon the numerous suits which would be instituted against her. She places the fund of which she is the stakeholder in the hands of the court, and insists that the various claimants should settle their rights contradictorily with each other, and not at her expense and hazard. There is an obvious justice in this; and we look in vain, either in the general law, or in the statute of 1844, for any thing which forbids such a proceeding. It certainly was not the object of that statute to oppress the proprietor, but to aid and protect the mechanic. When the proprietor comes forward honestly and places the fund at the disposition of the creditors, he has done all that the statute contemplated.

There is a strong analogy between the present action and the remedy which positive legislation has provided in the case of conflicting seizures. Act of February 10, 1841, sec. 11.

The Spanish law by which we were once governed, presents provisions strongly analogous to the present case. In the Partidas, that venerable monument of wisdom and simplicity, it is said: "Constreñido non, deve ser ningun ome, que faga demanda a otro, mas el de su voluntad la deve fazer si quisiere; fueras ende en cosas señaladas, quel puedan los Juzgadores apremiar segun derecho, para fazerla. E la una dellas es, quando alguno se va alabando, e

CLARKE D. SALOY.

diziendo contra otro, que es su siervo; o lo enfamando, diziendo del otro mal ante los omes. Ca en tales cosas como estas, o en otras semejantes dellas, aquel contra quien son dichas, puede ir al Juez del Logar, e pedir que constriña a aquel que las dixo, que le faga demanda sobrellas en juizio, e que las prueve, o que se desdiga dellas, o quel faga otra enmienda, qual el Juzgador entendiere que sera guisada." Partida iii, tit. ii, ley 46.

Nay, so far did the same lawgiver go in protecting the subject from vexatious litigation, that there was a provision enabling judges to compel those to bring suits immediately, who might have claims against persons going on a journey.*

An action like the present is familiar to courts of chancery, under the denomination of a bill of interpleader. Justice Story, in his treatise on Equity, sets forth at length the considerations justifying such relief, which we have already intimated, and adds that unless, under such circumstances, courts of equity would afford a party protection, he would in almost every event be a sufferer, however innocent and honorable his own conduct may have been. See also De Lizardi v. Gosset, 1 Ann. Rep. 138. We are of opinion that the exception was properly overruled, and that there is no error in the judgment appealed from.

Judgment affirmed.

Moss et al. v. Smoker et al.

Plaintiffs, owners of a steamer, received on their boat a quantity of cotton, to be delivered to the consignees for a certain freight. They were allowed, by the terms of the bills of lading, to reship the cotton on another boat. The cotton was reshipped on a steamer belonging to defendants, to be carried a part of the distance. The bills of lading were transferred to the latter, who, after deducting the amount agreed to be allowed to them for freight for the distance it was to be carried by them, paid plaintiffs an amount in cash, and gave them a note and a due bill, which together made up the full amount of the original freight contracted to be paid by the owners of the cotton for its transportation to the place of consignment. The cash was paid without any stipulation for its return in any future event, and the note and due bill were absolute on their face; nor was any condition stated in what passed orally between the parties. The cotton was lost by an unavoidable peril of the navigation shortly after it was reshipped, and the defendants were thus prevented from delivering the cotton and earning the freight, and never received any part thereof. In an action by the payees on the note and bill: Held that, by the absolute form in which defendants stipulated, they have subjected themselves to the burden of establishing their release by some implied condition resulting from the nature of the contract, if any such existed; that the peril to which the goods would be exposed, and with them the right to freight, was one that might have been easily foreseen; that the chance of earning freight and of re-imbursing themselves for any payments to the plaintiffs by collecting the entire freight of the consignees, was a benefit offered to the defendants, which they thought it their interest to

^{*&}quot;Asechan los omes unos a otros maliciosamente, por emvidia, o por malquerencia que han contra ellos. E esto fazen contra los mercaderes, e contra los otros omes, que han a fazer sus viajes por mar, o por tierra. Ca luego que saben que tienen sus mercaderias, e sus cosas aparejadas para irse, mueven demandas escatimosamente contra ellos ante los Juzgadores, para estorbarles que se non puedan ir de la tierra, en la sazon que devian. Onde dezimos, que los Juzgadores non deven sofrir tal escatima, nin tal engaño como este, quando lo sopieran. E para refrenarlos desta maldad, mandamos, que el mercader, o otro qualquier que se temiere desto, pueda pedir al Juez que apremie a aquel que le esta asechando, quel fagaluego su demanda, eque la non aluengue, fasta en la sazon que se quiere ir. E el juez develo fazer. Ca si estonce el demandador non quisiese su demanda mover, non deve despues ser oydo, fasta que el demandado torne de su viaje." Partida, iii, tit. ii, ley 47.

Moss V. Shoker accept with the accompanying burden; and that they took upon themselves the risk of the whole amount of freight money.

Where the business of a steamer is to carry freight for hire, an agreement made by the captain, or clerk of the boat, in order to obtain the carriage of merchandize and to earn freight for the owners, is within the scope of the partnership business; and notes executed in pursuance of it by the clerk, on behalf of the owners, will be binding on the latter.

A PPEAL by the defendants from a judgment rendered against them by the Fourth District Court of New Orleans, Strawbridge, J. Micou, for the plaintiffs, relied on the case of Andrew v. Moorehouse, cited in Abbott on Shipping, new Am. ed. p. 495, and note to page 496. T. G. Lacy, Hunton and Rawle, for the appellants, cited Avery v. Lauve, 1 An. R. 457. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought by the plaintiffs, owners of the steamer *Hempstead*, against the defendants, owners of the steamer *Express Mail*, to recover the amount of two due bills, signed by the clerk of the latter steamer, on behalf of her owners. One is in the following form:

"Shreveport, April 24, 1846. One day after date due to the order of Mr. Wm. Moss, four hundred dollars, for value received.

"Steamer Express Mail and owners, R. Gillet, clerk."

The other is dated at the same place, on the 26th April, 1846, is signed in the same way, and is of the following tenor: "Due to the steamer *Hempstead* and owners, three hundred and ninety-four dollars, for value received."

At the trial of the cause, in addition to some other evidence, the following statement of facts was agreed upon between the plaintiffs and a portion of the defendants.

"The note and due bill mentioned in the petition were given under the following circumstances: The steamer Hempstead, in the month of April, 1846, received on board and undertook to transport from Harris' Landing on Red river to New Orleans, 396 bales of cotton, consigned to Messrs. of New Orleans, the damages of the river excepted. The consignees to pay freight on 362 bales at \$3 per bale, and on 34 bales at \$2 50 per bale. By the terms of the bill of lading the steamer Hempstead had the privilege of reshipping the cotton on other steamboats. The Hempstead transported the cotton to Shreveport, and the cotton was then by agreement reshipped on the Express Mail; \$200 in cash paid, and the note and due bill given by the Express Mail, and a freight of 75 cents reserved for the Express Mail; the said Hempstead delivering and passing the bills of lading to the Express Mail. Afterwards, on the 27th of April, 1846, the Express Mail, about fifty miles below Shreveport, on her voyage to New Orleans with the said cotton on board, was, by the unavoidable dangers and perils of the river, lost, and was unable to deliver the cotton to the consignees, and thus to earn the freight, and never did receive the freight, or any part thereof. On the said voyage the freight of the said Express Mail was to the amount and value of \$2,071, upon which insurance had been made to the amount of \$980, which has been paid

The plaintiffs contend that, under the agreement, the defendants became their unconditional debtors for the amount of the notes or due bills, while, on the other hand, the defendants invoke an entirely different construction. They say that the cash paid and the notes given were an advance by the defendants to the plaintiffs, to be re-imbursed by the collection of the entire freight at

Moss w. Snoker.

New Orleans upon the original bills of lading, that the defendants did not take the plaintiffs' claim for freight at their own risk; that by the loss of the goods on the voyage the freight was lost, and they were unable to collect from the consignees; that the consideration of the notes has failed; that they are entitled to a judgment in their favor as to the notes, and to a decree against the the plaintiffs for the re-imbursement of the cash advance of \$200.

The question presented by this cause is novel, and one in which, as the counsel properly stated, we cannot derive much aid from precedent and special authority. Its solution must be attained by the application of those wellestablished principles which control the subject of contracts in general, and some aid may also be drawn from those familiar rules which regulate the obligation of promissory notes. The true enquiry in this case is, was the promise to pay, made by the defendants, absolute? or was it conditional, to wit, upon the condition of the safe arrival of the cargo, and the consequent ability to collect the freight from the consignees? A conditional obligation is one which is made to depend upon an uncertain event. If the obligation is not to take effect until the event happens, it is a suspensive condition; if the obligation takes effect immediately, but is liable to be defeated when the event happens, it is then a resolutory condition. It is certainly usual in agreements, as Domat has well said, for the parties to foresee accidents that may produce some change which they are willing to guard against; they therefore, said he, regulate what shall be done if those cases do happen.

It is not, however, indispensable to the existence of a condition in a contract, that it be expressed. There are tacit conditions, which are understood without being expressed. But this class of conditions is limited to those which are inherent in the nature of the affair, and which the law supplies, though the contracting parties are silent. Our Code defines them perhaps more correctly and fully, as those which result from the operation of law, from the nature of the contract, or from the presumed intent of the parties. An illustration is given by the civilians in the case of the sale of an estate, when the seller reserves to himself the fruits of that year. This reservation implies the condition that there shall grow fruits, in the same manner as if it had been said that he reserved the fruits in case there should be any. Tunc enim incipit actio cum ea per rerum naturam prestari potest. Another illustration is the resolutory condition which is implied in all commutative contracts, to take effect in case either of the parties does not comply with his engagements. See Civil Code, arts. 2015, 2016, 2021, 2040. Domat, book 1, tit. 1, sec. 4, § vi. Merlin, Répert. verbo Condition. Duranton, book 3, tit. 3, chap. 4, § 37.

If we examine the present contract, we look in vain for any express stipulation of a condition that the notes should not be exigible, and that the cash paid should be restored in case the goods should not arrive, and the liability of the consignees not be fixed by their delivery. The cash was paid without any positive stipulation for its return in any future event. The notes are absolute on their face. It is an absolute promise to pay, for value received, a certain sum; in one note at a certain day, in the other immediately. Nor was any condition stated in what passed orally between the parties. The defendants therefore are totally unsupported by the express terms of the agreement, and must show that the implied condition results from the operation of law, the nature of the contract, or the presumed intent of the parties. Now there is no express legislation to control a contract of this sort, and the defendants are therefore

Moss SHOKER restricted to whatever benefit may be derived from a consideration of "the nature of the contract, or the presumed intent of the parties."

Standing upon this narrow ground, the first difficulty which the defendants encounter is, that the whole burden is thrown upon them by the absolute form in which they have expressly stipulated. It is obvious that to relieve themselves from a written promise, unconditional on its face, they must make out the implied condition by very clear and cogent deductions from the nature of the contract, Now the petil to which the goods would be exposed, and with the goods the right of freight, was a peril not so strange or extraordinary as not be foreseen by men of ordinary prudence. The risk was not of so improbable a nature as not to suggest itself to the contemplation of the parties. But it is said that, if the contract is deemed an absolute one, and the defendants took the risk of earning freight from the consignees, they made a hard bargain. Certainly where a bargain is so unconscionable as to indicate surprise, or fraud, or duress, a court of justice will look into it very closely, and in a proper case might render such sum as may appear reasonable, without being bound by the terms of the contract. But here was no sort of coercion, nor any hardship but of the promissor's own making. There was a lawful and valuable consideration moving from the plaintiffs. You shall have the chance of earning seventy-five cents per bale upon this cotton by carrying it to New Orleans, as well as the chance of reimbursing yourself by collecting the entire freight from the consignees, if you will pay me, who have already labored and incurred risk in the matter, the proportion of freight money from the place of shipment to the point where we now are. Here was clearly a valuable consideration. There was a benefit offered to the party promising, which he thought it to his interest to accept with its accompanying burden, and did accept. He did it with his eyes open; the risk he incurred was one which he must be supposed to have foreseen; and which he could have guarded against by either refusing the contract altogether, or insisting upon a condition, instead of promising absolutely. He had the chance of earning \$297. Opposed to this was the risk of the loss of that amount, and of the sums paid and promised to the plaintiffs. Such a risk no underwriter would probably estimate at more than one per cent, or about ten dollars.

We are of opinion therefore that the defendants took the risk of the whole freight money upon themselves; and that, as between the parties now before us, and so far as the freight money was concerned, the interest of the plaintiffs in the enteprise was closed. The defendants bought out the plaintiffs unconditionally, and must pay the price.

In considering this case we have not thought proper to embarrass the subject with an enquiry, which is not necessary to the solution of the question before us, to wit, whether, notwithstanding the privilege of reshipment, the Hempstead remained liable to the consignee under the original bill of lading. That was one contract, and the agreement between the Hempstead and the Express Mail was a new and distinct contract. Each stands on its own footing. The rights of the owners of the steamers inter se, for the purposes of the present controversy, are not affected by their responsibility to the merchant.

It only remains to notice the grounds of defence urged by one of the defendants, Boyle. He does not dispute his being part owner of the Express Mail, but says he never authorized the captain or clerk to make such an agreement for him, and that they had no authority to make promissory notes for him.

Upon the first of these points we are of opinion that the agreement was within the scope of the partnership business. The business of the steamer was to carry freight for hire, and the agreement was made in order to get the carriage of the cotton, and earn freight for the owners.

Moss Broken

Upon the second point the objection is, in the present case, purely technical. If the whole agreement and its attendant circumstances were not in evidence, and the case before us nakedly upon the notes, the enquiry would then be necessary, whether the owners of a steamer are bound by notes drawn by the steamer's captain or clerk. But here the consideration of the notes is alleged and proved.

We are better satisfied with the conclusion we have formed in this case, from its concurrence with the views expressed by the learned and experienced judge who tried the cause in the court below, and who has given at length and very forcibly his reasons for deciding the cause in favor of the plaintiffs.

Judgment affirmed.

BERRY v. SLOCOMB.

One who signed an appeal bond as surety for a third person, in consequence of an obligation contracted by defendant to save him harmless, may recover from the latter a fee paid by him to counsel to defend him in an action on the appeal bond; and where defendant was notified by the surety of the name of the counsel so employed by him, and no objection was made thereto, such silence will be an implied approval of his employment.

A PPEAL from the Third District Court of New Orleans, Kennedy, J. G. B. Duncan, for the plaintiff. L. Peirce, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought to recover an amount expended for fees to counsel, under the following circumstances. Cox desired to appeal from a judgment. Berry agreed to become his surety on the appeal bond; and as his inducement to do so, the defendant executed in Berry's favor a written obligation, by which she bound herself to save him harmless. Berry was sued upon the appeal bond, employed counsel to whom he paid the amount now claimed, and defended the suit successfully. When suit was brought against him, Berry transmitted a copy of the citation to Mrs. Slocomb, reminding her of her obligation indemnify to him, stating also that he had retained counsel, whose name he gave, and who would "cheerfully receive whatever aid or advice your [the defendant's] counsel may think proper to give him." It is quite clear that where one party thus agrees to hold another harmless, the latter may recover the costs and charges reasonably disbursed in consequence of a suit against him. See Mott v. Hicks, 1 Cowen, 538.

But the defendant urges that Berry could have called upon her to employ counsel to defend him, had he wished or intended that the counsel's fee should be paid by her; and that, upon her neglect or refusal so to do, that then only would she have been chargeable with the sum paid to counsel of his selection. We are inclined to concur with the district judge in the opinion that Berry had a right to employ competent counsel of his own selection, unless, at least, a tender of suitable counsel was made by the defendant, which was not done. However, it is not necessary to decide this point. Berry notified her that he

BERRY V. SLOCOMB. had employed counsel, whom he named. Her silence was an implied approval. See *Hale v. Andrus*, 6 Cowen, 225. We think the defendant has nothing to complain of. The counsel employed must be considered competent, for he was successful. The compensation paid to him is admitted to be moderate. If the defendant had employed counsel herself, the result of the defence could not have been more satisfactory, and the expense, we must suppose, would not have been lighter.

Judgment affirmed.

LEE v. HIS CREDITORS.

In homologating a tableau of distribution presented by a syndic of the creditors of an insolvent, the decision of the court upon each claim is a separate judgment belonging to the party in whose favor it is rendered, and binding upon all who do not appeal from it; and where one creditor alone appeals from the judgment of homologation the other creditors must be viewed as strangers to the proceeding, and unaffected by any judgment rendered on the appeal.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge. J. Mott, for the plaintiffs in the rule. T. R. Wolfe, for other creditors. T. A. Clarke, for the syndic, appellant.

The judgment of the court was pronounced by

Rost, J. In the tableau filed by the syndic of the insolvent in this case, two privileged claims were disallowed: That of George Handy, claiming the vendor's privilege on a steamboat; and that of the present plaintiffs in the rule, claimed on the proceeds of the boat, under the laws of Kentucky. On the oppositions filed there was a judgment in the first instance in favor of the Kentucky claims, and against Handy, who alone appealed. Neither the syndic, nor any of the other ereditors joined in the appeal nor opposed these claims in the appellate court. The case was contested between these two parties alone. The judgment so far as appealed from was reversed, the privilege claimed by Handy was allowed; and the court held that the plaintiffs in the rule were not entitled to the privilege claimed by them. The funds in the hands of the syndic are more than sufficient to satisfy the judgment in favor of Handy, and the present rule was taken by the plaintiffs therein upon the syndic, to show cause why the balance remaining should not be paid over to them, on the ground that the judgment of the district court so ordered it, and that said judgment has not been appealed from, except by Handy, who will become disinterested by the payment to be made to him. The district court ordered this balance to be distributed between the plaintiffs and Handy on account of his ordinary claims, in proportion to the amount due to each. The syndic has appealed; and some of the ordinary creditors to whom no dividend is allowed have joined in the appeal, and insist that the decree of this court on the appeal of Handy enures to their benefit, and that, as it has been decided that the privilege claimed by the plaintiffs in the rule does not exist, it cannot be enforced against any one.

This case presents a question of practice, which we consider well settled in the case of Jean François Girod v. His Creditors, ante 546.

We held there that, parties considering themselves aggrieved by the judgment homologating a tableau of distribution must appeal, and make proper parties; and that the decision of the court upon each claim was a separate judgment belonging to the party in whose favor it was rendered, and binding upon all parties
who did not appeal from it. We recognized the right of the syndic to appeal
on behalf of the mass. But in this case the syndic did not appeal. The contest was exclusively between the plaintiffs and *Handy*, upon their respective
claims. The other creditors appeared to have acquiesced in the judgment of
the district court, rather than incur the expense of further litigation.

Had the appellant been cast, the other creditors could not have been compelled to pay costs. They would have maintained successfully that the appeal had been taken by him alone, for his exclusive benefit. The result cannot affect the question of right; and they must be viewed in all cases as having remained strangers to the proceeding.

Judgment affirmed.

LRE U. CREDITORS.

FLORANCE v. YORKE et al.

Plaintiff, who had applied for a f. fa. against a defendant, propounded interrogatories to a third person under the provisions of sec. 13 of the stat. of 20 March, 1639, for the purpose of ascertaining whether he had in his possession any real or personal property belonging to defendant, or was in any manner indebted to him. The answers to these interrogatories were traversed, and a rule taken on the respondent to show cause why judgment should not be rendered against him for the amount of the plaintiff's claim. On the trial of the rule objection was made to proceeding until plaintiff declared in writing, specifically, what property he expected to prove to be in possession of the party interrogated; when the court ordered the plaintiff to specify "what real estate or slaves" he intended to prove to be in the hands of the party interrogated, belonging to the defendant. The specifications filed by plaintiff not being considered a compliance, on motion of the party interrogated, the proceedings were dismissed. On appeal: Held, that the only effect of the non-compliance with the order to specify, would be to exclude any evidence as to the subjects embraced by it—real estate and slaves; that in relation to personal property and debts, the order was incoperative; and that the proceedings should not have been dismissed.

Where one, to whom interrogatories are propounded under sec. 13 of the stat. of 20 March, 1839, for the purpose of ascertaining what property he may have in his possession belonging to a defendant against whom an execution has been taken out, objects to the mode of preceeding, he should make such objections appear by exception or plea.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. Carter, for the appellant. Benjamin and Micou, for the defendants. The judgment of the court was pronounced by

Eustis, C. J. The plaintiff having an execution against Edward Yorke, propounded interrogatories to Joshua J. Hanna and Leonard Matthews, under the 13th section of the act of March, 1839, which were annexed to a petition praying that they be cited to answer as garnishees. They answered, and their answers were traversed by the plaintiff, and a rule was granted by the court for the garnishees to show cause why judgment should not be entered against them, for the amount of the original judgment against Yorke. On the trial of this rule, after some testimony was offered for the plaintiff and admitted, an objection was made by the counsel for the garnishee against proceeding further until the plaintiff disclosed in writing the specific property which he expected to prove in the possession of the garnishees which belonged to the defendant; and thereupon the court made an order that, the plaintiff put on file specifications

FLORANCE W.

of what real estate or slaves he intends to prove were in the hands of the garnishees belonging to Edward Yorke. The case was continued, and the plaintiff filed a document which he contends was sufficient in law to apprise the garnishees of the facts which he intended to establish in order to contradict the answers of the garnishees. Additional specifications were afterwards filed to the same effect. On another hearing, the judge being of opinion that the plaintiff had not complied with the order of the court, on motion of the counsel for the garnishees, dismissed the proceedings, and the plaintiff has appealed.

The interrogatories propounded to the garnishees were by no means confined to real esate and slaves belonging to Edward Yorke in their possession, but extended to every description of property, moveable and immovable; and a direct interrogatory is put to them as to their indebtedness to Yorke, all of which are negatived by their answers, and are covered by the traverse of the plaintiff. The petition, interrogatories and specifications, under the case as before us, we must consider as one whole. There is no objection made to this mode of proceeding on the part of the plaintiff by the garnishees, by plea or otherwise, except as noticed. It is obvious that we have nothing before us, except to determine on the sufficiency of the cause for dismissing the proceedings, which the district judge has assigned. The only effect of the order made by the judge, and its non-compliance on the part of the plaintiff, would be to exclude the evidence as to those subjects which it embraced, to wit, real estate and slaves. In relation to personal property and indebtedness the order was inoperative. If the garnishees objected to this mode of proceeding, they ought to have made it appear by exception or plea; and whatever conclusions we might come to, were the question properly presented to us, we are under the necessity of sending the case back, as we think there were no grounds for dismissing the proceedings as they were dismissed, namely, on motion of the counsel for the garnishees, on the ground that said Florance had not complied with the order requiring him to file specifications, &c.

It is to be regretted that a case of this importance should be sent back on a mere question of practice. This mode of reaching garnishees under the law of 1839, has been sometimes practiced; and we think it incumbent on the garnishees, in all cases where they object to it, to put their objections formally on record. This was done in Samory v. Hébrard, 17 La. 559, and Laville v. Hébrard, 1 Rob. 435, in which cases the practice under this act was considered.

The judgment of the district court is therefore reversed, and the case remanded for further proceedings; the appellees paying costs.

HAMPSON v. REYNAUD et al.

Where the certificate of the clerk does not show that the record contains all the evidence upon which the case was tried, and there is no statement of facts, bill of exceptions, or assignment of error, the appeal must be dismissed.

A PPEAL from the City Court of Lafayette, Carrigan, J. Schmidt, for the appellant. Lockett and Micou, contra. The judgment of the court was pronounced by

King, J. The appellees motion to dismiss this appeal must prevail. The only certificate furnished by the clerk is, that the record "contains a full and

HAMPSON'

correct transcript of all the records filed in the case of John Hampson v. Reynaud & Guillet," &c. A former motion was made to dismiss this appeal on the ground of the insufficiency of this certificate, and on the further ground that the petition, proceedings and judgment of the plaintiff, and the execution and marshal's return thereon, were not contained in the record. A certiorari thereupon issued, under which the execution and marshal's return have been brought up. The other deficiencies of the record have not been supplied, nor has the certificate been amended. The judge of the court to which the mandate issued states in his return, that the cause was tried and decided by his predecessor in office; that he is ignorant of the evidence adduced upon the trial; and is consequently unable to certify that the transcript contains all the evidence upon which the cause was tried. He further states that the person who was clerk of that court when the case was tried is out of office, and that the judge himself is now, by virtue of his office, the clerk of the court. This return has been on file for nearly two years, and no further effort to bring the appeal regularly before us has been made. The record contains no bill of exceptions, statement of facts, or assignment of errors. Appeal dismissed.

CLAY v. FISHER.

In an action to recover moveables in defendant's possession, it is sufficient to allege that defendant took illegal possession of the things claimed, and continues to withhold them wrongfully. It is not necessary that the time, place, and manner of the taking possession should be averred.

To acquire property in moveables by the prescription of three years, the party must have possessed as owner. C. C. 3479.

A PPEAL from the City Court of Laylayette, Burthe, J. Burns and Michel, for the plaintiff. Elliott, for the appellant. The judgment of the court was pronounced by

King, J. The plaintiff sues for the recovery of certain articles of moveable property, alleged to be in the possession of the defendant. The defendant first excepted that the plaintiff's petition did not sufficiently set forth the cause of action, and was defective in not having averred the time, place, and manner of his taking possession of the effects claimed. This exception was overruled, and the defendant pleaded the general issue, and the prescription of three years. A judgment was rendered against him, from which he has appealed.

The judge did not, in our opinion, err, in overruling the defendant's exception. The averments that the defendant took illegal possession of the objects claimed, and continued to withhold them wrongfully, are sufficiently distinct and explicit to put the defendant upon his defence, if any he had to oppose to the action.

In order to establish his title to the property by the prescription pleaded, it was incumbent on the defendant to show that he had possessed as owner, by a just title, and in good faith, during the time required by law, in which he has failed. C. C. art. 3472. A short time previous to the institution of this suit, he acknowledged that the property claimed was in his possession, that it belonged to the plaintiff, and that he was ready to surrender it upon being reimbursed a sum of money which he alleged was due to him by the plaintiff.

CLAY P. FISHER.

Thus, from his own admission, his possession was not that of owner, and he has neither averred nor proved that he holds the property in virtue of any title which authorises him to detain it until his alleged claim against the plaintiff shall have been paid; nor, indeed, has he shown the existence of any debt due to him by the plaintiff.

Judgment affirmed.

ROEBUCK v. CURRY.

Where a person of color offered as a witness is objected to as incompetent on the ground of his being presumed to be a slave, and it appears from evidence presented by the party by whom the witness was introduced that he had been emancipated by a notarial act, the witness will not be permitted to testify on the statement of another witness that he had formerly owned the person objected to, and had emancipated him a few years before. The production of the written act of emancipation, if insisted on by the opposite party, could not be disposed with, nor be supplied by secondary evidence without proof of the loss or destruction of the written instrument.

A PPEAL from the First District Court of New Orleans, McHenry, J. J. M. Wolfe, for the plaintiff. Budd and Redmond, for the appellant. The judgment of the court was pronounced by

KING, J. This action is instituted to recover damages for injuries alleged by the plaintiff to have been inflicted on her slave, by a slave belonging to the defendant. From a judgment rendered in favor of the plaintiff, the defendant has appealed.

On the trial below the plaintiff offered Thomas Burns, a person of color, as a witness, who being objected to as incompetent to testify, his testimony was excluded until evidence could be adduced of his freedom, and time was allowed to make this proof. A certificate was next offered, stating that Burns had been emancipated by an act passed before Louis T. Caire, a notary public in this city, which was also objected to, and excluded by the judge. A witness was then introduced who deposed that he had formerly owned Thomas Burns, and that he had liberated him about three years previously. Upon this evidence of his freedom the witness was permitted to testify, the defendant objecting and excepting to the opinion of the judge.

We think that the judge erred. Burns had been held in slavery, and, except in the criminal cases specially provided for by law, could only be heard as a witness on producing evidence that he had been liberated; the evidence of that fact, if it really existed, was shown to be in writing, and its production, when insisted on by the defendant, could not be dispensed with, nor supplied by secondary evidence, without showing the loss or destruction of the written instrument. The failure to produce the act of emancipation, which was stated to be within the immediate reach of the plaintiff, after time had been allowed for that purpose, leaves room to suspect that the instrument relied on, if produced, would not have established the liberty of the witness. In the absence of the testimony of this witness, there is no proof that the alleged injuries were inflicted by the slave of the defendant.

The judgment of the district court is therefore reversed. It is further ordered that the cause be remanded for a new trial, with instructions to the district judge not to permit Thomas Burns to testify therein until legal proof of his emancipation shall have been produced. It is further ordered that the plaintiff pay the costs of this appeal.

ROEBUCK V. CURRY.

THE BANK OF CHARLESTON v. HAGAN.

Defendant appointed an attorney by an instrument, under seal, in these words, which was delivered to the Bank of C.: "I hereby constitute M my true and lawful attorney, for me and in my name to draw, endorse, or accept any bills of exchange, promissory notes, drafts, checks, for any sum or sums of money whatever; also to receive from the Bank of C. all moneys that may from time to time be due me by said bank, whether for dividends or otherwise, and for the same to execute all requisite acquittances; also to receive all presentments, demands, protests, and notices, in relation to any notes, bills or negotiable instruments, which may at any time be in possession of said bank, whether discounted or lodged for collection, upon which I am or may be chargeable, in the same manner as I would do, if personally present: and I do agree that the powers above granted shall be exercised, and that this instrument shall continue in full force, until revoked by some other written instrument, and until notice of such revocation shall have been delivered in writing to the cashier of the said bank; and lastly, I do hereby, for my heirs, executors, and administrators, jointly and severally, covenant and agree with the said Bank of C. and their assigns, that notwithstanding the death of me, or of any of us, every act, matter and thing, which shall be done in virtue of any part of these premises before notice of such death shall have been received by the said bank, shall be valid and binding, and shall charge my heirs, executors and administrators, jointly and severally, to the same extent as though such death had not occurred; and from all and every damage or loss to arise from any such act, matter, or thing, I do hereby bind myself, my heirs, executors and administrators, jointly and severally, to indemnify and fully save harmless the said bank and their assigns." M having made several notes in his own name, endorsed them as the attorney in fact of the defendant, and in his own name as last endorser. The notes were discounted by plaintiffs, and the proceeds received by M, who absconded, leaving them unpaid. In an action against defendant as endorser: Held, that this instrument is a contract between defendant and the Bank of C., and not a naked procuration to M; that the endorsement was binding on defendant; that if it had been intended to confine the power to defendant's own business, there would have been some words of limitation; and that there is nothing in the rule that an agent cannot act so as to bind his principal where there is an adverse interest in him, which could prevent M from binding the defendant by the endorsement.

A PPEAL from the First District Court of New Orleans, McHenry, J. The facts of this case are stated in the opinion of the court infrd.

Schmidt, for the plaintiffs. The power of attorney is general in its nature, and authorised McDonald to draw, endorse, or accept any bill or note, for any sum or sums. There is no prohibition to McDonald to endorse his own notes, and courts cannot supply the limitation. The doctrine that an agent cannot act as such in a transaction in which his interest or employment is adverse to that of his principal, applies exclusively to factors and brokers, and other agents entrusted with the purchase and sale of property. The case of Florance v. Adams, 2 Rob. 556, differs essentially from this; there the power only authorised the agent to make and endorse notes for the use of the principal. See Addison on Contracts, pp. 146, 147, 168. 6 Amer. Jurist, pp. 2, 4.

Roselius, for the appellant. McDonald had not the legal capacity to endorse his own notes, for his own benefit, with the name of Hagan. Pothier's Pandects, lib. 17, tit. 1, no. 10. Pothier, Mandat, no. 14. 18 Duranton, nos. 206, 208, pp. 200, 202. Story on Agency, no. 210 to 214, p. 246; nos. 9, 10, p. 11. Story's Equity Jurisprudence, vol. 1, p. 338 et seq.; no. 315 et seq. 3 Chitty's Comm. Law, p. 216 et seq. Paley on Agency, pp. 10, 11, 33, 37.

BANK OF CHARLESTON W. HAGAN. Livermore on Agency, p. 416 to 433. Church v. Marine Ins. Co. 1 Mason's R. 341. Parkhurst v. Alexander, 1 Johnson's Ch. R. 394. Shepherd v. Perry, 4 Mart. N. S. 267. Copeland v. Merchants' Ins. Co. 6 Pickering, 198. Beal v. Keernan, 6 La. 407. Michoud v. Girod, 4 Howard's R. 552. Florance v. Adams, 2 Rob. 556. It is contended that the power of attorney contains a mercantile guaranty. Even if it did, the bank could not recover under whe evidence in this case, as no notice is shown to have been given to Hagan that the bank had acted on this pretended guaranty; and without such notice no action can be maintained against the guarantor. Edmondston v. Drake, 5 Peters 624. Douglass v. Reynolds, 7 Ib. 113. Lee v. Dick, 10 Ib. 482. Adams v. Jones, 12 Ib. 207. Reynolds v. Douglass, 12 Ib. 497.

Micou, on the same side.

The judgment of the court was pronounced by

EUSTIS, C. J. This suit is brought to make the defendant liable as endorser, on four promissory notes, amounting to \$6,150, which had been discounted by the Bank of Charleston. They were made by Alexander McDonald to the order of the defendant, bore date in the month of July, 1846, and were payable thirty days after date, at the bank; they were renewals of notes of the same parties, all originating within the year 1846. They were endorsed by McDonald, as the attorney of the defendant, and bore, as the last endorser, the signature of McDonald, who absconded, leaving the notes unpaid. There was judgment for the bank, and the defendant has appealed; and the argument for the defence has been principally directed to the want of authority on the part of McDonald to bind the defendant by his endorsement on these notes, as his attorney in fact.

The copy of the power of attorney offered in evidence is in print, and we think we are authorised by that fact, taken with the testimony of Alexander Hagan, a witness examined on the part of the defendant, in considering it as in the form of powers of attorney generally used at the bank. It is in these words:

"STATE OF SOUTH CAROLINA.

"Know all men by these presents, that I, John Hagan, do hereby ordain, constitute and appoint Alexander McDonald, Esq. of Charleston, my true and lawful attorney, for me and in my name to draw, endorse or accept any bills of exchange, promissory notes, drafts, checks, for any sum or sums of money whatsoever; also to receive from the Bank of Charleston, South Carolina, all moneys that may from time to time be due me by the said bank, whether for dividends or otherwise, and for the same to execute all requisite acquittances; also to receive all presentments, demands, protests, and notices in relation to any notes, bills or negotiable instruments, which may at any time be in possession of the said bank whether discounted or lodged for collection, upon which I am or may be chargeable, in the same manner as I would do, if personally present. Also, an attorney or attorneys under him for all or any of the aforesaid purposes from time to time to constitute and appoint, and the same to displace or remove, and others again to appoint and remove as often as he shall see fit; and all these acts to do as fully and effectually as I the constituent could, if personally present; hereby agreeing to ratify and confirm all the said attorney or my attorneys shall lawfully do in virtue of these presents. And I, the said constituent, do agree that the powers above granted, shall be exercised, and that this instrument shall continue in full force until revoked by some other written instrument, and until notice of such revocation shall have been delivered in writing to the cashier of the said bank; and lastly, I, the said constituent, do hereby for my heirs, executors and administrators, jointly and severally cove-

BANK OF CHARLESTON P. HAGAN.

nant and agree, with the said Bank of Charleston, South Carolina, and their assigns, that notwithstanding the death of me, the said constituent, or any of us, every act, matter and thing which shall be done in virtue of any part of these presents, before notice of such death shall have been received by the said bank, shall be valid and binding, and shall charge my heirs, executors and administrators, jointly and severally, to the same extent as though such death had not occurred; and from all and every damage or loss to arise from any such act, matter or thing, I do hereby bind myself, my heirs, executors and administrators, jointly and severally, to indemnify, and fully save harmless the said bank and their assigns. In witness whereof, I have hereunto set my hand and seal, this twenty-second day of October, in the year of our Lord one thousand eight hundred and forty-one.

John Hagan.

" Sealed and delivered in the presence of

"W. E. HAYNE, JR."

The original of this power of attorney was filed in the bank, and under its authority McDonald repeatedly endorsed his own notes, with the defendant's name, during the years 1841, '2, '3, '4, '5 and '6. The residence of the defendant was in New Orleans, where he was engaged in the business of selling slaves. He spent two or three weeks in Charleston every summer, on his way to Virginia, and passed through there on his return, his stay then being generally short. The defendant had business transactions with McDonald, and their intercourse was apparently friendly and intimate.

It is contended for the defence that, by the power of attorney, McDonald was only authorised to make and endorse notes in the name of the defendant for the business with which McDonald was entrusted by him, and not to endorse his, McDonald's, own notes; and it is conceded that the notes sued on were made and discounted for the accommodation of McDonald. Concerning the business of the defendant, with which McDonald is said to be charged, the power of attorney is silent, except as relates to the drawing, endorsing, and accepting bills of exchange, promissory notes, drafts and checks, receiving money due by the bank for dividends or otherwise, and demands and notices in relation to bills and notee held by the bank. The instrument contains no authority to McDonald to administer, manage, or interfere with the defendant's affairs, either generally, or in any particular case or contingency. There is nothing in it from which any such authority can be implied. Even the authority to borrow money, or raise funds for his use, is not substantively given, but rests exclusively upon the clause just referred to, which must be considered as containing the purpose and object of the powers, since none other is declared or even intimated.

The object of the power being thus to enable McDonald to use the defendant's name and credit in this form, the question is whether McDonald could use them for his own benefit, as he has attempted to do in the case before us; and if any thing short of express words to that effect could authorise it, they must be embraced in the very comprehensive terms in which the power of attorney is couched—to draw, endorse, or accept any bills of exchange, promissory notes, drafts, checks, for any sum whatever. The clauses by which McDonald should receive all demands, notices, &c. respecting negotiable instruments which might hereafter be held by the bank, on which the defendant should be chargeable; that the bank should not be affected by any revocation of the power, until notice of such revocation should be notified in writing to the cashier;

BASE OF CHARLESTON U. HAGAN. that the death of the constituent should not operate as a revocation of the power before notice of the death should have been received by the bank; and that his succession should be charged with all acts done under the power subsequent to the death and previous to the notice to the bank, provisions which the laws prevailing in the State of South Carolina may have rendered necessary, and the clause of indemnity at the conclusion of the power, appear to us to contain direct and formal covenants for the benefit and protection of the bank in its business to be done by virtue of this power. The last clause is to save harmless the bank, and its assigns, from all and every damage or loss, to arise from any such act, matter or thing. The relation of those general terms to the antecedent clause, or to the whole power, may be questionable; but that it contains a substantive agreement between two contracting parties, is not to be denied.

From the purport of this instrument it is evidently a contract between the defendant and the Bank of Charleston, and not a naked procuration to McDonald. The original, which is a deed under seal, was delivered to the bank, to which delivery the defendant must be considered as a party. The object of it related to the obligations of the defendant resulting from the paper which McDonald should endorse or draw in his (Hagan's) name, and the terms used are general both as to its character and amount, and only limited as to its form. If it was to be confined in its use to the defendant's own business, there would have been some words of limitation; something from which such an inference would result. With the usual language in which these instruments are clothed we are not unfamiliar, and when we consider that it is a contract between two parties in the relative position of the plaintiffs and the defendant which we are to expound, we cannot consider that the endorsement of McDonald's own notes was excluded from the power given to him. The words for me and in my name to draw, &c., without any terms of restriction whatever, or any other power implying restriction, are, in our opinion, insufficient to create it. They rather refer to the manual act of writing by substitution, in place of personal presence.

We have considered with great care the several decisions to which we have been referred by the counsel for the defendant. They are all cases arising under powers of attorney, and we have seen none in which the power was a substantive part of a direct contract with a third person, as in the present instance; and we find in all that the power was given for the conducting of some business for the principal, which imposed on the instrument the construction that the power was to be used for his benefit alone.

It is very difficult to attempt to fix or follow in the administration of justice any general rule of construction, which shall extend to every possible case in relation to any class of instruments of so general use and of such variety. The mode in which a power is to be executed as indicated by the instrument itself is an index to the purpose for which it was given, which must always be the guiding principle in determining its extent. The difference between a power to transact the business of the principal, which undoubtedly operates as a restricting clause in a letter of attorney, however general the other terms may be, and the contract under consideration between the plaintiffs and the defendant, appears to us so obvious, as to place the latter entirely out of the operation of those salutary rules which are recognised as limitation upon the authority of agents acting under a written authority from their principals.

It is urged on behalf of the defendant that, to hold him bound by theselen-

BANK OF HAGAN.

dorsements of McDonald, would conflict with the rule that, in matters of agency the agent cannot act so as to bind his principal where there is an adverse interest Charleston in him, as in the case of an agent employed to sell he cannot himself become the purchaser, and one employed to buy cannot himself be the seller. Independent of the construction which we think the power of attorney carries with it, we de not consider the rule as applicable to the case before us, in which there was, a contract between the defendant and the bank, which was completed on the discount of the notes. The accommodation notes made by McDonald in favor of Hagan, and endorsed by him as agent, created no obligation between the two parties. Accommodation notes do not bind parties in the form in which they are made; no action can be maintained on them by virtue of the instruments themselves. They are mere fictions-fabrications of credit, by which the parties hold themselves out by their signatures to be absolutely bound to every person who shall take them for value, in the usual course of business. Vide Chitty on Bills, 6. Bell, Law of Scotland, § 346. There was no contract made in this case until the notes were discounted by the bank, and the authority of McDonald to bind the defendant still rests upon the power of attorney; and the question is, whether this mode of raising money, by fictitious credit in this form with a bank, is included in it. That a large portion of the discounts of banks is made upon notes and bills on the faith of the signatures alone, and without reference to their origin or consideration, is a fact which we feel ourselves authorised in assuming. We think that there is nothing in the rule of law relied upon, which prevented McDonald from binding Hagan to the bank by his endorsement. The case of Florance v. Adams, cited by counsel, we consider not applicable to the state of facts which this case presents.

The bank is charged with having connived at and participated in the fraud of McDonald in discounting the notes; of this we have no evidence. It is, said that the bank kept the defendant in ignorance of what was done by Mc-Donald. Without remarking on the difficulty of such conduct on the part of a public institution with which the defendant had business, and during a series of years, there is nothing before us from which the fact of ignorance on the part of the defendant of the use of his name by McDonald on his own notes can be inferred, when the relations between the parties are fully considered. It is stated in argument that in order to lull the suspicion of Hagan more effectually, the following certificate was issued on the 23d July, 1845:

"Dear Sir.-Upon examination, we find that neither John, or Alexander Hagan individually, or as a firm, are upon any paper in this bank. Bank of Charleston, S. C. A. Moise, Jr., Ass. Cashr.

"July 23, 1845.

" To ALEXANDER McDonald, Esq."

This certificate was given by Moïse to McDonald. The only note of Mc-Donald bearing the names of John or Alexander Hagan, then running in the bank, was one for \$2,600, due the 26-29th July, 1845, which McDonald paid in advance, on the 23d, before obtaining the certificate. We find nothing in the reasons assigned by McDonald on application for the certificate, which could create distrust in his good faith or solvency. Bearing in mind that, since October, 1841, McDonald had been in the habit of borrowing large sums of money upon his own notes, endorsed by him in the name of the defendant under the power of attorney, as late as 1845; and that, in the months of May, June, July of that year drafts were discounted at the bank belonging to Hagan, and the

BANK OF CHARLESTON E. HAGAN. proceeds passed to the credit of McDonald, and two of them were negotiated on the 24th July, the day after the date of the certificate, we proceed to consider it.

This certificate was to make known to the defendant, what? Whether his name was upon the paper of McDonald in the Bank of Charleston. Had he endorsed McDonald's paper himself? This is not shown or pretended. How then could his name be upon McDonald's paper in that bank, except under the power of attorney lodged there? This circumstance, so far from establishing an artifice on the part of the bank, points to the conclusion that the power had been heretofore used in endorsing McDonald's notes to the knowledge of the defendant, and the certificate was to ascertain for what sum, if for any, his name was on the paper at that time. It furnishes a key to the true intent of the power of attorney. If the defendant had suspected McDonald to be capable of abusing the trust confided in him, would he not have revoked the power? The certificate relates to the present time, not to the past, and its production is sertainly evidence that the state of facts which it disaffirms might exist. suspicion of the defendant related to what he considered an abuse of his confidence, the certificate, if required at all, would not have been satisfactory, unless it contained evidence that McDonald had not so used his name in the bank, of which fact it contained no proof whatever. This circumstance of the certificate, and its terms, indicate an enquiry into the use, and not the abuse, of the power by McDonald and the bank.

On a demand for payment of these notes, the defendant declined making any offer of settlement until he could ascertain the extent of his liabilities from the acts of his uncle. This is testified to by the person who was the agent of the bank, and is uncontradicted. The witness entertained no doubt of being able to make a settlement, until the matter was referred by the defendant to his counsel.

We alluded to the testimony of Alexander Hagan in relation to the power of attorney used at the bank. It is not without importance in elucidating the object for which it was given. In his answer to a cross-interrogatory propounded by the plaintiffs, among other things, he states: "I gave McDonald a power of attorney in 1841; it was in the form used by the Bank of Charleston for such instruments, and was to enable him to draw a note in my name in the event of his wanting money during my absence. I went to New Orleans immediately afterwards. Hugh McDonald had died shortly previous, in June, or July, 1841, and up to his death Alexander McDonald had held a similar power given by said Hugh McDonald. The witness is the brother of the defendant, and the nephew of McDonald, and is the person whose name is mentioned in the certificate. which was shown to him and the defendant by McDonald, at the same time and on the day on which he procured it. The witness returned to Charleston in 1842, and frequently asked McDonald whether he had used the power, and McDonald always denied having used it. The witness states that the defendant had no knowledge of McDonald's having used his power of attorney; that he, the witness, heard the defendant, from time to time, from its being given up in July, 1846, make enquiries if he had exercised the power for any purpose, to which McDonald always replied in the negative. The defendant and McDonald settled accounts on the 28th July, 1846, and the balance due by him to McDonald, \$5,079 50, was paid by the check of the witness, who had business transactions with the defendant growing out of a shipment of

slaves to New Orleans, and their sale on commission by the defendant. Mc
Donald absconded three days after the settlement, on the 31st of July. The Charleston

power was revoked on the 13th of August.

HAGAS.

The construction we have given to the power, and the facts connected with the use made of it, concur.

Judgment affirmed.

HAGEDORN et al. v. St. Louis Perpetual Insurance Company.

If freight be not earned in consequence of events not attributable to the shipper, any advance made on it must be returned, unless there be an agreement to the contrary.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Bradford, for the plaintiffs. Hunton, for the appellants. The judgment of the court was pronounced by

Eustis, C. J. This is an action brought by the plaintiffs, as assignees of a policy of insurance for \$1,600, or charter party, of the schooner Planet, from New Orleans to Barita, via the Havana. There was judgment for the plaintiffs, and the defendants have appealed.

The judge of the Fourth District Court of New Orleans, who tried the cause, considered that there was no substantial defence to the action, and gave his reasons in writing for his opinion, which, on a motion for a new trial, at the instance of the counsel for the defendants, were reconsidered by him without producing any change in his original views of the case. In these views we concur.

It is contended that the insurable interest in the owner of the schooner, for whose benefit the insurance was made, was diminished by the receipt of \$800 advance on the freight made by the plaintiffs, who were the charterers in New Orleans, and that that sum must be deducted from the amount due on the policy. We are satisfied that it was merely an advance on the freight, and not an absolute payment to be retained at all events: and if the freight be not earned by events not attributable to the shippers, it must be returned, unless there is an agreement to the contrary. After the cases of Watkins v. Duykink, 3 Johnson, 335, and Griggs v. Austin, 3 Pick. 22, the law on this subject must be considered as settled.

Judgment affirmed.

OAKEY v. GARDINER.

The assignee of a bankrupt is not obliged to take property of the bankrupt which will be a charge to the creditors—as an hereditas damnosa, or a litigious right, the sale of which will involve the estate in fruitless litigation.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Benjamin and Micou, for the appellant. H. D. Ogden and Most, for the defendant. The judgment of the court was pronounced by

OAKET V. GARDINER.

EUSTIS, C. J.* On the 5th of September, 1842, in New Orleans, Henry S. Buckner applied for the benefit of the bankrupt act for his own debts; and, as a member of the firm of Buckner, Stanton & Co., of New Orleans, Stanton, Buckner & Co., of Natchez, M. B. Hamer & Co., of Yazoo City, was declared a bankrupt, and an assignee was appointed to his estate. The members of the firms were Frederic Stanton, of Natchez, Henry S. Buckner, and M. B. Hamer, of Mississippi, who died previous to the bankruptcy. On the schedule filed by Buckner of the assets of the partnership of Buckner, Stanton & Co., was a claim against G. G. Skipwith, of the parish of Carroll, set down as amounting to \$3,259 55, balance on note in the hands of Yerger, which, with several other claims, was purchased by the defendant, at the public sale of the bankrupt's effects, in June, 1844. Stanton had, in November, 1842, individually, and as a member of the firms before mentioned, been declared a bankrupt by the bankrupt court of Mississippi, and an assignee was appointed to his estate. After the sale of the claim to defendant, Stanton's assignee formally relinquished in his favor all right and interest in the assetts of Buckner, Stanton & Co., purchased by him. On the discovery being made that this claim had passed into a judgment against Skipwith in the United States Circuit Court of Tennessee, by order of the bankrupt court of New Orleans, the assignee of Buckner executed a formal transfer of the judgment to the defendant, on the 25th March, 1845; all of which was notified to the debtor, Skipwith.

Subsequently the aforesaid judgment was sold by Stanton's assignee in Mississippi to the plaintiff, at the sale of the bankrupt effects, under the description of "Judgment of M. B. Hamer & Co. against G. G. Skipwith," giving its date, amount, etc., and the court in which it was rendered. This judgment is the subject of controversy between the plaintiff and defendant in the present suit. The district judge decided in favor of the defendant, and the plaintiff has appealed.

We concur in the view of the district judge of the rights of the parties. The debt we think belonged of right to the house of Buckner, Stanton & Co., of New Orleans, and was properly sold for the benefit of their creditors. The extent of the interest acquired by the purchaser it is unnecessary to examine. Any interest which Stanton had in it we think his assignee was competent to release, and in so doing he acted in discharge of his duty. The decree of the bankrupt court in New Orleans, ordering the formal transfer of the judgment to the defendant, was rendered contradictorily with the assignee, and evidence it appears, was adduced in relation to the rights of the former, and the judgment, though in the name of M. B. Hamer & Co. was ordered to be transferred to the defendant under his purchase at the marshal's sale of the effects of the bankrupt. Thus, as far as the power of that court under the bankrupt proceedings extended, the right to this judgment was vested in the defendant. Bankrupt Act, § 6.

The assignee of Stanton, so far from having any interest in disturbing this purchase, acted, we think, discreetly, in releasing any interest he might have in it. The proceeds of the sale were to be applied under the bankrupt law to the extinguishment of the partnership debts, at the domicil of the partnership in New Orleans. Any interference with this disposition of the assetts of Buckner, Stanton & Co., to defeat or embarrass this application, would have been

^{*} SLIDELL, J. did not sit in this case, having been of counsel.

OAKEY

GARDINER.

rather a burthen than a benefit to Stanton's estate, and we think the assignee had an undoubted right to release the interest. Turner v. Richardson, 7 East, 339. Assignees of a bankrupt are not obliged to take property of a bankrupt which will be a charge to the creditors—an hereditas damnosa, or a litigious right, the sale of which will involve the estate in fruitless litigation and embarrass the rights of bond fide creditors, and which their interests require should be extinguished.

The defendant having thus acquired the judgment, we think his rights could not be affected by the subsequent sale of it to the plaintiff.

Judgment affirmed.

HEPBURN et al. v. THE CITIZENS BANK OF LOUISIANA.

An entry made in a bank-book of a certain amount to the credit of the depositor, if made at the time of the deposit, by a clerk authorized to make the entry, in the absence of proof of any fraud or collusion between the clerk and the depositor, is conclusive on the bank, which will be estopped from alleging that the entry was erroneously made; but where the book is written up afterwards, the entry is not an original one, and may be examined into. Where two witnesses, of unimpeached veracity, contradict each other, the presumption of truth is in favor of the one who swears affirmatively.

PPEAL from the Fourth District Court of New Orleans, Kennedy, J., A presiding. Sigur and Bonford, for the plaintiffs. Pitot, for the appellants. The judgment of the court was pronounced by

Rost, J. This suit is brought for the recovery of the sum \$2,230 73, a balance on State bonds alleged to have been deposited by the plaintiffs with the defendants, and of a farther sum of \$1,081 07, for interest on unmatured coupons, alleged to have been due at the time of the deposits. The defendants deny the claim for interest; and further allege that, on the 29th of April, 1845, an entry was made, by their clerk, through error, in the bank-book of the plaintiffs, of a series of bonds amounting to \$2,222 20, which series had been deposited by Peschier & Forstall, on whose bank-book no entry was made, and that said credit belongs to them. The defendants acknowledge their indebtedness to the plaintiffs for the sum of \$32 56, which they tender, and pray that the entry alluded to be declared null and void. The court of the first instance allowed the claim of the plaintiffs on the deposit of the bonds, and rejected their claim for interest. The defendants have appealed; and the plaintiffs ask that the judgment be amended in their favor, and their claim for interest allowed.

In the case of The Mechanics and Traders Bank v. Banks, 11 La. 260, the Supreme Court held that, a bank is bound for the amount entered as a deposit on a bank-book to the credit of the depositor, by any clerk authorized to make the entry, where there is no evidence of fraud or collusion between the clerk and the depositor. This decision goes far to recognize the doctrine that, unless fraud is alleged and proved, the defendants are estopped from alleging error. The rule thus laid down would however be too general, and we think that the distinction taken in the Manhattan Bank v. Lydig, 4 Johns. 389, meets the equity of the case. "If the dealer's book," says Justice Spencer, "accompanied the deposit, and the credit be then given when the deposit is made, it HEPSURN V. CITIZENS BANK

the book is sent to be written up afterwards, it is not an original entry and may be examined into." In this case, by a previous agreement, the book remained in bank; the credit was not given at the time of the deposit of the bonds, and in presence of the depositor. We are therefore of opinion that the error alleged may be examined into. Absolute presumptions often work injustice, and should be restricted to the cases expressly provided for their application.

In the contract which the entry in the bank-book created between the plaintiffs and the defendants, the latter allege error as to the person with whom they contracted, and say that they intended to bind themselves to Peschier & Forstall, from whom the consideration of the contract had been received. It was incumbent upon them to substantiate that allegation by proof. The evidence adduced did not satisfy the mind of the judge of the court below, and in questions so peculiarly within his province we would not feel authorized to differ from him, unless the judgment was manifestly contrary to evidence.

The error is first attempted to be proved by the order in which the credit stands on the books of the bank, and by its connection with previous and subsequent transactions. The irregularity and gross neglect which has given rise to this controversy, and the fact, that the books of the bank show on their face other errors made at the time of those entries, renders this kind of evidence of very little value; and the present appearance of the books is far from establishing the fact that, the transactions they record were made in the order in which they are entered. One of the clerks of the defendants states that, one of the plaintiffs told him that, on the 1st April, 1845, he was out of bonds, and that all those he had since acquired or deposited in bank were obtained from the houses of Albert and A. Lanfear & Co. Upon that admission the defendants obtained from those two houses a list of the bonds delivered by them to the plaintiffs. They obtained also from the plaintiffs a list of the bonds they had sold during that time; and this clerk testified that he examined the memoranda of bonds sold by Lanfear & Co. and by Albert to Turpin, and a memorandum of the series sold by Hepburn & Turpin, and also the entries made in the name of Hepburn & Turpin of bonds deposited by them in bank; and that upon that examination he found that the plaintiffs had sold and deposited from the 1st to the 30th April, ten bonds more than they had received.

But the credit alleged to have been given in error was for five bonds only, and the identity of the other five bonds with a series purchased by the plaintiffs from Shiff, is not placed beyond doubt; if it was, the list of bonds sold by the plaintiffs, given in evidence by the defendants, shows that after identifying all the bonds contained in the lists of Albert and Lanfear & Co., ten bonds still remained in their possession. These bonds are unaccounted for, and corroborate the testimony of Henlin, the clerk of Lanfear & Co., who states that the list furnished by that house did not contain the cash transactions; that the house several times sold Citizens Bank funds to the plaintiffs for cash, and that in such cases no entry was made to the debit of the plaintiffs, those sales being entered as cash sales.

Besides this most uncertain and unsatisfactory evidence, the clerk of the bank, who made the entry, swears that the plaintiffs deposited no bonds during the day on which it was made; but the clerk of the plaintiffs swears positively that they did. The truth or falsehood of their declarations, and one of the two

must be untrue, rests between God and their consciences. The veracity of Herburn neither is impeached, and the court below correctly considered that the pre-Chargens Bank sumption of truth is in favor of the witness who swore affirmatively. 1 Starkie, p, 516, sec. S2.

The books of the plaintiffs appear to have been at all times open to the inspection of the defendants. The defendants might have had them brought into court, if they had deemed it to their advantage. They might have availed themselves of the testimony of Mallard, who posted them up after the occurrence of these transactions; and, as a last resort, they might have put the case to the conscience of their adversaries, by requiring one or both of them to answer interrogatories in open court. They were bound to make out their case, and this litigation cannot be indefinitely protracted because they have neglected some of the means they had of doing so. The course they have pursued may have been adopted after mature deliberation; and, as the case is before us, the plaintiffs must have judgment for the amount of the deposits entered upon their bank-book.

There is no error in that part of the judgment refusing the interest claimed. The bank has never allowed interest on coupons not matured, except during the month of January, 1844. The plaintiff's account with the bank had been open before that time, and they were credited with interest on the coupons deposited in that month only. They were repeatedly told by the officers of the bank, that previous to that month and afterwards no interest would be allowed. When that allowance was made they did not claim interest on coupons deposited prior to its date, and they have continued since to deal with the bank. Their accounts have often been balanced without a claim for interest having ever been made, before the institution of this suit. Without enquiring, therefore, into the absstract legal rights of the plaintiffs, and the manner in which interest accrues on obligations, we are satisfied that the arrangement entered into between the plaintiffs and the defendants in relation to these bonds, was made with the tacit understanding between them that no interest should be charged before the maturity of the coupons. Judgment affirmed.

JONES v. ELLIOTT.

Where in an action by the holder of a note, not endorsed by the payee, plaintiff alleges that he is the owner, the allegation of ownership sufficiently implies a transfer to authorise the admission in evidence of a notarial act of transfer and subrogation by the payee to the plaintiff.

A PPEAL from the District Court of Jefferson, Clarke, J. Michel and Burns, for the appellant. F. B. Conrad, for the defendant. The judgment of the court was pronounced by

EUSTIS, C. J. This is an action against the maker of a promissory note brought by the plaintiff, who charges that he is the holder and owner of it. It is not endorsed by the payee. On the trial of the cause the plaintiff offered to prove his ownership of the note by a notarial act of transfer and subrogation, made by the payee to him. The judge refused to receive this evidence, on the

JONES C. ECLIOTY. ground that there was no allegation in the petition of any transfer of the nete, and non-suited the plaintiff, who has appealed. The allegation of ownership sufficiently implies the transfer of the note to the plaintiff. We are of opinion the judge erred in refusing to admit the evidence offered.

It is therefore ordered that the judgment appealed from be reversed, and the case remanded, with directions to the district judge to receive in evidence the notarial act offered by the plaintiff, and that the appellee pay the costs of appeal.

THAYER et al. v. Tudor.

One who owns real estate in this State specially mortgaged to secure the payment of a note, and is not represented by any agent authorised to defend suits instituted against him, may be sued, for the purpose of subjecting the mortgaged property to the payment of the debt by the appointment of a curator to represent him; and a judgment rendered contradictorily with such curator will be binding on the absence, as far as it can be executed on the property specially affected in favor of the creditor. Such judgment can have no effect beyond the property mortgaged.

It is not necessary that a curator appointed to represent an absentee in a suit should be sween.

One who has accepted the appointment of curator to represent an absent defendant, cannot afterwards resign his trust so as to defeat the action of the plaintiff. The court may, in the exercise of its discretion, discharge him for sufficient cause; but until thus relieved he is bound to defend the action

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. Benjamin and Micou, for the plaintiffs. C. T. Stewart and Bonford, for the appellant. The judgment of the court was pronounced by

King, J. The plaintiff instituted this action to recover the amount of two promissory notes executed by the defendant, and secured by a mortgage passed in Boston, bearing upon property of the defendant in this city. Both the plaintiffs and the defendant are residents of Massachusetts. The plaintiffs in their original petition alleged, that Bosworth was the agent of the defendant in this State, and prayed that the defendant be cited by service on his agent. Bosworth declared under oath that he was not the agent of the defendant for bringing or defending suits, and was unauthorised to defend this action. The plaintiffs then presented a supplemental petition, alleging that Charles R. Green was the agent of the defendant, and praying that Green be appointed curator ad hoc to represent the absent defendant, and that he be cited both as agent and curator. Green was subsequently shown not to be the agent of the defendant; he was, however, appointed curator ad hoc in conformity to the plaintiffs' prayer, accepted the appointment, and thirty days were allowed him to correspond with the defendant. At the expiration of that delay he tendered his resignation of the trust, stating that he had advised the defendant, by letter, of the institution of this suit, and of his appointment, and requested to be informed of the defences to be made to the action, but that he had received no answer. He further stated that he was not an attorney; that the suit was an important one, and that he was unwilling to assume either the responsibility or expense of defending it, without express authority to that effect. This resignation was not ac-

cepted by the judge. A default was entered, and, after the legal delays and THATER due proof made of the demand, a final judgment was rendered in favor of the plaintiffs, from which the defendant has appealed.

The only question presented is, whether the defendant was properly cited and represented in the cause. It is assigned as error that a curator ad hoc to represent the defendant was illegal, as no writ of attachment had issued against the property of the defendant, in the absence of which no proceedings binding upon him could be had contradictorily with a curator ad hoc. It is further objected that, no oath was administered to Green as curator, and that he had tendered the resignation of his trust and ceased to be curator, before either the rendition of the final judgment, or the entry of the default.

The facts of this case, in our opinion, clearly authorised the appointment of a curator ad hoc to represent the defendant. The defendant owned property in this State, which gave jurisdiction to the court; that property was specially mortgaged to secure the payment of the notes on which the action was founded, and the defendant was unrepresented by an agent authorised to defend suits instituted against him. He belonged strictly to the class of absentees, who may be brought before our courts through curators; and for the purpose of subjecting the mortgaged property to the payment of the debt, a jugdment rendered contradictorily with such curator is valid and binding upon the absentee, as far as it can be executed upon the property thus specially affected in favor of the creditor. In the case of Millaudon v. Beazley, lately decided (ante p. 916), substantially the same question arose which is now presented. We then held that, a creditor could proceed to enforce his mortgage upon the property subject to it, by causing the mortgagor, who was an absentee, to be represented by a curator ad hoc. A judgment, however, rendered in such a proceeding must be restricted in its operation exclusively to the property mortgaged, beyond which it can have no effect, and can possess none of the attributes of a judgment in personam. Dupuy v. Hunt et al., ante p. 562.

The position assumed that the curator should have been sworn, is untenable. Neither the provisions of the Civil Code nor the Code of Practice contemplate, that the curator appointed to represent an absent defendant in a pending litigation is to take an oath for the faithful discharge of his duties. The 52d article of the Civil Code, which it is contended requires such an oath, refers to the curators spoken of in the two preceding articles, who are appointed to administer the property of absentees. These are expressly required to be sworn. The 57th article provides for the further contingency of judicial proceedings being instituted against the unrepresented absentee, and directs that in such cases the court shall appoint a curator ad hoc, whose duties are limited to the defence of the suit for which he is specially appointed; but neither that article, nor the corresponding articles of the Code of Practice, require that he be sworn. C. P. 116, 964. The curator, having accepted the appointment and acted under it, was not at liberty to resign his trust so as to defeat the action of the plaintiff. The judge, in the exercise of a sound discretion, could have discharged him upon sufficient cause shown, but until thus relieved he was bound to defend the suit. The plaintiffs had the legal right to provoke the appointment of a curator, whose intervention in the suit was indispensable in obtainining a judgment, and to insist upon his continuing to act until the ends of his appointment were accomplished. If a curator could, at will, withdraw from a cause, then it would, at all times, be in his power to defeat the plaintiff's

THAYER

action, by depriving him of the means expressly granted to him by law, for bringing his debtor into court, and proceeding to judgment against him. We cannot recognise the right of the curator, who has accepted the appointment, thus to withdraw and defeat the purpose of the law and the rights of the creditor. The resignation tendered was not accepted by the judge, and the defendant was properly represented in the cause when the judgment was rendered against him,

Judgment affirmed.

LITTLE et al. v. THE MANAGERS OF THE CONSOLIDATED ASSOCIATION OF THE PLANTERS OF LOUISIANA.

On production of the half of a bank none and on accounting for the loss of the other half, the bank will be bound to pay the full amount for which it was issued, on being secured against liability for the other half. C. C. 2258. But in such a case interest will not be allowed from judicial demand, if objected to by defendant.

A refusal by the Consolidated Association to pay the amount of a note issued by it, on the production a half of the note and accounting for the loss of the other half, will not subject that institution to the penalty of paying interest at the rate of twelve per cent a year, under the 15th section of the act of incorporation of 10 March, 1827.

A PPEAL from the Fifth District Court of New Orleans, Buchanan, J. T. A. Clarke and Barker, for the plaintiffs, cited 6 Wend. 378. 2 Robinson, 113. 4 Washington C. C. 253. 5 Conn. R. 106. Chitty on Bills, 10th ed. note p. 260. Lavergne and Labarre, for the appellants. The judgment of the court was pronounced by

EUSTIS, C. J.* This is an action brought for the recovery of the amount of several bank notes of the Consolidated Association, which it is alleged were sent by mail from New York to New Orleans in halves. The left hand halves only are produced, the others, sent by a subsequent mail, never having arrived. The loss of the right hand halves, and the advertisement thereof, have been sufficiently established, and the judge has provided for the future security of the bank by requiring a bond of indemnity from the plaintiffs, under article 2258 of the Code, which has been furnished. There is no valid objection to the plaintiffs' right of recovery.

The judgment allows the plaintiffs interest from judicial demand. No objection has been made to this allowance in this court, or by an application for a new trial in the court below, on the part of the defendants. We shall therefore make no change in the judgment; but we desire that this case be not considered as a precedent for the allowance of interest on lost obligations. In Murdock v. The Union Bank, 2 Robinson, 112, no interest was given in a similar case.

The claim of the plaintiffs for twelve per cent interest under the charter of the bank, we consider inadmissible.

Judgment affirmed.

^{*} Rost, J., being interested, did not sit on the trial of this case.

CHAMPOMIER v. WASHINGTON.

Where an appellant abandons his appeal, the surety on the appeal bond cannot exempt himself from responsibility on the ground that "the judgment appealed from has not been affirmed," as contemplated by sec. 20 of the stat. of 20 March, 1839, and arts. 575, 596 of the Code of Practice. Per Curian: The condition of the appeal bond, following literally the requisition of art. 579 of the Code of Practice was, "that the appellant shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, &c." The appellant did not prosecute his appeal, and the condition of the bond was thus broken.

A certificate of the clerk of the Supreme Court that the transcript of a record has not been "brought up" within the time fixed, is equivalent to a certificate that the transcript had not been "filed" within that time, and is sufficient to authorise the issuing of an execution

It is not sufficient to entitle an appellee to execution, to file in the clerk's office of the court of the first instance a certificate of the clerk of the Supreme Court that the record was not filed in time; the certificate must be produced before the lower court, and an order of 'execution obtained. C. P. 589.

The surety on an appeal bond is not bound until a f. fa. has been duly issued against the principal, and returned unsatisfied.

A PPEAL from the Third District Court of New Orleans, Kennedy, J. Benjamin and Micou, for the plaintiff. I. W. Smith, for the appellant. The judgment of the court was pronounced by

SLIDELL, J. An appeal had been taken by the defendant which, we said in the opinion just delivered (ante p. 722), was to be considered as abandoned. The present appeal was taken by Goodrich, the surety, on the appeal bond in that case, against whom, after the abandonment of the appeal and execution returned nulla bona, the plaintiff proceeded by rule.

The first point made by the surety is, that the plaintiff cannot proceed against him by rule, or in any form whatever, because the judgment against Washington, from which the appeal was taken, was not affirmed by this court. In support of this doctrine the surety relies on the literal expressions used in the act of 1839, "if the judgment appealed from be affirmed"; and similar expressions in the 575th and 596th articles of the Code of Practice. We cannot recognise so narrow a construction of the legislation on this subject, or of the bond executed by the surety. The condition of the bond, following literally the requisition of the 579th article of the Code, was "that the said Washington shall prosecute his appeal, and shall satisfy whatever judgment may be rendered against him, or that the same shall be satisfied by the proceeds of his estate, real or personal, if he be cast in the appeal; otherwise that the said Goodrich, surety, shall be liable in his place." The appellant did not prosecute his appeal, and thus, even in a literal sense, the condition of the bond was broken.

The next point urged is that, the certificate of the clerk of the Supreme Court filed in the court below, and upon which execution was obtained, is informal; that it should have certified that the transcript had not been "brought up," whereas it certifies that it had not been "filed." The objection is untenable. The expressions are equivalent, and are used as such in articles 588 and 589 of the Code of Practice.

The next point is, that it was not sufficient to file the certificate of the clerk of the Supreme Court in the clerk's office below; that the certificate should

WASHINGTON.

CHAMPONIER have been produced before the lower court, and an order of execution obtained. We consider this objection well taken. The language of the Code is: "On the-production of this certificate in the lower court it shall award execution on the judgment, which then becomes irrevocable." The french text is to the same effect: "Sur la représentation de ce certificat, la cour, dont est appel, rendra un ordre d'exécution du jugement par elle rendu, et ce jugement demeurera ferme et irrévocable." These expressions contemplate judicial, and not mere ministerial action, upon the clerk's certificate, and very properly; for the district judge having granted an order suspending execution, while that order stands undisturbed on his records, no execution ought to issue; and whether the certificate of the clerk of the Supreme Court, which he issues without any action of the Supreme Court, is in due form and rightfully given as to time, is a matter very properly submitted to the judge, and not left to the clerk of the court below, a mere ministerial officer.

> For this reason we think the action against the surety premature. The surety is not bound until a fieri facias has been duly issued against the principal and returned. It issued illegally in this case, and the basis of proceeding against the surety is defective.

> It is therefore decreed that the judgment of the court below against the said Goodrich be reversed, and that the rule taken against him be dismissed, as in case of non-suit; the plaintiff paying the costs of said rule, and of this appeal.

SAME CASE-ON A RE-HEARING.

Where a case is decided on a point suggested for the first time in a printed argument, filed after the case had been argued and submitted, and never communicated to the opposite party, the latter will be relieved from the effects of the surprise; and where a certified copy of an order made by the court below, annexed to the application for a re-hearing, shows that the ground on which the case was decided had no existence in fact, the additional extract from the minutes will be received as if brought up on a certiorari, and the case be decided at once.

RE-HEARING was granted in this case on the application of Benjamin and Micou, for the plaintiff, and the final judgment was pronounced by Rost, J. In the second brief of the counsel for the appellant, Goodrich, filed a week after the case had been argued and submitted, the point was made,

for the first time, that no order of execution had been obtained from the District Court, on the certificate of the clerk of the Supreme Court that the transcript of the appeal taken by the defendant in the main suit had not been filed. No such order being found in the record, we considered the objection well taken, and reversed, as premature, the judgment rendered upon the rule against Goodrich, as surety on the bail bond.

The plaintiff's counsel has applied for a re-hearing on the following grounds: That the case was argued on the 18th of May, and on that day a printed brief was filed by the counsel of the surety, Goodrich; that the point upon which the case was decided was not made, either in argument or in the first brief, and that the second brief never was communicated to him; that had this point been made at any time before the case was submitted to the court, he would have applied for a certiora: i. He has annexed to his petition a copy of the order of execution in due form and properly certified, and prays that the

court may receive the additional extracts of the minutes as if brought up on a CHARPONIER certiorari, and decide the case accordingly.

WASHINGTON.

We see no good reason for refusing this application. The filing of a new ground of defence, after the case had been argued and submitted, operated a surprise against which the plaintiff is entitled to relief; and, under the peculiar circumstances of this case, we feel authorised to extend it to him without further delay. The ground on which we were misled into a decision adverse to his claim had no existence, and the judgment should have been affirmed.

Judgment affirmed.

McAlpin v. Lauve et al.

The claim of one who has furnished labor and materials for the construction of a steamer under a contract with an agent of the owners, asserted in an action against the latter for the price, cannot be defeated on the ground that the cost of the steamer exceeded the amount for which the agent was authorised to bind the owners, where there is no evidence that the limit had been exceeded at the time the plaintiff furnished his labor and materials, and it is proved that the owners accepted and used the boat without having demanded an accurate statement of the liabilities contracted for her construction.

A PPEAL by defendants from a judgment in favor of plaintiffs, rendered by the Fourth District Court of New Orleans, Strawbridge, J.

Wray, for the plaintiffs. The only point made for the defence worthy of notice is, that the contract was made in a common law State, where parties owning and running ships and steamers are tenants in common and not commercial partners, and that consequently the defendants are not bound in solido. It may well be doubted whether this contract, payable in Louisiana, is not to be governed by our law, for Contraxisse, &c., Dig. lib. 44, tit. 7, l. 21. At common law, part owners of ships and steamers are bound in solido for the whole debt, for repairs or expenditures for the common benefit; they are analogous to partners, and liable as such to third persons for necessary repairs and stores. Story on Part. 589, sec. 419. 3 Kent's Com. 155, 156.

Bonford, for the appellants. The judgment of the court was pronounced by

SLIDELL, J. This suit is brought upon a note of the following tenor:

"Louisville, Sept. 5, 1845. Seven months after date steamboat Belle Creele and owners promise to pay to the order of J. McAlpin the sum of three hundred and fifteen dollars, for value received, payable at the office of Omer Lauve.

Dimitry & Plaisent."

The petition also charges that the consideration of this note was cabin furniture, &c., supplied for said boat, at the request of Dimitry & Plaisent, the agents of the defendants, and also part owners. Interrogatories were propounded to defendants, and by their answers it appears that the defendants, as well as Dimitry & Plaisent, were part owners of the boat at the date of the note, and so continued until the 20th April, 1846, when the owners sold her; that Dimitry & Plaisent were specially authorised by the defendants to build the boat, and purchase materials, engines, furniture, &c., with the limitation that they were not to exceed \$30,000 in their contracts, the whole of which sum the stockholders have paid; that the boat, after her completion, was received by the stockholders at New Orleans, although, as they say, they were not aware that the cost of the boat had exceeded the amount to which Dimitry

MCALPIN S. LAUVE. A Plaisent had been authorized to contract; that after receiving the boat, she was employed by the defendants for their account and profit, and under Dimitry's command, in carrying freight and passengers for hire. By other testimony the consideration of the note, as above alleged, is proved; and the price of the furniture is proved to have been fair and reasonable.

It further appears that a number of persons, among whom are the defendants, signed articles of partnership, of which the purport was that a boat should be built to be run as a packet boat upon the Mississippi. The stock was divided into shares. Dimitry & Plaisent were to be the agents to build the boat, and Laure to be the boat's agent at New Orleans; the amount of capital to be advanced by the stockholders was first agreed at \$22,000, and afterwards, upon suggestion that the vessel would cost more, was extended to \$30,000, which the stockholders bound themselves to furnish in proportion to their respective shares. By the letters of Dimitry, addressed to Lauve, while the building of the boat was in progress, he informed him that the boat would cost more than was originally contemplated. He states the probable cost at \$28,000, but gives this only as an approximate estimate, and expresses the hope that the earnings of the boat before the payments all become due, will supersede the necessity of calling on the stockholders beyond the sum of \$24,000. In this statement of facts we have not noticed the testimony of Dimitry, whose competency is disputed.

The defence set up is that Dimitry & Plaisent exceeded their authority by expending a larger sum in the construction of the boat than the stockholders contemplated, and that the defendants were ignorant of this fact when they received the boat.

It is a sufficient answer to this defence to say that, Dimitry & Plaisent were undoubtedly authorised to contract up to the amount of \$30,000, and there is no evidence to the point that when the plaintiff supplied a portion of the boat's equipment the limit had been exceeded. There is also no evidence to show the slightest negligence or impropriety of conduct on the part of the plaintiff. He furnished his labor and materials for the boat's equipment at a fair rate to an agent authorized to build the boat; the principals permitted that agent to go on with approximate estimates before them, in which he did not undertake to define the exact cost; and they accepted and used the boat, without first demanding an accurate statement of the liabilities incurred. Under this state of facts, we see no justice in their resistance of the plaintiff's claim. The nature of the partnership imposed a liability in solido.

Judgment affirmed.

AVERY et al. v. LAUVE et al.

A PPEAL from the Fourth District Court of New Orleans, Strawbridge, J. The judgment of the court was pronounced by

SLIDELL, J. The judgment in this case is affirmed for the reasons stated in the case of McAlpin v. Lauve et al., just decided.

C. A. Jones, for the plaintiffs. Bonford, for the appellants.

PARKER et al., Executors, v. Moore et al.

Where a plaintiff sues in a representative capacity, such as that of a curator or executor, want of authority to maintain the action must be specially pleaded in limine litis, in order to put him on the proof of his capacity. A ples of prescription is an admission of plaintiff's capacity, which will preclude the defendant from afterwards contesting it.

Commercial partners being bound in solido, the acknowledgment of one interrupts prescription as to the other.

One who sues as executor, and who declares that he has no personal interest in the case, is competent as a witness.

A PPEAL from the Third District Court of New Orleans, Kennedy, J. H. H. Strawbridge, for the plaintiffs. Grymes, for the appellants. The judgment of the court was pronounced by

King, J. The plaintiffs, styling themselves executors of Eden Brashear, deceased, instituted this action upon a promissory note executed by Joseph H. Moore & Co., and endorsed by Muir, Moore & Co., of both of which commercial firms the defendants were members. The note bears date the 3d of December, 1838, and fell due on the 1st of January, 1839. The defendants first filed an answer, in which they pleaded the extinction of the note by the prescription of five years. Nearly one year later their counsel filed an exception, which in the plea itself is termed a peremptory exception founded on law, to the right of the plaintiffs to maintain the action, on the ground they were not executors of Brashear in this State, no will having been probated or ordered to be executed in this State, and that they were not authorized within this State to recover debts or administer property of the deceased, and prayed that the action be dismissed. A judgment was rendered in favor of the plaintiffs, from which the defendants have appenled.

The second plea filed by the defendants cannot be regarded as a peremptory exception founded on law, which could be pleaded at any stage of the action. The issue which it presented was the capacity of the plaintiffs to maintain the action, and not whether a cause of action existed. The rule is well settled that when the plaintiff claims in a representative capacity created by law, such as curator or executor, the want of authority to maintain the action must be specially pleaded in limine litis, in order to put the party on the proof of his capacity. The answer of the defendants was an admission of the capacity of the plaintiffs, which precluded them from contesting it at any subsequent stage of the cause. 2 Mart. N. S. 389. 4 La. 328. 5 La. 405. The question whether the plaintiffs, under their authority as executors derived from the courts of Mississippi, can maintain this action, has been discussed at bar, but under this state of the pleadings is not properly before us for enquiry. The allegation in the petition is not that the plaintiffs are executors in the State of Mississippi, but merely that they are executors of the deceased. This must be understood as an averment that they are such executors as are authorized to maintain the suit in this State. If their capacity had been seasonably put at issue, it would then have devolved upon them to show either that they were acting in virtue of an appointment by the courts of this State, or that they fell within some of the exceptions to the general rule that a foreign executor can only maintain actions in this State after obtaining new letters of administration.

PARKER V. MOORE. Previous to the institution of this suit sufficient time had elapsed for prescription to accrue. To show an interruption, the plaintiffs rely, first, upon the acknowledgment of *Hooper*, one of the makers, contained in the schedule of his debts, presented when applying for the benefit of the bankrupt act in 1842, less than five years prior to the commencement of this suit; and secondly, upon the recognition of the debt by the defendant *Moore*, and his promise to pay it, made in 1844.

It is contended, on the part of the defendants, that the articles of the Code which provide that the acknowledgment of a debt by one of several co-debtors in solido interrupts prescription as to the others, apply only to such obligations as are recognized by positive legislation to be joint and several, and that as the solidary liability of commercial partners results from no express legislation the acknowledgment of one partner has not the effect of interrupting prescription as to the others.

We are aware of no statutory enactment of this State declaring commercial partners to be bound in solido, yet such has uniformly and repeatedly been held to be the character of their liability. The principle that solidarity takes place in commercial contracts without being stipulated, has been expressly recognized as an exception to the general rule that solidarity is not to be presumed. nett v. Allison, 2 La. 421. Pothier states the exception to be founded in the interests of commerce, to give additional credit to mercantile associations, and to rest upon the further principle that commercial partners are considered to be the agents of each other for the business of the partnership. Pothier, Contrat de Société, no. 96. The jurisprudence of this State upon this question had been well settled, previous to the adoption of the Code. The principle had been recognized as a part of the law governing such contracts, and was as obligatory as though it had had its origin in express legislation. That the compilers of the Code considered it to be an established rule, is to be inferred from the article which provides that ordinary parties are not bound in solido. Art. 2843. We find no provision of our law which authorises the conclusion that the articles which provide that the causes which interrupt prescription as to one interrupt it as to all the debtors in solido, are to be restricted to such solidary obligations only as are expressly treated of in the Code itself. The terms of the articles are general; they make no exception; and must be understood to relate to all obligors in solido.

II. The objection to the testimony of *Parker* is untenable, and his evidence removes all doubt from the question of prescription.

In the case of De Kerlegand v. Robin, we held that an administrator who had no personal interest in the cause was competent to testify. 1 An. R. 227. The rule applies equally to executors. The plaintiff Parker, who sues as executor in this action, declares expressly that he has no interest in the suit. His testimony was properly admitted, and establishes a distinct acknowledgment of the debt by the defendant Moore, and his promise to pay it made a short time previous to the institution of this suit.

Judgment affirmed.

STACHLIN v. DESTREHAN.

An owner of property is justifiable in beating a trespasser, only where the battery is accessary to the defence of his property.

Where a party expressly waived his right to challenge a juror who declared that he had formed an opinion on the case, the fact of the juror's impartiality cannot be urged by him as a ground for a new trial.

The fact of the existence of strong prejudice in the public mind against a party is a ground for an application for a change of venue (stat. 1 June, 1846, s. 3); but is no ground for a new trial, unless it be shown that the prejudice operated on the minds of the jurors or influenced their verdict.

Where a party resides in the parish in which a case is tried, and is not absent at the time, an affidavit for a new trial on the ground that it had been discovered since the trial that some of the jurors had formed and expressed opinions before being sworn, must be made by the party and not by his attorney. Stat. 29 March, 1839, s. 16.

A PPEAL from the District Court of Jefferson, Clarke, J. Hiestand and Preston, for the plaintiff. Collens and Thompson, for the appellant. The judgment of the court was pronounced by

King, J.* The defendant is sued for damages for having caused his slave to inflict personal chastisement with a whip upon the plaintiff. The jury gave a verdict in favor of the plaintiff for one thousand dollars, and the defendant, after an ineffectual effort to obtain a new trial, has appealed. The facts disclosed by the evidence are, that the defendant has a canal running through his plantation, communicating with Barataria, which the public are prohibited from navigating, without previously obtaining the consent of himself or manager. One Mrs. Ohler employed the plaintiff to assist her in removing her effects from her former residence at Baritaria, and for that purpose the two repaired to the canal. Mrs. Ohler discovered that a boat, which she appears to have had in the canal, had been taken away during her absence, and, without applying for permission, embarked in a skiff which she found at the same spot, and had proceeded some distance on the canal, when the defendant, recognizing his boat, hailed the parties and ordered them to stop, and to return it to the place whence they had taken it. Mrs. Ohler asserted that the defendant had lent her boat to some other person, and that she was therefore authorized to use his. The plaintiff, who was towing the boat with a line refused to return it, and was about to proceed on his way, when the defendant ordered his driver, a negro man slave, to chastise the plaintiff, and the slave, in obedience to the order, inflicted several severe blows with a heavy lash which drew blood, as is stated by one of the witnesses, and left marks upon the person of the plaintiff for several days. At the urgent solicitation of Mrs. Ohler she was permitted to proceed on her errand with the boat, accompanied by the plaintiff. These are the principal facts upon which the jury based their verdict. There is no material conflict in the testimony; but the defendant relies for a reversal of the judgment and for a new trial upon the alleged mis-direction of the judge in his instructions to the jury, and on the fact that one of the jurors had formed an opinion before he was sworn on the panel.

^{*} Rosr, J., did not sit in this case on account of relationship to the defendant.

BTACHLIN E. DESTREHAS.

The judge was requested to instruct the jury that, the owner is justifiable in the defence of his property in beating the trespasser, which was charged as requested, with the qualification that the beating must be necessary for the defence. The same instructions were asked in relation to the right of an owner to resist an attempt to commit a larceny, which were given with the same qualification. He was also requested to inform the jury what constituted a larceny and what a tresspass, which instructions were given, with the addition that neither the larceny nor the trespass justified beating, nor a resort to violence. It is contended that this charge constantly reminded the jury that the fact of beating, proved in this case, was unjustifiable, and is a virtual violation of the 516th article of the Code of Practice, which directs the judge to abstain from saying any thing about the facts. It is further urged that the charge is contradictory, the judge having at one time instructed the jury that, under certain circumstances, blows may be justified in resisting the aggressions of the thief or trespasser, and at another time that they could not be resorted to.

We find no contradiction in the different parts of the charge delivered by the judge. The instructions are to be taken as a whole. The jury were first informed that the owner could justify beating in the defence of his property, but that the beating must be necessary as a means of defence. The subsequent part of his charge, in which he defined a trespass and a larceny, and added that neither of these offences authorised a resort to violence, are to be understood with the qualifications stated in the previous part of his charge, and which it was unnecessary to repeat. The judge did not, in our opinion, err in the principles of law announced to the jury, nor did he violate the rule which forbids him from speaking of the facts.

Six distinct propositions were submitted to the judge by the defendant's counsel, as embodying the principles of law applicable to the case, and these he was requested to give in charge to the jury. The judge recognised those rules as applicable, with certain qualifications, which he added. If he had omitted those qualifications the charge would have been improper, and well calculated to mislead the jury. The fact of beating having been proved, the question at issue was, whether, under the circumstances, it was justifiable. Blackstone concisely states the familiar rule on this subject to be that "in defence of my goods or possession, if a man endeavors to deprive me of them, I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away" (3 Blac. Com. 121); and this was substantially the charge given to the jury. The necessity for a resort to blows as a reason of resisting the alleged trespass, could alone justify the violence used. It was the duty of the judge, when called on to give certain principles of law in charge to the jury, only to give them with such qualifications and explanations as rendered them applicable to the case under consideration. It was his duty to shape his charge with reference to the particular facts proved, and to announce to the jury only the principles applicable to those facts, and so to announce them as to keep the minds of the jury continually directed to the material question at issue between the parties.

An application was made for a new trial upon the ground, among others, that one of the jurors had formed and expressed his opinion before he was sworn to try the cause. It appears that the juror in question was interrogated upon his voir dire, and stated that he knew nothing of the case. No objection was made to him, and he was sworn as a juror. A few minutes after, he applied to the

STACHLIS V. DESTREHAN

court to be excused from serving, stating that when interrogated on his roir dire, he was not aware who the parties to the suit were, and that he had formed an opinion upon the facts. He was directed by the judge to address himself to the counsel in the case, which he did. The defendant's counsel answered that, "It was too late; that he did not know the juror's opinion, and was willing to take him." The defendant's counsel, it appears, was under the impression that the opinion of the juror was favorable to his client. The objection, which the juror frankly stated to his sitting in the cause, is one which would have excluded him if it had been urged before he was sworn, and which would clearly have authorised the judge to discharge him even after he had been sworn, if either party had requested it. The defendant had the right to make the objection, but expressly waived it, and his complaint cannot now be heard that the juror was not impartial. A further ground upon which an application for a new trial is made is, that a strong prejudice existed in the public mind against the defendant. This would have been a ground for applying for a change of venue, but is none for a new trial (Acts of 1846, p. 107), without showing that those prejudices operated upon the minds of the jurors and influenced their verdict. The fact that a jury was obtained without much difficulty, who declared on their voir dire examination, that they were free from bias or prejudice, repels the idea that the prejudice, if any existed, was so prevalent as to prevent the defendant from obtaining an impartial trial.

During the argument of the motion for a new trial the counsel for the defendant presented his own affidavit, stating that he had just been informed that two other members of the jury had formed and expressed their opinions before being sworn as jurors, and he applied for subpænas to compel the attendance of the witnesses by whom he expected to prove the fact. This application was disregarded by the judge, and we think properly. The defendant was a resident of the parish in which the case was tried, and was not absent. He alone could have made the affidavit upon which the motion was based. Bul. & Curry's Dig. p. 157, sec. 30.

Upon the merits, we think that the verdict ought not to be disturbed. The outrage upon the plaintiff was not only without justification or excuse, but the chastisement inflicted was the most ignominious to which a free man can be subjected. The law gives much latitude to jurors in assessing damages in such cases; and no circumstances are disclosed by the evidence which induce us to believe that they have, in the present instance, abused the discretion confided to them.

Judgment affirmed.

Note.—The following cases, decided during the period embraced by this volume, presenting only questions of fact, have not been reported:

CASES DECIDED AT NEW ORLEANS:

Planters Bank v. Crane; Roumage v. Blatrier; Matter of New Orleans Improvement and Banking Company; Walker v. Duckworth; Fagot v. Colomb et al.; Green v. Phillips; Lacoste v. Ibos et al.; Cooper v. Hubert; Beasley v. Kirchner et al.; Stanbrough v. Grand Gulf Railroad and Banking Company; Bailey v. Stevens; Selby v. Roberts; Stevens v. Bailey; Thomas v. Berry; Bouche v. Michel; Union Bank v. Myers et al.; Ralliff v. Ratliff; Gil v.

Gil et al.; McKee . Ellis; Green et ux. v. Glasscock; Gedge v. Amonett; Ingram et al. v. Stokes; Succession of Chaney; McKitrick v. Harival; Nash v. Nash; Tarkington v. Lynch; Tarkington v. Gordy; Tarkington v. Maskell; Tarkington v. Baker; Hawkins v. Bailey; Sharp v. Brashear; Osgood v. Brashear et al.; Smith v. Brashear et al.; Holmes v. Brimberry et al.; Peyronnin v. Peyronnin et al.; Donohue v. Harding; Wilcoxen v. Sparks et al.; Murrell v. Vargas; McMicken v. Smith; Parker v. Brashear; Theall v. Lacy et al : Tachoire v. Bureau ; Findren v. Cummings et al. ; Pennock v. Sparrow; Succession of Layton; Florance v. Kendig; Cucullu'v. Capdeville; City of Lafayette v. Litters et al.; Ricard et al. v. Marigny; Andrews et al. v. Augustin; Union Bank v. Millaudon; Corcoran v. Killian et al.; Lagrave et al. v. Fowler.; Zacharie et al. v. Buisson et al.; Connolly v. Montanye; Robertson v. Leslie et al.; Millbank et al. v. Livaudais et al.; Calder v. Lewis et al.; McIntyre v. Eastland et al.; Wentworth v. Simpson et al.; Barnes v. Tilghman; Sowles v. Crawford; Egerton et al. v. Creditors; Hanna v. Auter; Kirk v. Tilghman; Weems et al. v. Paterson; Miller v. New Orleans Canal and Banking Company; First Municipality v. General Council of New Orleans; Boyers et al. v. Western Marine and Fire Insurance Company; Succession of Armstrong; Tate et al. v. Burke et al.; Fisk v. Gregg et al.; Matter of the Opening of Apollo street; Bruslé v. Bagnerés; Eggleston v. Quarles et al.; Tourné v. Rivière ; Sidle v. Fowler ; Kenton v. Woodworth.

. CASES DECIDED AT OPELOUSAS:

Bell v. Mitcheltree et al.; Evins v. Murphy; Dupré v. Clark; Frère v. Rogers; Tiernan v. Peebles; Frosard v. Leger et al.; Prindle v. Sandoz; Davis v. Edmonds; De Kerlegand v. Robin; Dupré v. Dejean et al; Dautreuil v. Thenet et al; O'Donegan v. Knox.

CASES DECIDED AT ALEXANDRIA:

Bailey v. Solibellas; Benoist v. Gillard; Newton v. Luckett; Luckett v. Dodd; Benoist v. Fels; Lambeth et al. v. Lecomte et al.; Clements v. Police Jury; Police Jury v. Chew; Taylor v. Normand; Fuller v. Chambers.

CASES DECIDED AT OUACHITA:

Lambeth et al. v. White; Scott v. White et al.; King v. Godwin; White v. Lambeth et al; Scott v. Felps.

The cases of Conrey v. Gontz et al.; Succession of Asbridge; Monagle v. Glidewell; Davis v. Coons et al.; Keeney v. Coons et al.; Goodhue v. Coons et al.; Riddle v. Coons et al.; Bryan v. Moss et al., decided at New Orleans; that of Wells v. Flint et al., decided at Alexandria; and those of Woodruff v. White, and Elgee v. Sherrouse, decided at Ouachita during the period embraced by this volume, are not reported, damages having been allowed in each for a frivolous appeal.

my Carles de la mer & Links

